Representative Passing Answers

Below are the Multistate Performance Test (MPT), Multistate Essay Examination (MEE), and Indian Law Question (ILQ) questions for the listed South Dakota bar examination and a representative passing answer to each question.

The representative passing answers have been reprinted without change, except for minor formatting. They were written by examinees under time restraints and without access to legal materials. The examinees authorized the Board of Bar Examiners to publish the answers anonymously for the benefit of future South Dakota bar applicants.

The answers are not "model answers." They do not, in all respects, accurately reflect South Dakota law and/or its application to the facts. They do not always correctly identify or respond to the issues raised by the question and may contain extraneous or incorrect information. The answers demonstrate the general length and quality that earned an above average score. They are not intended to be used as a means of learning the law tested; their use for such purpose is strongly discouraged.

Applicant Number

THE MPT®
MULTISTATE PERFORMANCE TEST

In re Alice Lindgren

Read the directions on the back cover.
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NATIONAL CONFERENCE OF BAR EXAMINERS
302 S. BEDFORD ST., MADISON, WI 53703
608-280-8550
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In re Alice Lindgren

FILE

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FILE

Neighborhood Immigration Services

15 Wall Street
Franklin City, Franklin 33705

MEMORANDUM

TO: Examinee
FROM: Elizabeth Saylor, Supervising Attorney
DATE: July 28, 2020
RE: Alice Lindgren's U Visa Case

I am assigning you a U nonimmigrant visa (U visa) case for pro bono client Alice Lindgren. U visas were created by the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA). They are meant to encourage immigrant victims of crime, who might otherwise be afraid to interact with law enforcement, to report crime and assist in the investigation or prosecution of crimes that occur in the United States. We did an intake with Alice Lindgren and determined that she was eligible for a U visa. We now need to prepare her U visa application.

Ms. Lindgren's U visa application will be submitted to United States Citizenship and Immigration Services (USCIS) and will include a Form I-918 Petition for U Nonimmigrant Status (Petition) and supporting materials, including an affidavit from Ms. Lindgren. I will prepare the Petition and the supporting materials, but I need your assistance with drafting the cover letter. This cover letter is our only opportunity to argue that the facts and the law support our client's eligibility for a U visa.

I have attached a memorandum that sets forth our firm's conventions for drafting cover letters to USCIS. This format has proven to be effective in our past advocacy for clients. For this reason, it is critical that your letter follow the guidelines in that memorandum. Our client's future rests on this letter. Your cover letter should argue that Ms. Lindgren meets all the eligibility requirements for a U visa.

I have attached the relevant sections of the Immigration and Nationality Act (INA), which is the primary collection of statutes governing immigration law. I have also attached relevant sections of Title 8 of the Code of Federal Regulations (C.F.R.) and two relevant state statutes. Please cite the INA, 8 C.F.R., and the state statutes in your cover letter (e.g., 8 C.F.R. § 214.2(c)(5)(A)). All the documents referenced in the file will be attached to the cover letter that we submit to USCIS.

Neighborhood Immigration Services

TO: Neighborhood Immigration Services attorneys and paralegals
FROM: Carol Wu, Executive Director
RE: Cover letters that accompany initial submissions to USCIS

Follow these guidelines in drafting cover letters that accompany initial submissions to United States Citizenship and Immigration Services (USCIS). Cover letters will be printed on letterhead.

Date:

Recipient's Address:
USCIS
Franklin Service Center
119 Exchange St.
Franklin City, FR 33705

Subject: Type "Re:" followed by the client's name, the client's alien number or "A number" (if he or she has one), and the number and name of the form or petition being filed on separate lines.

Re: Tom Nguyen
A 33-44-555
Form I-918 Petition for U Nonimmigrant Status

Greeting: Dear USCIS Officer:

Body: Begin with the purpose of the letter and state that we represent the client. E.g., "We represent Mr. Tom Nguyen in his Form I-918 Petition for U Nonimmigrant Status. We submit this letter, Mr. Nguyen's Form I-918, and documents in support of his petition for a U visa."

Note that the cover letter is an opportunity to "brief" and argue for our client's eligibility. For each eligibility requirement, state the law and then argue how the facts of our client's case satisfy that requirement. Provide relevant legal citations, usually from the INA and Title 8 of the C.F.R. Do not include a separate statement of facts. Instead, use the facts in arguing that the client meets the requirements of the statutes, regulations, and/or case law.

Be sure to use a heading for each requirement that clearly identifies the immigration requirement being addressed. You do not need to provide citations to documents or evidence. Our paralegal will prepare an index of supporting documentary evidence.

Closing: Tell the immigration officer to contact you with questions or if he or she needs additional information. Offer thanks for USCIS's consideration of the application or petition.

Signature: Elizabeth Saylor, Supervising Attorney

Copies: cc: [client name]

Enclosures: Type "Enclosure" or "Enclosures" as appropriate.

DEPARTMENT OF HOMELAND SECURITY
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES

Affidavit of Alice Lindgren, A 21-454-988
In Support of Her Form I-918 Petition for U Nonimmigrant Status

1. My name is Alice Lindgren. I submit this affidavit in support of my petition for a U visa.

2. I was born in Stockholm, Sweden, on June 8, 1996. I am a native and citizen of Sweden.

3. I came to the United States on August 10, 2018, on an F-1 student visa. I obtained the F-1 visa to enter the United States to study at the University of Franklin in Franklin City, Franklin. I have resided in Franklin City and have not left the United States since my arrival. My F-1 visa has lapsed.

4. I studied architecture as an undergraduate and wanted to come to the United States to obtain a graduate degree in architecture. The University of Franklin has a highly competitive architecture graduate program. I was accepted into the program and was excited to attend.

5. Additionally, my boyfriend, an American citizen, lived in Franklin City, and I wanted to continue my relationship with him. I met him while he was an exchange student in Sweden.

6. On February 5, 2020, I was mugged right across the street from campus. I was staying late in the architecture studio to finish up a final project. I left the architecture building around 11:00 p.m. to walk to a late-night coffee shop to pick up a cup of coffee and a pastry. The coffee shop is just across the street from the campus. That area is a bit seedy.

7. Just as I crossed the street, I heard footsteps running up behind me. I turned to see a man running toward me. I started to run and tripped. I tried to catch myself with my hands. I felt a sharp pain in one wrist. I fell onto the concrete, skinning my face pretty badly. While I was on the ground, the man pulled my backpack off my back. I heard his footsteps running away. I waited a minute before I lifted my head. I saw him jump into the backseat of a car that sped off. I saw the first three numbers of the license plate.

8. I was very shaken up. I went back to the architecture studio. My classmates were shocked when I walked in because my face was bloody. They called the campus police, who met me at the architecture building and took me to the local police precinct. I stayed at the precinct for about an hour making a report. I told the police everything I knew about the incident. I told the police about the numbers I saw on the license plate and described the man who attacked me.

9. When I got home, my boyfriend and I washed the blood off my face and cleaned the gravel out of the wounds on my face. The next morning, I saw my primary care doctor. The doctor further cleaned up and bandaged my wounds. She determined that I had a bruised wrist.

10. About one month later, I received a call from a police detective. A man had tried to pawn the laptop that had been in my backpack. He fit the description I had given to the police. He also owned a car that fit my description of the getaway car, and the license plate numbers matched.

11. The detective asked me to come to the precinct to see if I could identify the man in a lineup. I was afraid and felt that I could not bear to see the man again, so I refused.

12. Six weeks later, the case against him went to trial. I met with Mary Garcia, the assistant district attorney, before the trial and then testified at trial. I was very afraid to look at the defendant while I was in court, but I was stoic and told my story to the jury. In my testimony, I identified the defendant as the man who attacked me that night. The jury found the defendant guilty of robbery.

13. I have had a lot of emotional problems since the incident. I am afraid to go out at night. I have trouble sleeping and have nightmares. I have been afraid to go to campus, and I dropped out of school. My boyfriend and I broke up. I have been seeing a counselor to deal with post-traumatic stress disorder associated with the event.

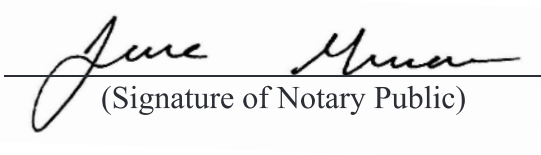
14. Even though I have been greatly traumatized during my time here in Franklin City, I would like to remain here and eventually continue my architecture studies at the University of Franklin.

I declare to the best of my knowledge that the information above is true and complete.

Alice Lindgren

July 21, 2020

Sworn to before me on this
21st day of July, 2020



(Signature of Notary Public)

Franklin City Police Department, 12th Precinct
Franklin City, Franklin
Incident Report No. 237894

Reporting Officer: James Sanders
Approving Officer: Alfred Mathews

Date/Time Reported: 02/06/2020, 1:05 a.m.

PERSONS:	Role	Name	DOB	Race	Sex
	Victim	Alice Lindgren	6/8/96	Caucasian	Female

OFFENDER(S):
Middle-aged Caucasian male, salt-and-pepper beard, black jacket, running shoes

VEHICLES:
Older Toyota Camry, rusty, green, license plate 406xxxx

PROPERTY:
Navy blue backpack containing wallet, $80 cash, iPhone, MacBook Air, red cardigan

NARRATIVE:
University of Franklin Police Department contacted 12th Precinct about suspected robbery. UFPD Officer Solomon brought victim to precinct to make report. Officers Sanders and Wong met with victim and took report. Victim had multiple contusions and bleeding on left side of face. Victim complained of wrist pain. Victim was visibly upset with recurrent episodes of crying. Victim reported that she left campus around 11:00 p.m. on 02/05/2020 to go to Koffee, 501 State Street, to get a snack to go. She reports she was chased on the sidewalk outside of 300 State Street. Victim tripped and fell to the ground, and assailant stole her backpack. Victim began screaming. Victim reports that assailant told her to shut up. Assailant escaped on foot and then jumped into the back of a green Toyota Camry. There were no other witnesses to the incident.

