

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.

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Applicant Number

MPT-1
726

MPT[®]

Multistate Performance Test

Matter of David Dawes

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Matter of David Dawes

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FILE

Van Every & Rice LLP
Attorneys at Law
9 Templeton Avenue
Fitzwilliam, Franklin 33726

TO: Examinee
FROM: Simone Rice
DATE: July 28, 2026
RE: Subpoena from US Attorney

I have received a subpoena from the US Attorney as part of a prosecution of an army veteran, David Dawes, to whom I gave advice about six years ago. The government has charged Dawes with knowingly and willfully concealing material information in an application for benefits from the Department of Veterans Affairs (VA). The subpoena requests documents relating to my conversations with him about his eligibility for benefits.

I first met with Dawes on March 11, 2020. He had heard that our firm helps veterans file initial applications without charging a fee. As is my usual practice, I asked permission to record the conversation. The next day, I met again with Dawes, and I informed him that I would not represent him in preparing the application. I documented that conversation in a separate memo to file.

In the present criminal action, Dawes is represented by the Federal Public Defender's office. After I received the subpoena, the attorney representing Dawes called me to talk about the case and to ask about my plans regarding the subpoena.

I plan to contest the subpoena if I have grounds to do so, as the rules of ethics suggest I should do. I need you to write a memorandum analyzing the following:

- (1) Do the Franklin Rules of Professional Conduct prevent me from disclosing to the government the documents in my files about my conversations with Dawes?
- (2) Based on the information in my possession relating to the crime charged in the indictment, would the crime-fraud exception to the attorney-client privilege apply to the documents in my files?
- (3) Based only on the information in the government's possession, can the government successfully compel disclosure of the documents in my files under the crime-fraud exception?

Do not draft a separate statement of facts but be sure to integrate the relevant facts and applicable law into your legal analysis.

UNITED STATES DISTRICT COURT
for the
District of Franklin

United States of America,
Plaintiff,

v.

Case No. 26-CR-1382

David Dawes,
Defendant.

INDICTMENT

The grand jury charges that on or about April 7, 2020, in the District of Franklin, David Dawes did knowingly and willfully conceal and cover up a material fact, namely the existence of an outstanding criminal warrant, when applying for disability compensation benefits from the Department of Veterans Affairs, resulting in the illegal receipt of approximately \$260,000 in benefits from July 1, 2020, to May 1, 2026, all in violation of Title 18, United States Code, § 1001.

A TRUE BILL

July 9, 2026

Jean Pearsall Schmidt

Jean Pearsall Schmidt
Foreperson

Amalie Semmes

Amalie Semmes
United States Attorney

TRANSCRIPT OF INTERVIEW

Between Attorney Simone Rice and Mr. David Dawes

March 11, 2020

Att'y Rice: Mr. Dawes, thank you for coming in today.

David Dawes: No, thank you. I need your help.

Rice: Let's see what we can do. Your intake sheet tells me that you're an army veteran with an honorable discharge.

Dawes: Yes, I am.

Rice: Why are you here today?

Dawes: I want to start getting disability from the VA. My buddies tell me that, with all the problems I have been having, I should be able to get full benefits.

Rice: What kind of problems?

Dawes: I have a lot of pain in my back and hips. I don't sleep well at all and keep waking up. And a therapist told me I have PTSD.

Rice: Okay. I appreciate your letting me know all this. We'll go back over each of those conditions in a minute. But I want to start with your current situation. Your intake form says you don't have any place to sleep and you have no income.

Dawes: That's right.

Rice: How long has this been going on?

Dawes: About two years, ever since I moved here to Franklin.

Rice: Where did you live before?

Dawes: Centerville, in Columbia.

Rice: Did you have the same trouble there?

Dawes: No . . . well, not until I was released from prison.

Rice: Tell me about that.

Dawes: Well, right after I was discharged from the army, I had a job driving a delivery truck. But I had trouble staying awake and settling my nerves. So I started using and then started buying for other people. I got caught and convicted.

Rice: Using what?

Dawes: Cocaine. I was charged with felony possession with intent to distribute. The judge gave me a five-year sentence. I served one year and got out on probation. Then everything went to hell. I dropped off the grid and started using cocaine again. That's when I lost my apartment and everything.

Rice: Did you finish your probation before that happened?

Dawes: No, it all happened within a couple of months.

Rice: Did you keep in touch with your probation officer?

Dawes: No, like I said, everything went to hell.

Rice: Do you know whether they charged you with violating your probation?

Dawes: I never checked. They must have.

Rice: As far as you know, did they issue a warrant to arrest you for that probation violation?

Dawes: Again, I never checked. I'm pretty sure they did, but I moved here before they caught up with me.

Rice: Have you ever contacted anyone to help you with the warrant?

Dawes: No. I don't want to. I'm not going back to prison.

Rice: Okay. Now, you need to know that the rules of lawyer ethics keep me from telling anyone what you just told me. And I need to advise you that, by not taking care of that probation violation, you're breaking the law.

Dawes: I don't want your help with that. I want you to help me file my application for disability benefits from the VA.

Rice: That's going to be a problem too. The VA won't pay disability benefits to someone who has an outstanding warrant.

Dawes: That's crazy. How am I supposed to live if I can't get disability?

Rice: That's how the VA rules work.

Dawes: But this is a different VA regional office, and it only handles claims from veterans in Franklin. The VA will never find out about a warrant in Columbia.

Rice: When you apply, you'll have to tell them about it.