OFFENSE(S):
Robbery, Fr. Penal Code § 29

NEIGHBORHOOD IMMIGRATION SERVICES

FILE MEMORANDUM

From: Elizabeth Saylor
Date: July 18, 2020
Re: Alice Lindgren's I-918 Supplement B

We have a signed Form I-918 Supplement B from Officer James Sanders at the Franklin City Police Department certifying that Ms. Lindgren (A 21-454-988) was a victim of robbery, that she has been helpful in the investigation and prosecution of the robbery, and that she suffered injuries to her wrist and face as a result of the robbery. He attached reports on her known injuries. It was signed on April 26, 2020. I asked Officer Sanders to certify that Ms. Lindgren was a victim of aggravated assault as well, but he refused, saying that the defendant was prosecuted only for robbery.

Officer Sanders's refusal to add aggravated assault to the Form I-918 Supplement B complicates Ms. Lindgren's case. The relevant immigration laws list the specific crimes that qualify a victim to petition for a U visa. Felonious assault is an enumerated crime, but robbery is not.

We will need to argue that robbery is a similar crime to felonious assault in Franklin. I have put a printout from an immigration experts' listserv regarding this issue in the file (attached). While not authoritative, this discussion should help us to formulate successful arguments that Ms. Lindgren meets the qualifying crime requirement for the U visa.

[Archive] Crimmigration Experts Forum Listserv

Query: Does robbery qualify an individual for a U visa?

Emily 10-03-2019, 1:07 pm

I have a new client who we think should be eligible for a U visa. She has an I-918 Supplement B from the police department certifying that she was a victim of robbery. Of course this isn't a qualifying crime for a U visa. Any suggestions about what to do?

Sonia 10-03-2019, 2:15 pm

You have to argue that robbery is similar to felonious assault. It is extremely difficult to successfully argue "similar" crimes.

Monica 10-03-2019, 2:37 pm

Make sure you look at 8 CFR 214.14(a)(9). You must argue that the nature and elements of robbery are similar to the nature and elements of felonious assault using your state's penal code provisions. The proper inquiry is not an analysis of the factual details underlying the crime, but a comparison of the nature and elements of the crime that was investigated or prosecuted and the crime enumerated in the statute and regulations. By "nature of the crime" the regulations mean the inherent character of the crime as defined by the criminal statute. We have had a number of robbery cases approved.

Juan 10-04-2019, 11:01 am

Good luck, Emily. Here in Olympia, the elements for robbery and felonious assault are very different. We have filed several cases arguing that robbery and felonious assault are similar crimes, and they have all been denied. I hope your state's statutes for robbery and felonious assault are more similar than those we have here in Olympia.

Etsuko 10-05-2019, 1:20 pm

USCIS hasn't provided any guidance on this. We make the best argument we can looking at the elements and the nature of the crimes. We know there have been a lot of denials because some states' robbery statutes are so different from those states' aggravated assault statutes.

Emily 10-06-2019, 11:59 pm

Thanks to everyone for the help. I really appreciate it!

Charles Einhorn, PhD
1501 Jane Way
Franklin City, Franklin 33117

July 20, 2020

To whom it may concern:

I write this letter in support of Alice Lindgren's petition for a U visa. I received my PhD in psychological counseling from Olympia State University. I am a licensed psychologist in both Olympia and Franklin. I maintain a solo practice through which I provide one-on-one counseling. While I work with a wide variety of patients, I specialize in providing counseling to trauma victims.

I have provided Alice individual counseling since March 2020, approximately one month after she was robbed near the University of Franklin campus.

Alice acknowledged that she had mild anxiety related to her performance in her architecture graduate program before this incident. Since the robbery, Alice suffers from intense anxious and fearful feelings and thoughts, increasing her isolation. As an immigrant to this country, she is far from her family and friends in Sweden.

Alice also suffers from post-traumatic stress disorder (PTSD), a disorder that develops in some people who have experienced a shocking or dangerous event. Alice experiences flashbacks, bad dreams, and frightening thoughts. She also has difficulty sleeping and is easily startled. She has withdrawn from her friends in the architecture program, and she and her long-term boyfriend broke up. These all support my diagnosis of PTSD.

I find Alice's account of her experience and her emotions to be credible. It is my opinion that her current intense anxiety and PTSD are directly related to the robbery. Please feel free to contact me if you have any questions.

Very truly yours,

Dr. Charles Einhorn

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Excerpts from Immigration and Nationality Act (INA) § 101(a)(15)(U)

(i) [An alien qualifies for a U Visa if]:

(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity;

(II) the alien possesses information concerning qualifying criminal activity;

(III) the alien has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, or to other Federal, State, or local authorities investigating or prosecuting qualifying criminal activity; and

(IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States . . . .

. . .

(iii) the qualifying criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: . . . felonious assault . . . .

8 C.F.R. § 214.14
Alien Victims of Certain Qualifying Criminal Activity

(a) Definitions. As used in this section, the term:

. . .

(5) Investigation or prosecution refers to the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity.

. . .

(8) Physical or mental abuse means injury or harm to the victim's physical person, or harm to or impairment of the emotional or psychological soundness of the victim.

(9) Qualifying crime or qualifying criminal activity includes one or more of the following or any similar activities in violation of Federal, State or local criminal law of the United States:

. . . felonious assault . . . .

The term "any similar activity" refers to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities.

. . .

(12) U nonimmigrant status certification means Form I-918, Supplement B, "U Nonimmigrant Status Certification," which confirms that the petitioner has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim.

(b) Eligibility. An alien is eligible for U-1 nonimmigrant status if he or she demonstrates all of the following:

(1) The alien has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity. Whether abuse is substantial is based on a number of factors, including but not limited to: The nature of the injury inflicted or suffered; the severity of the perpetrator's conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions. No single factor is a prerequisite to establish that the abuse suffered was substantial. Also, the existence of one or more of the factors automatically does not create a presumption that the abuse suffered was

substantial. A series of acts taken together may be considered to constitute substantial physical or mental abuse even where no single act alone rises to that level;

(2) The alien possesses credible and reliable information establishing that he or she has knowledge of the details concerning the qualifying criminal activity upon which his or her petition is based. The alien must possess specific facts regarding the criminal activity leading a certifying official to determine that the petitioner has, is, or is likely to provide assistance to the investigation or prosecution of the qualifying criminal activity;

(3) The alien has been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which his or her petition is based; and

(4) The qualifying criminal activity occurred in the United States . . . .

(c) Application procedures for U nonimmigrant status:

(1) Filing a petition. USCIS has sole jurisdiction over all petitions for U nonimmigrant status. An alien seeking U-1 nonimmigrant status must submit, by mail, Form I-918, "Petition for U Nonimmigrant Status" and initial evidence to USCIS in accordance with this paragraph and the instructions to Form I-918.

(2) Initial evidence. Form I-918 must include the following initial evidence:

(i) Form I-918, Supplement B, "U Nonimmigrant Status Certification," signed by a certifying official within the six months immediately preceding the filing of Form I-918. The certification must state that the agency is a Federal, State, or local law enforcement agency, or prosecutor, judge or other authority, that has responsibility for the detection, investigation, prosecution, conviction, or sentencing of qualifying criminal activity; the applicant has been a victim of qualifying criminal activity that the certifying official's agency is investigating or prosecuting; the petitioner possesses information concerning the qualifying criminal activity of which he or she has been a victim; the petitioner has been, is being, or is likely to be helpful to an investigation or prosecution of that qualifying criminal activity; and the qualifying criminal activity violated U.S. law, or occurred in the United States . . . .

(ii) Any additional evidence that the petitioner wants USCIS to consider to establish that: the petitioner is a victim of qualifying criminal activity; the petitioner has suffered

substantial physical or mental abuse as a result of being a victim of qualifying criminal activity; the petitioner possesses information establishing that he or she has knowledge of the details concerning the qualifying criminal activity of which he or she was a victim and upon which his or her application is based; the petitioner has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement agency, prosecutor, or authority, or Federal or State judge, investigating or prosecuting the criminal activity of which the petitioner is a victim; or the criminal activity is qualifying and occurred in the United States . . . . ; and

(iii) A signed statement by the petitioner describing the facts of the victimization. The statement also may include information supporting any of the eligibility requirements set out in paragraph (b) of this section.

Excerpts from Franklin Penal Code

§ 22 Aggravated Assault

(a) A person commits an offense if the person:

(1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly, or recklessly; or

(2) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon.

(b) An offense under this section is a felony . . . .

§ 29 Robbery

(a) A person commits an offense if, in the course of committing theft with intent to obtain or maintain control of the property, the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

(b) An offense under this section is a felony . . . .

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

Neighborhood Immigration Services

July 28, 2019

USCIS
Franklin Service Center
119 Exchange St.
Franklin City, FR 33705

Re: Alice Lindgren
A 21-454-988
Form I-918 Petition for U Nonimmigrant Status

Dear USCIS Officer:

We represent Ms. Alice Lindgren in her Form I-918 Petition for U Nonimmigrant Status. We submit this letter, Ms. Lindgren's Form I-918, and documents in support of her petition for a U visa. As discussed below, Ms. Alice Lindgren qualifies for a U visa as she meets all eligibility requirements in the jurisdiction of Franklin.

(1) Ms. Lindgren has suffered substantial physical and mental abuse resulting form a qualifying crime.

In order to qualify for a U visa, an alien must suffer substantial physical or mental abuse as a result of having been a victim of a qualifying crime. INA Section 101(a)(15)(U) (i)(I). Ms. Lindgren's February 5 mugging began when she initially saw her attacker, and made her best attempt to flee in response to the attacker's behavior, as he appeared to be chasing her.

(A) Injury

Physical or mental abuse is defined as "injury or harm to the victim's physical person, or harm to or impairment of the emotional or psychological soundness of the victim. 8 C.F.R. Section 214.14(8). When she fell, Ms. Lindgren stated that she felt a "sharp pain" and was aware that she had skinned her face. The bloody appearance of Ms. Lindgren's face shocked her architecture classmates when they first viewed it. Ms. Lindgren's primary physician confirmed the wrist injury was a bruised wrist. These injuries were harmful to Ms. Lindgren's person and as such, qualify as physical abuse under the applicable law.

Additionally, Ms. Lindgren suffered from emotional abuse as a result of the accident. Ms. Lindgren's psychologist has affirmed that, in his professional opinion, the current intense anxiety and Post Traumatic Stress Disorder that Ms. Lindgren was afflicted with after the attack was directly related to the robbery. As such, Ms. Lindgren suffered from emotional abuse under the applicable law.

(B) Qualifying Crime

The abuse Ms. Lindgren suffers must also have been as a result of a qualifying crime or any similar activity in violation of... state law. INA Section 101(a)(15)(U)(i)(I). As robbery is not expressly listed, it must be a "similar activity" in violation of state law. 101(a)(15)(U)(iii). According to 8 C.F.R Section 214.14(9) "any similar activity refers to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities. Since aggravated assault is a listed crime, and robbery is not, examination of the two yields a result that shows us that they are similar criminal activities. An *aggravated assault* occurs when the person: (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly, or recklessly; or (2) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon. FPC Section 22. *Robbery* occurs when a person (1) commits an offense if, in the course of committing theft with intent to obtain or maintain control of the property the person (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. The aggravated assault (2) definition and the robbery (2) definition are substantially similar. Under this definition aggravated assault just requires an attempt to to cause bodily injury to another with a deadly weapon. Robbery adds the element of theft, but according to the definition requires to intentionally palce another in fear of imminent bodily injury or death. The overlapping language here is strong. It actually appears that under these definition, aggravated assault could be a lesser included offense to robbery. As such, the crime of robbery is substantially similar to aggravated assault.

(2) Ms. Lindgren possesses information concerning qualifying criminal activity.

Ms. Lindgren was able to see her attacker, the vehicle her attacker got into to flee, as well as 3 license plate numbers on the fleeing car. All of this is relevant information regarding the qualifying similar criminal activity of robbery.

(3) Ms. Lindgren has been helpful to the jurisdiction of Franklin law enforcement's efforts to investigate and prosecute the qualifying crime.

Investigation or prosecution refers to the detection or investigation of a qualifying crime. Ms. Lindgren gave law enforcement a description of her attacker, a description of the getaway vehicle, and

3 license plate numbers. While she did not immediately identify her attacker, she assisted the prosecution by testifying in court against the robber. This constitutes help to the jurisdiction of Franklin's law enforcement.

(4) The criminal activity in question occurred in the United States.

The jurisdiction of Franklin is in the US. The police officer's report indicates that is where this crime occurred. Therefore, the criminal activity in question did occur in the United States which houses the jurisdiction of Franklin.

Please contact our office with any question or concerns you may have. Thank you for your time and consideration in reviewing this application.

s/

cc: Alice Lindgren

Enclsoures

Applicant Number

THE MPT®
MULTISTATE PERFORMANCE TEST

Fun4Kids Terms of Service Agreement

Read the directions on the back cover.
Do not break the seal until you are told to do so.

NATIONAL CONFERENCE OF BAR EXAMINERS
302 S. BEDFORD ST., MADISON, WI 53703
608-280-8550
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Fun4Kids Terms of Service Agreement

FILE

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Weiss & Briotti LLP
Attorneys at Law
14 Charles Street
Franklin City, Franklin 33800

MEMORANDUM

TO: Examinee
FROM: Tony Briotti
DATE: July 28, 2020
RE: Terms of Service Agreement for Fun4Kids

Our client, Fun4Kids Inc., is planning to start a commercial internet service designed to provide educational games for children ages 11 through 14. Its owner, Jan Morrison, is aware that there are both federal and Franklin state laws and regulations that affect commercial online services designed for children. She has asked me to draft the necessary "terms of service" agreement that will appear on the service and will allow the children to use it. Before I can do so, I need your assistance in identifying and analyzing the relevant issues, and your recommendations as to how to deal with them. I am attaching a transcript of my interview with Ms. Morrison, as well as other materials.

Please prepare a memorandum to me (i) identifying and analyzing the relevant issues discussed in the client interview and (ii) making recommendations as to how to address those issues. Use the following format for each separate issue:

Issue: [Insert a brief statement of each issue to be addressed.]

Analysis and Recommendation: [State your recommendation for addressing the issue and your reasons for making that recommendation, including references to applicable law, regulations, and other materials, and how they apply to the facts.]

Do not draft the terms of service agreement. I will do that after reviewing the analysis and recommendations in your memorandum.

Transcript of Interview with Jan Morrison, July 27, 2020

Briotti: Hello, Jan, great to see you. What can we do for you?

Morrison: Hi, Tony. Here's how you can help. We're looking ahead to the launch of our Fun4Kids commercial online service—our website—and related mobile app, which will offer educational games for kids in their preteen and early teenage years. We've put a lot of effort and expense into research on what approaches can best educate kids that age, and into designing the service to appeal to kids ages 11 through 14. I know that there are laws about commercial online services that are used by kids. Do they apply to us? If they do, we want to be sure that we're in compliance with them.

Briotti: Yes, there are such laws and regulations, and they would apply to your website. That's important, because failure to comply can be very expensive as well as bad for a business's reputation. Tell me what your other concerns are.

Morrison: Well, to begin with, we're not sure what kind of terms of service agreement we need to have in place. The easiest solution for us would be to somehow make it possible that the use of the service itself signifies agreement with any terms of service we'd have in place—what I know is called a "browsewrap" agreement. If that's not possible, we'd want something simple like a click-through "clickwrap" agreement where the user clicks an "I Agree" button that indicates agreement with those terms.

Briotti: That's the first issue that we'll look at and make a recommendation to you.

Morrison: We also don't know if we need the kids' parents to consent to the use, and if we do, how we go about getting it.

Briotti: We'll look at that issue as well. It involves both federal and Franklin state law. How do you plan to make this service a profitable business?

Morrison: We've concluded that there is a possibility of good commercial success. We plan to earn revenue from the website in two ways. First, we're going to charge a small monthly overall fee for the service's use, as well as a fee for each different game used. That means we've got to allow for payment by credit card.

Briotti: You should be aware that how you do that could raise a significant issue, which will have to be carefully addressed. For example, the Federal Trade Commission has required Persimmon Inc., an online service for children, to pay many millions of dollars in restitution for credit card charges made on kids' apps that the FTC said

didn't comply with the law's requirements. We'll have to take the FTC position into account when we look at whether credit cards may be used and what safeguards you'll have to employ for their use.

Morrison: I certainly don't want to risk that sort of result—I trust you'll tell me how to avoid that risk.

Briotti: We'll add that to the list.

Morrison: Okay. The second source of revenue will be the sale of advertising geared to kids on the site. As you know, web-based advertising can be lucrative because of the ability to target individual users of websites with advertising keyed to their particular needs. So we plan to collect information about the users of the service—we're thinking of the user's name, home address, gender, age, and email address—and provide that information to advertisers.

Briotti: What's the basis for your asking for that information?

Morrison: We need the user's name because the games are personalized for the kids, and their names are used within the game. For example, in a math game, the game visual would say "Hi, Johnny, let's work on some math problems." Same thing with gender and age—some games are geared to research on whether boys or girls respond better to certain lesson approaches, and many of the educational subjects are age-specific.

Briotti: What about home and email addresses?

Morrison: That information will help sell it to the advertisers; it's not really needed for the games themselves.

Briotti: I understand. We'll take a look at that issue as well. You should be aware that there is one more issue to consider: there are state limitations on online advertising to minors here in Franklin, and we'll have to look at that, too. We'll examine all these issues and give you our recommendations and the reasons for them. Once we've consulted on that and you give us the go-ahead, we'll draft the terms of service agreement for you.

Federal Trade Commission Press Release

Persimmon Inc. Will Provide Full Consumer Refunds of At Least $45 Million to Settle FTC Complaint It Charged for Kids' Online Purchases Without Parental Consent

Company Will Also Modify Its Billing Practices Under FTC Settlement

For Release – May 12, 2018

Persimmon Inc. has agreed to provide full refunds to consumers, paying a minimum of $45 million, to settle a Federal Trade Commission complaint that the company billed consumers for millions of dollars of charges incurred by children in kids' mobile apps without their parents' consent. Under the terms of the settlement with the FTC, Persimmon will also be required to change its billing practices to ensure that it has obtained express informed consent from parents before charging them for items sold in mobile apps.

The FTC's complaint alleges that Persimmon acted unlawfully by failing to tell parents that entering a password finalizes pending purchases and permits unlimited purchases on a child's account for 15 minutes afterward. The complaint also alleges that Persimmon's online terms of service agreement did not inform parents of either result.

The settlement requires Persimmon to modify its terms of service agreement to ensure that it obtains parents' express informed consent before finalizing purchases and before opening a window for unlimited purchases. Parents must also have the option to withdraw their consent at any time.

LIBRARY

Excerpts from Children's Online Privacy Protection Act (COPPA)

15 U.S.C. § 6501 *et seq.*

§ 6501. Definitions

In this chapter:

(1) Child

The term "child" means an individual under the age of 13.

. . .

(4) Disclosure

The term "disclosure" means, with respect to personal information,

(A) the release of personal information collected from a child in identifiable form by [a website] operator for any purpose, except where such information is provided to a person other than the operator who provides support for the internal operations of the website and does not disclose or use that information for any other purpose; and

(B) making personal information collected from a child by a website or online service directed to children, or with actual knowledge that such information was collected from a child, publicly available in identifiable form, by any means . . . .

. . .

(7) Parent

The term "parent" includes a legal guardian.

(8) Personal information

The term "personal information" means individually identifiable information about an individual collected online, including

(A) a first and last name;

(B) a home or other physical address including street name and name of a city or town;

(C) an email address;

. . . or

(G) information concerning the child or the parents of that child that the website collects online from the child . . . .

(9) Verifiable parental consent

The term "verifiable parental consent" means any reasonable effort (taking into consideration available technology), including a request for authorization for future

collection, use, and disclosure described in the notice, to ensure that a parent of a child receives notice of the operator's personal information collection, use, and disclosure practices, and authorizes the collection, use, and disclosure, as applicable, of personal information and the subsequent use of that information before that information is collected from that child.

. . .

§ 6502. Regulation of unfair and deceptive acts and practices in connection with collection and use of personal information from and about children on the Internet

(a) Acts prohibited

(1) In general

It is unlawful for an operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child, to collect personal information from a child in a manner that violates the [Federal Trade Commission] regulations [authorized by this Act] . . . .

Excerpts from Federal Trade Commission Regulations

16 C.F.R. §§ 312.3–312.7

§ 312.3 Regulation of unfair or deceptive acts or practices in connection with the collection, use, and/or disclosure of personal information from and about children on the Internet.

General requirements. It shall be unlawful for any operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting or maintaining personal information from a child, to collect personal information from a child in a manner that violates the regulations prescribed under this part. Generally, under this part, an operator must:

(a) Provide notice on the website or online service of what information it collects from children, how it uses such information, and its disclosure practices for such information (§ 312.4(b));

(b) Obtain verifiable parental consent prior to any collection, use, and/or disclosure of personal information from children (§ 312.5);

(c) Provide a reasonable means for a parent to review the personal information collected from a child and to refuse to permit its further use or maintenance (§ 312.6);

(d) Not condition a child's participation in a game, the offering of a prize, or another activity on the child['s] disclosing more personal information than is reasonably necessary to participate in such activity (§ 312.7); . . . .

§ 312.4 Notice.

(a) General principles of notice. It shall be the obligation of the operator to provide notice and obtain verifiable parental consent prior to collecting, using, or disclosing personal information from children. Such notice must be clearly and understandably written, complete, and must contain no unrelated, confusing, or contradictory materials.

(b) Direct notice to the parent. An operator must make reasonable efforts, taking into account available technology, to ensure that a parent of a child receives direct notice of the operator's practices with regard to the collection, use, or disclosure of personal information from children, including notice of any material change in the collection, use, or disclosure practices to which the parent has previously consented.

(c) Content of the direct notice to the parent—

(1) Content of the direct notice to the parent . . . . This direct notice shall set forth:

(i) That the operator has collected the parent's online contact information from the child, and, if such is the case, the name of the child or the parent, in order to obtain the parent's consent;

(ii) That the parent's consent is required for the collection, use, or disclosure of such information, and that the operator will not collect, use, or disclose any personal information from the child if the parent does not provide such consent;

(iii) The additional items of personal information the operator intends to collect from the child, or the potential opportunities for the disclosure of personal information, should the parent provide consent;

(iv) A hyperlink to the operator's online notice of its information practices . . .;

(v) The means by which the parent can provide verifiable consent to the collection, use, and disclosure of the information; and

(vi) That if the parent does not provide consent within a reasonable time from the date the direct notice was sent, the operator will delete the parent's online contact information from its records.

. . .

§ 312.5 Parental consent.

(a) General requirements.

(1) An operator is required to obtain verifiable parental consent before any collection, use, or disclosure of personal information from children, including consent to any material change in the collection, use, or disclosure practices to which the parent has previously consented.

(2) An operator must give the parent the option to consent to the collection and use of the child's personal information without consenting to disclosure of his or her personal information to third parties.

(b) Methods for verifiable parental consent.

(1) An operator must make reasonable efforts to obtain verifiable parental consent, taking into consideration available technology. Any method to obtain verifiable parental consent must be reasonably calculated, in light of available technology, to ensure that the person providing consent is the child's parent.

(2) Existing methods to obtain verifiable parental consent that satisfy the requirements of this paragraph include:

(i) Providing a consent form to be signed by the parent and returned to the operator by postal mail, facsimile, or electronic scan;

(ii) Requiring a parent, in connection with a monetary transaction, to use a credit card, debit card, or other online payment system that provides notification of each discrete transaction to the primary account holder;

(iii) Having a parent call a toll-free telephone number staffed by trained personnel;

(iv) Having a parent connect to trained personnel via videoconference;

(v) Verifying a parent's identity by checking a form of government-issued identification against databases of such information, where the parent's identification is deleted by the operator from its records promptly after such verification is complete;

. . .

§ 312.6 Right of parent to review personal information provided by a child.

(a) Upon request of a parent whose child has provided personal information to a website or online service, the operator of that website or online service is required to provide to that parent the following:

(1) A description of the specific types or categories of personal information collected from children by the operator, such as name, address, telephone number, email address, hobbies, and extracurricular activities;

(2) The opportunity at any time to refuse to permit the operator's further use or future online collection of personal information from that child, and to direct the operator to delete the child's personal information; and

(3) Notwithstanding any other provision of law, a means of reviewing any personal information collected from the child. The means employed by the operator to carry out this provision must:

(i) Ensure that the requestor is a parent of that child, taking into account available technology; and

(ii) Not be unduly burdensome to the parent.

. . .

§ 312.7 Prohibition against conditioning a child's participation on collection of personal information.

An operator is prohibited from conditioning a child's participation in a game, the offering of a prize, or another activity on the child's disclosing more personal information than is reasonably necessary to participate in such activity.

Excerpts from Franklin Civil Code § 200.1

§ 200.1 Disaffirmance of Contracts

(a) A contract made by a person after he or she has attained the age of 18 years may not be disaffirmed by himself or herself on the ground of infancy. A contract made by a person before he or she has attained the age of 18 years may be disaffirmed by that person's parent or guardian, except as provided in this section.

(b) [Exceptions omitted]

Excerpts from Franklin Children's Protection on the Internet Act (CPIA)

§ 18 Marketing and advertising

(a) An operator of an Internet website, online service, online application, or mobile application directed to minors shall not market or advertise a product or service described in subsection (h) on its Internet website, online service, online application, or mobile application directed to minors. A "minor" is an individual under the age of 18 years.

. . .

(h) The marketing and advertising restrictions described in subsection (a) shall apply to the following products and services as they are defined under state law:

(1) Alcoholic beverages

(2) Firearms, handguns, or ammunition

(3) Cigarettes or other tobacco products

(4) Dangerous fireworks

(5) Tickets or shares in a lottery game

(6) Permanent tattoos

(7) Drug paraphernalia

(8) Obscene matter

. . .

Sampson Scientific Foundation, Inc. v. Wessel
Franklin Court of Appeal (2017)

We are asked to determine if a particular type of online "terms of service" agreement is binding on the users of an Internet website. At the outset, we note that a contract is no less a contract simply because it is entered into via a computer. That is to say, agreements entered into via computer technology may be binding contracts, if the principles of contract law are followed.

The record shows that plaintiff Sampson Scientific Foundation conducts research and development in cutting-edge technologies. It operates a website, to which access is limited to individuals vetted by Sampson for their scientific and academic credentials. Basically, Sampson only allows those whom it trusts and who have "impeccable" reputations in the sciences and the academy to access its website. It takes this step in part because it deems much of the information it posts on its website to be confidential. Hence, it incorporates a "terms of service" agreement on the website, to which all who are given access to the website must agree.

It does so by employing a "clickwrap" agreement. Each time an individual who has been cleared to access Sampson's website logs on to it, a window appears asking the user to "Agree" or "Disagree" to the terms of service by clicking on an appropriate "button" indicator on the window; before making that choice, the user may access and review those terms (the full text of the agreement) by clicking a link that brings up the text. One term contained in the terms of service agreement specifies that the user will not disclose the substance of the information on the website to third parties.

Defendant Frederick Wessel is an associate professor of engineering at Franklin State University, whose academic specialty is rocket propulsion. He was granted access to the Sampson website in 2013, after being vetted and approved by Sampson. In 2014, Sampson posted some information on its website about research it was undertaking on new formulas for rocket fuels. Wessel accessed the website, printed out the information, and supplied it to Astrodyne Industries Inc., a commercial aerospace business, with whom Wessel had a paid consulting relationship. By means unimportant here, Sampson learned that Astrodyne had received the confidential information from Wessel. Sampson sued for breach of contract and sought significant damages. The trial court found for Sampson, and this appeal followed.

Wessel does not contest the facts as found by the trial court and as set forth above. Rather, he claims an error of law. Specifically, he argues that the "clickwrap" agreement is not a binding

agreement at all. He relies on our decision in *Hartson v. Hobart* (Fr. Ct. App. 2011). There, the validity of a "browsewrap" agreement for a commercial loan service was at issue. "Browsewrap" agreements typically have links to their terms of service, but the user's consent is deemed given by the mere use of the website, without the need to click an "Agree" or "Disagree" button. We held that such agreements are not necessarily binding, but rather depend on fact-specific questions. We said: "Because no affirmative action is required by the website user to agree to the terms of a contract other than his or her use of the website, the determination of the validity of a browsewrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions. A court may be willing to overlook the utter absence of assent only when there are sufficient reasons to believe that the website user is aware of the website owner's terms." We concluded that there was no evidence that the user had actual knowledge of and hence assented to the agreement. We further noted that the overwhelming majority of users of the service were unsophisticated in the world of finance, let alone in the details of commercial loan agreements. Hence, in *Hartson*, we found that the "browsewrap" agreement was not binding.

Wessel's reliance on *Hartson* is misplaced, for a "clickwrap" agreement significantly differs from a "browsewrap" agreement. As the trial court here said, "the clickwrap agreement provided adequate notice to Wessel as a user of the website because it required clicking assent, an affirmative action on his part, and indeed on the part of any user, before access to the website was permitted." We find that the "clickwrap" agreement at issue is valid and binding. We note that many other courts across the nation have almost uniformly reached a similar conclusion.

Affirmed.

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

To: Tony Briotti

From: Examinee

Date: July 28, 2020

RE: Terms of Service Agreement for Fun4Kids

I have been tasked with writing a memo identifying the relevant issues related to writing terms of service for Fun4Kids, analyzing those issues, and making recommendations as to how to deal with those issues.

The first issue here is whether a browsewrap or a clickwrap agreement is a better solution.

I recommend using a clickwrap agreement for Fun4Kids. I do so because it has a substantially better chance of being upheld as a binding contract. In *Sampson Scientific Foundation, Inc. v. Wessel* (2019) ("Sampson"), the Franklin Court of Appeals considered whether a clickwrap agreement was binding upon its users. In that case, Sampson operated a highly technical website which contained confidential information available to its limited users, which are vetted and permitted to use the website. The website used a clickwrap agreement, which means that each time a user logs onto the website, it is prompted to agree or disagree with the terms of service by clicking a button indicating either choice. Before clicking, the user has the option to click a link and read the full terms of service (TOS) before agreeing or disagreeing. One particular term there was that users are not to disclose any information from the website to third parties not permitted to use the website. the defendant in that case, after agreeing to the TOS, thereafter disclosed information to a non-permitted third party. He argued that the clickwrap agreement was not binding. The Court of Appeals noted first that just because a contract is entered into on the internet, does not make it any less a contract; regular contracts may be entered into on the internet. The Defendant relied on *Harston v. Hobart* (Fr. Ct. Appl. 2011) to argue the clickwrap agreement was non-binding. However, in *Hobart*, the contract at issue was a browsewrap agreemet. this means that by merely using the website, a user consents to the TOS. This also means that there is no

popup or anything prompting users to agree or disagree with the TOS. The court there found that browsewraps are not necessarily binding, but rather depend on fact-specific questions. Because no affirmative action is required by users (such as clicking agree), the determination of validity of a browsewrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions. A court will overlook the absence of assent only where there are sufficient reasons to believe that the user is aware of the website's terms. The court also noted that most of the users of the service in *Hobart* were unsophisticated in the world of finance (the website's use). The court then upheld the trial court's ruling against the defendant, finding the clickwrap to be binding. It also noted that most other courts in the nation find clickwrap agreements valid and binding. Additionally, Franklin law (§200.1) states that minors under 18 may have contracts they entered into while a minor disaffirmed by their parents.

As a result, here, for Fun4Kids, I recommend utilizing a clickwrap agreement. As noted, most courts in the nation uphold those as valid and binding. More importantly, for us, is the fact that browsewrap agreements are only upheld if the court can make a determination that the user has actual or constructive knowledge of the website's terms and conditions. Here, the audience is children ages 11-14. Per the Children's Online Privacy Protection Act (COPPA), a child means an individual under 13. That is the bulk of Fun4Kids' audience. It is very unlikely that a court would find that children have actual or constructive knowledge of the website's terms and conditions because children will likely not look into that sort of thing. It would be much safer to require the children to click "agree" on the website before each use, as that will have a better chance of being upheld. Further, per § 200.1, the children may have any contract disaffirmed by their parents, so we need to be very clear in our TOS, which will be addressed below.

Thus, my recommendation is to use a clickwrap agreement because it is much more likely to be upheld as a binding contract than a browsewrap due to its superior clarity and obtaining of consent.

<u>The second issue here is whether the parents' consent is needed, and if so, how it should be obtained.</u>

My recommendation, rather, the FTCs' requirement, is that a parents' permission is needed before an operator of a website directed at kids, or one who actually knows that it is collecting personal information from kids, must obtain verifiable parental consent to any

collection, use, and/or disclosure of personal information of children. I would recommend sending the parents a notice, and providing them with a form to sign or a number to call.

An operator is the person or entity that operates the website or mobile app. Per the FTC's regulations and COPPA, verifiable parental consent must be obtained before the operator of a website collects, uses, or discloses any personal information of children. Per COPPA, verifiable parental consent is any reasonable effort, including a request for authorization for future collection, use, and disclosure described in a notice*, to ensure a parent of a child receives notice of the operator's personal information collection, use, and disclosure practices. Further, FTC regulation 312.5 provides that an operator is required to obtain verifiable consent before any collection or use or disclosure of children's information, and also consent for any changes to agreements parents previously consented to. further, the parent must have the option of consenting to collection of the kids' information without disclosing his/her own info. Numerous methods of obtaining parental consent exist, such as: provide a consent form to be signed by the parent and returned to the operator, requiring a parent use a credit/debit card, have a parent call a toll-free number, have parent connect to trained personnel via videoconference, or check the parents' identity through a government database. The parent must also have the right to request and view all personal information provided by a child, including names, addresses, telephone numbers, and hobbies. Disclosure, as it relates to this, means any release of personal information for any purpose, other than to an internal operator for website support, and also means making personal informatin of children collected from a children's website, or by an operator with knowledge of collection, publicly available by any means. Personal information means names, addresses (both physical and email), or info concerning the child or parents collected by the website. Lastly, per FTC reg. 312.4, notice is required to be given to the parents, which must contain: the operator has collected parents' info from the kids, that parents' consent is needed for collection, use, or disclosure of such info and won't be done withot consent, a hyperlink to operator's practices, the means by which a parent can provide verifiable consent, and if a parent doesn' consent within a reasonable time, operator will delete their info.

As such, I think providing the parents with notice of what the website will collect, info about that, info about how to review it, and procedures for consenting is appropriate. It may be easiest to simply provide the parens with a form they can sign and send in, or with a number they can call to consent to. We should also send the parents a notice any time the TOS change so they may re-consent. These methods will help protect against a kid pretending to be a parent online. Being clear with the parents is important because they may disaffirm contracts that kids enter into.

The third issue is whether credit cards may be used and what safeguards must be used to employ their use.

My recommendation is to require express consent from parents before charging for anything on the website or app. We could use some of the verifiable consent methods listed above. Further, we should give the parents the option to withdraw their consent.

Per the Persimmon Inc. case, FTC issued a Press Release providing that the above mentioned recommendations are what Persimmon Inc. must comply with going forward. In their case, they had a sitautio where parents entered a password and that finalized purchases and allowed for unlimited purchases for the next 15 minutes. Persimmon did not inform the parents of this.

To protect Fun4Kids, we should require excpress parental consent via writing in order to protect against unauthorized purchasing and lawsuits. This includes the website and the app. Plus, an option to take back consent.

The fourth issue is whether the website can collect the kids' information and if so, to what extent.

My recommendation would be that the website can collect kids' information, but limit it to the personal information necessary to participate in the games/activities on the website.

FTC Regulation; 16 CFR §312.3(d) provides that an operator must not condition a child's participation in a game, the offering of a prize, or another activity on the child's disclosing more personal information than is reasonably necessary to participate in such activity. This is repeated in 312.7. As stated above, violation of this regulation is unlawful. As also stated above,"personal information" includes names, addresses, email addresses, and information concerning the child or parents of that child that the website collects online from the child.

Here, Jan stated that they wish to collect the child's name so that the game can interact with them and use their name in the activities. They wish to collect gender for the same reasons. I would advise that those are both reasonably necessary to the participation of the game, and thus can be collected. However, i would advise against collecting information about the children's or parents' addresses or email addresses. As Jan told us, that information is only for the advertisers and not necessary for the game itself. As such, it is not reasonably

necessary to collect that information to participate in the game, and the website cannot condition participation on disclosing such information.

Thus, I would advise that collecting names and genders is fine, but not to collect home or email addresses.

The fifth issue is whether the advertising to children complies with Franklin's statutes.

My recommendation for advertising would be that as long as the advertising on the website is "geared to kids on site," it will be fine.

Per Franklin Children's Protection on the Internet Act (CPIA), a minor is any individual under 18 years of age. An operator of any Internet website or mobile app shall not market or advertise a product on its website or app, if such marketing or advertising is of: alcohol, guns, cigarettes and other tobacco products, dangerous fireworks, tickets or shares in lottery games, permanent tattoos, drug paraphernalia, or obscene matters.

So, as long as the ads shown on the website are related to kids' interests and about things kids enjoy, it will be safe. Even though some kids may enjoy guns and fireworks (or other items prohibited), it will be a violation of CPIA to advertise such items.

MULTISTATE ESSAY EXAMINATION DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin.

You may answer the questions in any order you wish. Do not answer more than one question in each answer booklet. If you make a mistake or wish to revise your answer, simply draw a line through the material you wish to delete.

If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions.

Read each fact situation very carefully and do not assume facts that are not given in the question. Do not assume that each question covers only a single area of the law; some of the questions may cover more than one of the areas you are responsible for knowing.

Demonstrate your ability to reason and analyze. Each of your answers should show an understanding of the facts, a recognition of the issues included, a knowledge of the applicable principles of law, and the reasoning by which you arrive at your conclusions. The value of your answer depends not as much upon your conclusions as upon the presence and quality of the elements mentioned above.

Clarity and conciseness are important, but make your answer complete. Do not volunteer irrelevant or immaterial information.

In accordance with Regulation 3 of the South Dakota Board of Bar Examiners, "[t]he MEE will test both general and South Dakota principles of law."

July 2020
MEE Question 1

A woman brought a tort action against a trucking company in a federal district court in State A one month after a traffic accident in State A. The woman had been driving a car that collided with a truck owned by the trucking company and driven by one of its employees. As a result of injuries sustained during the accident, the woman is permanently disabled and unable to work.

The diversity action, which is properly before the federal court, requires a determination of fault. The woman alleges that, at the time of the accident, the truck driver was driving under the influence of prescription narcotics and lost control of his truck on the highway, which caused the collision. The trucking company argues that the woman caused the accident by driving her car at an excessive speed.

The woman will seek to introduce the following three items of evidence:

1. In-court testimony from a trucking company representative that, less than one hour after the accident, the trucking company began an internal investigation into the accident, which resulted in the truck driver's being fired the next day.

2. A handwritten letter the woman received while she was recuperating in the hospital. The letter, dated one week after the accident, read: *"I am terribly sorry about the accident that I caused. It was all my fault. I was taking pain pills prescribed by my doctor and shouldn't have been driving."* The letter was signed with the name of the truck driver. The woman no longer has the original (hard copy) letter, but she has a photograph of the letter that she took with her cell phone.

3. In-court testimony from the truck driver's doctor that the truck driver has suffered from chronic pain for years and that she had prescribed a powerful narcotic to treat that pain one month before the accident. The doctor is licensed in State A, where she has treated the truck driver for many years.

The truck driver will be unavailable to testify at trial because neither party has been able to procure his attendance and his whereabouts are unknown. The woman's cell phone has been examined by a neutral computer expert, who reports that the photograph of the letter is clearly legible and that the image has not been altered in any manner. The doctor has informed the parties that she does not want to testify about her communications with her patient, the truck driver, and that she has had no contact with her patient since the week before the accident.

The defense team will seek pretrial to exclude all three items of evidence proffered by the woman. Assume that the judge will find all three items relevant under Rule 401 of the Federal Rules of Evidence and will refuse to exclude any item of evidence under Rule 403 of the Federal Rules of Evidence.

With respect to each item of evidence that will be proffered by the woman, identify and explain the most plausible objections that the trucking company's defense team could make, any plausible responses the woman's attorney should make to those objections, and how the court should rule.

In regards to the first piece of evidence, the trucking company may argue that the internal investigation is inadmissible for public policy reasons. Evidence showing a subsequent remedial action is inadmissible if the evidence is introduced to prove that the defendant was culpable for the actions in the case. A subsequent remedial action is an action to fix or to correct a previous action so that it will never happen again. Public policy wants to encourage subsequent remedial actions so that individuals will fix or correct things that may bring about a similar result. Here, the company perform an internal investigation to decide when the trucker was responsible for the action, leading to the trucker being fired. The company performed a subsequent remedial action to ensure this wouldn't happen again. The plaintiff may argue that the evidence was admissible because it is a relevant piece of evidence that could point to the trucker's liability. However, I do not think the court will see it that way. The court will likely rule the evidence inadmissible.

In regards to the second piece of evidence, the defense may argue that the piece of evidence is in violation of the best evidence rule. The best evidence rule states that a party must introduce the original or a satisfactory copy of the original evidence when the evidence is a legal operative document or the document is key to the testimony of the party. Here, the original document could not be brought forward because it could not be found, but rather a copy provided on a phone was introduced. The plaintiff may respond that a satisfactory alternative is admissible if the original document cannot be found and the copy is not illegible or has been tampered with. The court will most likely allow this evidence in regards to the best evidence rule. While the original could not be located, the copy is satisfactory because it has not been tampered with due to the computer expert's opinion that the photograph has not been tampered with and is not illegible in any way.

The trucking company also may also argue that this evidence is inadmissible hearsay. Hearsay is an out-of-court statement offered for the truth of the matter asserted, whether it be words, statements, or gestures. The handwritten letter is a out-court statement offered to prove that the trucker was liable for the tort action. However, the plaintiff may respond that the letter is a statement against self-interest

by a party and is therefor admissible as an exception to hearsay. The court will most likely agree that the evidence is admissible under this exception.

Lastly with the letter, the defense may argue that there is no proof that the letter was written by the truck driver, and therefor cannot be authenticated. However, the plaintiff may provide a witness, a handwriting expert, or show the jury the handwriting along with another piece of handwriting by the truck driver to prove that it was the truck driver's handwriting--therefore authenticating the letter. The court will likely allow the letter in if it is authenticated properly.

As for the testimony from the truck driver's doctor, the defense team can argue that the information or conversion is inadmissible because it is privileged as doctor-patient confidentiality. As long as the testimony involves the treatment of the patient involving the matters of this case, the testimony will be inadmissible. Here, the truck driver was seeing the doctor to treat pain with a powerful narcotic. The plaintiff will most likely argue that because the defendant is unavailable to question about the prescription judge, that the doctor is the only other person they can ask to prove that the plaintiff was taking the drug. However, the court will likely rule that any conversation between a doctor and patient is inadmissible due to privilege.

July 2020
MEE Question 2

Ann, a successful entrepreneur, grew up in a small town in State A. Ann's family could not afford to send her to college, but a group of local store owners, sensing Ann's potential, paid Ann's tuition for college and graduate business school. Twenty years later, in honor of the store owners, Ann created a trust and funded it with $1,000,000.

Under the terms of the trust, the trustee (a local bank) must annually use trust income to purchase and install seasonal plantings on all principal streets in the town where Ann grew up. The trustee is authorized to invade trust principal to purchase and install such plantings if the trust income is insufficient. The trust instrument further provides that the trust will last in perpetuity or until such time as the principal of the trust has been exhausted; no individuals are named as trust beneficiaries. Currently the trust's annual income is $40,000 and the annual cost of seasonal plantings is anticipated to be about $35,000.

Last week, Ann died unexpectedly and without a will. At the time of her death she had $100,000 in a bank account in her name alone. Ann's uncle and niece survive her.

The personal representative of Ann's estate properly filed an action to set aside the $1,000,000 trust on the ground that it is invalid under the common-law rule against perpetuities, which applies in State A. The personal representative also requested judicial approval of a proposal to distribute the assets of the allegedly invalid trust, with the other assets of Ann's estate, to Ann's niece but not to her uncle. Ann's uncle contends that he is entitled to half of Ann's estate.

State A has adopted the Uniform Trust Code.

1. May the trust endure for its stated duration (in perpetuity or until its assets are exhausted)? Explain.

2. Assuming that the trust cannot endure for its stated duration, could a court preserve the trust for any period of time to carry out Ann's intentions? Explain.

3. To whom should Ann's estate be distributed and in what shares? Explain.

May the trust endure for its stated duration?

Most likely, this trust will be able to endure for its stated duration.

Generally, a trust is created when a settlor intends to create a trust by placing trust property with a trustee for the benefit of beneficiaries for a valid purpose. Certain trusts, called charitable trusts, are created when the settlor intends to create a trust for a charitable purpose, often to benefit the public at large, and has no ascertainable beneficiaries, meaning, it cannot be for a few limited or named people. Often, the charitable trusts are for scientific research or education, but are not limited to those. Generally, it needs to be for public benefit. The rule against perpetuities (RAP) does not apply to charitable trusts.

Here, Ann would be the settlor. there is an intent to create the trust. She appointed the bank as a trustee and placed assets (money) into the trust. She is also doing the trust for a valid/non-illegal purpose. The only issue is there are no beneficiaries. However, it seems as though Ann's trust can be construed as a charitable trust. There are no beneficiaries of the trust and so it can meet that standard. It is debatable whether the purpose of this trust meets the standard for "public benefit," but cities often decorate and have plantings and floral decor around town. The purpose of this trust is to give back to the town that did a good deed for her as a younger kid. This promotes a clean and vibrant town and most of the residents benefit from that. There is not an enumerated list of what qualifies as charitable for trust purposes, and the goal here, as stated, is to promote the town at large and show appreciation. On the other hand, it does not necessarily promote a specific charitable goal, and perhaps the town benefitting is not large enough of a party to be sufficient for charitable trust purposes. If the court would find that this is not charitable, the trust would be subject to RAP, and could also fail as a result of not naming any beneficiaries.

Thus, I think a court could find this to be a charitable purpose and therefore except the trust from RAP, allowing it to endure in perpetuity. If the court ruled the other way, however, it would be void as violating RAP.

Assuming the trust cannot endure for its stated duration, could a court preserve the trust for any period of time to carry out Ann's intentions?

The court likely cannot preserve the trust.

The cy pres doctrine is one which allows a court to conform a charitable trust to benefit a different purpose, or just amend a trust to continue in duration. Courts do not like to invalidate trusts or see them fail. the cy pres doctrine does not apply to regular trusts; trusts for ascertainable beneficiaries.

Here, assuming the trust cannot endure in perpetuity, that would mean the court found the trust to not be charitable. In that event, the cy pres doctrine could not be applied. If that is the case, the court likely does not have any discretion to amend the trust. Especially considering there are no beneficiaries in the trust. The only argument would be if the court limited the trust to 21 years for it to comply with RAP. There is still an issue of no beneficiaries, but the court could perhaps impose a resulting trust in equity and have the remaining principal, if any, revert to Ann's issue.

Overall, it is unlikely the court can preserve the trust.

To whom should Ann's estate be distributed and in what shares?

Ann's estate should be distributed to

When someone dies without a will, they are said to die intestate. There are rules of intestate succession to hopefully comply with what would have been the grantor's intent The general common law rule is that when one dies intestate, their property goes to their spouse. If the person is widowed, their estate goes to their children, if any, or to their grandchildren. If none of those, you next look to the testator's parents, and to their descendants (i.e., the testator's siblings and their children). If the event that also fails, you can go to the grandparents and their descendants. The UPC applies similar rules, with a difference being that at the first level, the property may be split between kids and spouse.

Here, Ann died intestate and a widow with no children and no grandchildren. Going next, her parents are also not alive. Going to her parents' descendants, she has no siblings alive either. However, she has a niece, which would be a descendant of her parents because it would be her sibling's child. The niece comes before the uncle, because we do not reach the next level of grandparents' descendants.

Thus, the niece is entitled to all of Ann's estate.

July 2020
MEE Question 3

Ten years ago, a husband and wife were married during a one-day stopover in State A while they were traveling by train on a cross-country vacation. After this trip, the husband and wife returned to their home in State B.

Five years ago, the couple had a child, Sarah, in State B. The wife then quit her job and stayed at home to serve as Sarah's primary caregiver.

Two years ago, the husband was seriously injured when he was struck by a car while walking across a street. After the accident, the husband began drinking to excess. He also became physically and emotionally abusive toward his wife and was convicted of assault after a physical attack led to her hospitalization. The husband has not worked since his injury.

Nine months ago, the wife took Sarah and moved to State A, where the wife's sister lives. The wife did not tell her husband that she was leaving, but she called him a week after arriving in State A, gave him her address, and told him that she intended to remain in State A with Sarah. The wife found a job in State A and moved out of her sister's home and into a nearby apartment. The husband made no effort to contact the wife or Sarah.

One week ago, the wife commenced a divorce action against the husband in State A. In this action, the wife seeks custody of Sarah and a share of the couple's marital property. The husband was personally served with a summons and divorce complaint at his home in State B.

The husband has never been to State A except for the one-day stopover when he and the wife were married there. He owns no assets in State A.

State A law allows for both fault-based and no-fault divorce and requires that either the divorce plaintiff or the defendant have been residing in State A for six months before the plaintiff may file a divorce petition. State A has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).

1. Does a State A court have jurisdiction to grant the wife

    (a) a divorce? Explain.

    (b) sole physical custody of the couple's daughter, Sarah? Explain.

    (c) a share of the couple's marital property? Explain.

2. Assuming that the State A court has jurisdiction, could the court grant the wife

    (a) a divorce based on the husband's fault? Explain.

    (b) sole physical custody of Sarah? Explain.

1. State A Court's Jurisdiction

A. Divorce

The State A court has jurisdiction to grant the wife a divorce. At issue is whether the wife may obtain a divorce in a state in which the husband married the wife but had no further contact. One spouse may seek a divorce in a state in which the other spouse does not live so long as they are domiciled in the state. This is an ex parte divorce. There is a presumption of domicile if the person has lived in a jurisdiction for a statutorily noted period of time.

Here, the wifehas lives in State A and has lived in State A for nine months. State A requires that either the divorce plaintiff or defendant reside in State A for six months before filing for divorce. The wife's nine month residency exceeds this six month requirement. Thus, the wife may obtain an ex parte divorce form her husband in State A. The State A court has jurisdiction to grant the wife a divorce.

B. Sole Physical Custody of Daughter

State A has jurisdiction to grant the wife sole physical custody of the couple's daughter, Sarah. Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), a court has original jurisdiction over a case when it is the child's home state. A child's home state is generally where the child has resided for six consecutive months.

Here, the wife took Sarah with her when she moved to State A nine months ago. Sarah has continued to reside in State A with her mother since that time. This makes State A Sarah's home state. Since State A is Sarah's home state under the UCCJEA, the court has jurisdiction to grant the wife sole physical custody of the couple's daughter.

C. Share of Couple's Marital Property

State does not have jurisdiction to determine the distribution of the couple's marital property. A court needs personal jurisdiction over both the husband and wife to distribute marital property between the parties.

Here, the court has jurisdiction over the wife, but not the husband. Plaintiffs subject themselves to the jurisdiction of the state in which they file suit. Thus the court has general personal jurisdiction over the wife. To have jurisdiction over the defendant, the defendant

needs to be either domiciled in the state, or have sufficient minimum contacts with the state as to render if fair that he should be hailed into court in that state.The husband is clearly not domiciled in State A since he does not live in State A and never has. The husband has never been to State A except when the wife and himself made the one day stop in State A to become married. This one-day stop occurred when they were traveling by train on a cross-country vacation. While this is a contact, it does not appear to be a sufficient minimum contact that he would reasonably anticipate having availed himself to future lawsuits in the state. Thus, the court does not have personal jurisdiction over the husband. Therefore, the court does not have jurisdiction to determine the distribution of the couple's marital property.

2. Court's Jurisdiction

A. Divorce Based on Husband's Fault

It is possible the court could grant the wife a divorce based on the husband's fault if the State A court has jurisdiction.. In states that still recognize fault-based divorce, grounds for fault include physical and mental abuse of a spouse; as well as continuous drunkness or lack of sobriety that did not previously exist. Fault grounds also include abandonment of a spouse without reason and with no intent to return for a statutorily stated period of time.

Here, the husband was seriously injured in a accident two year ago when he was struck by a car while crossing the street. The accident caused him to begin drinking excessively. It also caused him to become physically and emotionally abusive toward his wife. The husband was so abusive that he was convicted assault against his wife after a physical attack led to her hospitalization. This physical and mental abuse and the continuous drunkness are grounds on which the wife could obtain a fault divorce.

It could be argued that since the wife left her husband without intent to return prior possibly for a statutory period of time, that perhaps she is at fault as well. In some states, a spouse who is at fault may not seek a divorce on fault based grounds. However, it appears that Sarah had a legitimate reasonable for leaving which was to prevent her future abuse and potential hospitalization. The court should consider this and grant the divorce based on her husband's fault.

B. Sole Physical Custody of Daughter

If the court has jurisdiction, it will grant sole physical custody of Sarah to the wife if the State A court has jurisdiction.. A court is likely to grant joint physical custody unless a spouse

objects, the spouses are unable to cooperate on the matter, or the child is at risk of harm if staying with one of the parents or the parent is otherwise unfit.

Here, the wife left with Sarah nine months ago and the husband has made no effort to reconnect with his child. The husband has abused his wife to the point of hospitalization in the past because of his drunkness. It is reasonable to believe that he may injure his daughter due to his drunkness as well. The drunkness of the husband alone makes sole physical custody of Sarah by the wife appropriate showing that the father is potentially unfit and not likely to be cooperative in sharing custody. Therefore, the court will grant sole physical custody of Sarah to wife if the State A court has jurisdiction.

July 2020 MEE
Question 4

On February 1, a company borrowed $100,000 from a bank. Pursuant to an agreement signed by both parties, the company granted the bank a security interest in "all of [the company's] present and future inventory, accounts, and equipment" to secure its obligation to repay the loan. Later that day, the bank filed, in the appropriate filing office, a properly completed financing statement listing the company as the debtor and the bank as the secured party and indicating "inventory, accounts, and equipment" as collateral.

On March 1, the company bought a power generator, for use in the company's business, from a manufacturer. The purchase price of the power generator was $24,000. The manufacturer agreed that the company could pay the purchase price in 12 monthly installments of $2,000 each. Pursuant to an agreement signed by both parties, the company granted the manufacturer a security interest in the power generator to secure the company's obligation to make all the installment payments. Later that day, the manufacturer filed, in the appropriate filing office, a properly completed financing statement listing the company as the debtor and the manufacturer as the secured party and indicating the power generator as collateral. The manufacturer delivered the power generator to the company on March 3.

On April 1, the company entered into an agreement entitled "Lease Agreement" with a supplier. The Lease Agreement, signed by both parties, stated that the supplier was leasing to the company a retinal scanner for use in the company's security system for a fixed term of three years with no right of cancellation by either party. The Lease Agreement also provided that, if the company made each of the 36 required monthly lease payments of $3,000, it would have the option to become the owner of the retinal scanner for no additional consideration. The supplier delivered the retinal scanner to the company on April 2. The supplier did not file a financing statement with respect to this transaction.

The company has defaulted on its obligations to the bank, the manufacturer, and the supplier. The bank and the manufacturer are each asserting an interest in the power generator, and the bank and the supplier are each asserting an interest in the retinal scanner.

1. (a) Does the bank have an enforceable interest in the power generator? Explain.

   (b) Does the manufacturer have an enforceable interest in the power generator? Explain.

   (c) Assuming that both the bank and the manufacturer have enforceable interests in the power generator, whose interest has priority? Explain.

2. (a) Does the bank have an enforceable interest in the retinal scanner? Explain.

   (b) Does the supplier have an enforceable interest in the retinal scanner? Explain.

   (c) Assuming that both the bank and the supplier have enforceable interests in the retinal scanner, whose interest has priority? Explain.

1. (a) The bank has an enforceable interest in the power generator. Article 9 of the UCC governs secured transactions. A security interest is created upon attachment and perfection of the security interest creates priority. For a security interest to attach, there must be (1) evidence of an agreement between parties indicating that the secured party retains a security interest in specified collateral; (2) the secured party must give value to the debtor; and (3) the debtor must have rights to the collateral. Here, there is an agreement set forth in a signed security agreement. A written agreement signed by the parties and adequately describing the collateral is sufficient to prove a security interest where the collateral is not controlled or possessed by the secured party. The security agreement adequately identifies the collateral as "all of the company's present and future inventory, accounts, and equipment."After acquired property clauses are permitted, but subject to relevant priority rules. The secured party gave value to the company when it gave the company $100,000. Finally, the debtor has rights in its inventory, accounts, and equipment that it owns at the time of the agreement. The bank adequately perfected its security interest by filing a financing statement, with the appropriate filing office on February 1. When the company purchased the power generator, the bank's security interest attached and maintained its priority date of February 1. The power generator is "equipment" and therefore covered by the after acquired property clause of the security agreement and adequately described in the financing statement. Equipment is a catch-all category for goods and is therefore a good that is not a consumer good, inventory, or farm product. Generally, equipment is used for business purposes. A good is tangible moveable property when identified to the contract. A consumer good is a good used for household or family purposes. Inventory is a good held for sale or lease by a business or consumed quickly by a business to create its product or service. Property is categorized as it is used by the debtor at the time of the agreement. A power generater is presumably tangible moveable property, although it is likely large and heavy. It is not for personal use nor for sale so it is not a consumer good, nor inventory, and not a farm product. It is also used for business purposes. Therefore, it is equipment.

(b) The manufacturer maintained an enforceable security interest in the power generator when it sold the power generator to the company. Per the requirements of attachement set forth above, the parties (1) had an agreement; (2) the manufacturer gave value, being the financing for the purchase of the generator; and (3) when sold the company gained right to the property. Further, the company perfected its security interest by filing a financing statement in the appropriate office later that day, March 1. Therefore, the manufacturer has

an enforceable security interest in the generator. When a security interest is created by the seller of the collateral to finance the purchase of that collateral, it is called a purchase money security interest (PMSI). The transaction here is a PMSI because the manufacturer sold the the generator to the company and retained a security interest in the generator as collateral in exchange for the financing of the generator. Therefore, the underlying security interest is a PMSI.

(c) The manufacturer has priority. A PMSI has priority over a perfected security interest. Because the manufacturer has a PMSI in the generator as explained above, the manufacturer has priority over the perfected security interest held by the bank.

1. (a) The bank has an enforceable interest in the retinal scanner. The retinal scanner is equipment and therefore covered by the bank's security agreement and financing statement. Equipment is, again, catch-all category for goods and is therefore a good that is not a consumer good, inventory, or farm product. Generally, equipment is a good used for business purposes. The retinal scanner is used for the company's security system - business purposes. It is a good because it is tangible moveable property. It is not used for household or family purposes and is not consumed, sold or leased for its business. therefore it is equipment and covered by the bank's security agreement and financing statement.

The issue is whether the company had rights to the retinal scanner, or if it was merely a lease. Although it is described as a lease agreement, a security interest will be found if it appears that it is merely a sale disguised as a lease. Here, it is a sale disguised as a lease because at the end of the lease, the company can purchase the retinol scanner for no additional consideration. Presumably, the appreciable life of the scanner is the length of the lease. Therefore, this is actually a financed sale of the scanner and the company has rights to the scanner and the bank has a perfected security interest in the scanner as equipment per the original loan and security agreement.

(b) The supplier has a PMSI in the scanner, as definded above. the supplier financed the purchase of the retinal scanner, which is a purchase with the seller retaining a security interest, disguised as a lease. The supplier did not file a financing statement and therefore did not perfect its PMSI.

(c) The bank has priority because it is a perfected security interest, which prevails over an unperfected security interest.

July 2020
MEE Question 5

The owner of a two-story building converted it into three two-bedroom apartments. The owner occupied the ground-floor apartment; the other two apartments were rental units. All the apartment interiors had a similar modern look and design. In the apartments, the owner installed standard modern light fixtures in all rooms except the master bedroom of her own apartment, where she installed a gold-plated chandelier. The chandelier was of an ornate, old-fashioned style and did not match the modern light fixtures in her apartment or the other apartments. But because the owner had inherited the chandelier from her mother, she had a strong sentimental attachment to it. In her living room the owner also placed a 65-inch television on a wall mount affixed to the wall over the fireplace. The conversion was completed last year, and immediately upon completion, the owner moved into her apartment.

The owner then wrote the following advertisement and paid to have it published in the local newspaper:

> Two 2-bedroom apartments for rent. Only professional women (but not lawyers) need apply.

Eight individuals applied to rent the apartments. Three were male accountants. Five were women, three of whom were lawyers. The owner told the men that she "[does] not rent to men." She then rented one of the apartments to a female architect and the other to a female physician. Both leases ended last month and were not renewed. The owner then decided to sell the building.

Last week, the owner showed the apartment building to a prospective buyer. While showing her own apartment, the owner commented to the buyer that the chandelier had come from her mother and meant a lot to her. After seeing all three apartments, the buyer agreed to buy the building. The sales contract, signed by both parties, does not mention fixtures, and the owner and the buyer now disagree on whether the chandelier and the wall-mounted television are fixtures included in the sale of the building.

The state has adopted a fixtures code, of which Sections 1 and 2 provide as follows:

> (1) Unless the terms of a residential real estate contract otherwise provide, upon the closing of the contract the seller shall deliver to the buyer the real property described in the contract, including all fixtures that were affixed or attached to the real property at the time the contract was signed.
>
> (2) For purposes of Section 1, a fixture is an item of personal property affixed or attached to the real property by the seller unless a reasonable person would conclude, based upon all the facts and circumstances relating to the specific personal property, that the item of personal property at the time it was affixed or attached was not affixed or attached to the real property with the intent to make it a permanent part of the real property.

1. Did the owner violate the Fair Housing Act of 1968 by refusing to rent to men and lawyers? Explain.

2. Did the owner or the newspaper publisher violate the Fair Housing Act of 1968 by publishing the owner's rental advertisement? Explain.

3. Assuming that both the television and the chandelier are affixed or attached to the real property:

(a) Is the television a fixture? Explain.

(b) Is the chandelier a fixture? Explain.

1. The first issue is whether the owner violated the Fair Housing Act of 1968 by refusing to rent to men and lawyers.

The general rule is that the fair housing act prohibits individuals who sell or rent property from partaking in discrimination based on a parties age, sex, familial status, race, nationality, or disability. The act contains a few properties that are exceptions to its general provisions including a rental apartment with four or less units, if the owner occupies one of the units. When determining if the party is partaking it discriminatory advertising, the court will look to see whether the advertising has a disparate impact or intent (which is different than the equal protection standard).

Here, the woman's unit does fall within the exception to the FHA. It is a three two-bedroom apartment unit and she lives in one of the units. She could discriminate in who she rents to or provide different units or accommodations to different people based on the delineated class. Her comments to the men that she does not rent to men and the statistics that she has not rented to men fall within the Act, but she is an exception. Additionally, a profession is not one of the listed classes within the FHA. Therefore, this action did not violate the act either.

Therefore, since the woman falls within an exception, she did not violate the FHA based on her rental policy.

2. The second issue is whether the owner or the newspaper publisher violated the FHA by publishing the owner's rental advertisement.

The above rules for the FHA and its exceptions apply. However, the act's exceptions do not apply to discriminatory advertising. Outside of religious organizations, the exceptions to the act must not publish discriminatory advertisements. Further, a publisher can also be liable for a violation of the FHA, as they are spreading the discriminatory message.

Here as discussed above the woman is an exception to the act. However, she cannot under the act participate in discriminatory advertising. Here, the woman published an advertisement that explicitly stated she would only rent to women. Sex is one of the classes included in the act. Therefore, her advertisement against men violated act. However, her advertisement against lawyers do not violate the act as discussed above a profession is not a protected class.

The publisher too can be liable under the Act as the publisher published the discriminatory advertisement. An advertiser is responsible for not spreading discriminatory messages.

Therefore, the woman violated the FHA by publishing a discriminatory advertisement against men, but not against lawyers. And, the publisher too can be liable. The exception does not apply to discriminatory advertisements.

3A. Is the television a fixture?

The general rule is that fixtures are included in the sale of property. Unless, the owner explicitly excludes the fixtures in the contract of sale. Here, State A's statute states that the owner shall deliver the real property including all fixtures affixed or attached to the real property. Fixtures are defined as personal property affixed to the real property that a reasonable person would conclude based upon all the facts and circumstances relating to the specific personal property that the item when it was affixed was affixed with the intent for it not to be personal property.

The contract does not mention the TV; therefore, the woman will have to argue that a reasonable person would not have found it to be a fixture under the act.

Here, the issue will be whether a reasonable person would find the television to be personal property that was intended to be a permanent part of the home when affixed. The television is affixed to the wall over the fireplace; therefore it is personal property falling within the act. However, the woman will argue that a reasonable person would not intend to leave their television with the home when they move. In fact, very few people leave their 65 inch TVs in their homes with the intent for it to stay their permanently.

The TV will most likely not be considered as a fixture as most people bring their TVs with them when they leave their homes and do not intend the to stay.

3B. The issue is wether the chandelier is a fixture.

The same rules stated above apply. The chandelier was also not mentioned in the contract. It is also a fixture that is attached to real property and falls within the act.

The woman will have a harder argument on the chandelier. However, the act says to look to all the facts and circumstances. The chandelier is gold plated and different from the other light fixtures in the home. Additionally, as they were walking through the property, the

woman stated that the chandelier meant a lot to her so the buyer was on notice that the chandelier had a special value.

The buyer will argue that a reasonable person attaches a chandelier with the intent to leave the chandelier when they move. This is a strong argument as most people do not bring their chandelier's with them.

The court will look to the facts and most likely find in favor of the buyer on the chandelier. Although it is a different fixture from the other light fixtures, a reasonable person would conclude that the person attaches the fixture with the intent for it to be a permanent part of the real property.

July 2020
Indian Law Question

William Blue Moccasin is an enrolled member of the Rosebud Sioux Tribe and the owner of 300 acres of trust land located on the Rosebud Sioux Reservation in South Dakota. He is also the owner of a (private) 20-unit housing complex located on his trust land which is fully within the Reservation boundaries. The building and operation of the housing complex have been fully approved by the Bureau of Indian Affairs and are in full compliance with the laws of the Rosebud Sioux Tribe.

Mr. John James is a non-Indian, who, pursuant to a written and signed lease, is the leasee of Unit #5 of Mr. Blue Moccasin's housing complex. The written lease, which is also signed by Mr. Blue Moccasin runs for the duration of two years and requires a monthly rent of $700 to be paid directly by the leasee, John James, to the leasor, William Blue Moccasin, by the first day of each month. The lease also expressly states that all disputes concerning the payment of rent or the condition of the unit shall be resolved in tribal court. Mr. James has not paid any rent for the past two months but continues to reside in Unit #5.

Mr. Blue Moccasin has filed a private civil action against Mr. James in the Rosebud Sioux Tribal Court. The complaint filed by Mr. Blue Moccasin's attorney seeks payment of the two months rent due and owing. It does *not* seek to evict Mr. James from Unit #5. Such a civil action is explicitly authorized by the Rosebud Sioux Constitution and the Rosebud Sioux Tribal Code.

Mr. James' attorney filed a motion to dismiss in Tribal Court for a lack of subject matter jurisdiction pursuant to Federal Indian Law principles. How should Judge Cheryl Red Sky (who is law-trained and a member of both the South Dakota Bar Association and the Sicangu Oyate Ho Bar Association of the Rosebud Sioux Tribe) rule on this motion?

Generally, a tribal court has no civil subject matter jurisdiction over Non-Indians. However, there is an exception to that rule called the *Montana* test, named after the case in which announced the rule. There are two prongs under the *Montana* test, either of which, if satisfied, will confer subject matter jurisdiction on the tribal court over a Non-Indian. It also needs to be noted that the status of the land in which the alleged action took place on is not determinative, but rather just a factor in the entire analysis but the action must have accrued inside of Indian Country. Indian Country is all land that is inside of a formal reservation, is held in trust by the United States for the Indian tribe, is held in trust as an allotment to a specific Indian, or is a dependent Indian community. The first prong of *Montana* states that in order for a tribal court to have civil jurisdiction over a Non-Indian, that Non-Indian (1) must have entered into a consensual relationship with an Indian or the Tribe; and (2) there must be a nexus between that consensual relationship and the action at hand. The second prong under *Montana* states that the tribal court could have civil jurisdiction over a Non-Indian if the Non-Indian's conduct strikes at the heart of tribal self-government, threatens the political integrity of the tribe, or threatens the health and welfare of the tribe. The Non-Indian's conduct must also be deemed to be "catastrophic" to one of those interests.

Under the *Montana* test, Judge Cheryl Red Sky should deny Mr. James' motion to dismiss for lack of subject matter jurisdiction. The issue is whether Mr. James entered into a consensual relationship that would bring him under the *Montana* rule. Mr. James signed a lease agreement with William Blue Moccasin, an enrolled member of the Rosebud Sioux Tribe, to rent a unit of a housing complex that is situated on Indian trust land that is within the Reservation boundaries. A lease agreement, a contract for housing, with an Indian landlord on Indian trust land is definitely a consensual relationship for the sake of *Montana*. There is a nexus between that contract and the cause of action here because Mr. Blue Moccasin is suing to collect past due rent, which is money damages for nonperformance of a contract. The tribal court does have civil subject matter jurisdiction over this dispute under the first prong of *Montana* and should deny Mr. James' motion to dismiss.

Even though the first prong of *Montana* confers jurisdiction over the matter, the second prong of *Montana* should also still be analyzed. To satisfy the second prong of *Montana*, the Non-Indian's conduct must strike at the heart of tribal self-government, threaten the political integrity of the tribe, or threaten the health and welfare of the tribe and the Non-Indian's action must be of catastrophic nature. Here, it cannot possibly be argued that Mr. James'

failure to pay his rent is catastrophic to any of these interests. Failing to pay rent under the lease does nothing to strike at the heart of tribal self-governance. It's possible that his failure to pay rent threatens the political integrity of the tribe by not respecting the tribe's borders or lands, but even Mr. Blue Moccasin is not attempting to evict Mr. James, rather just to get the rent money that is owed to him. Therefore, the failure to pay rent cannot be construed to be catastrophic to the tribal political integrity. Again, it could be argued that failure to pay rent is impacting the health and welfare of the tribe by taking money out of Mr. Blue Moccasin's pocket, but it does not rise to the level of catastrophic to the health and welfare of the entire tribe, so that element must also fail. The second prong of *Montana* cannot be met, but the first prong was met so there is tribal subject matter jurisdiction under that prong.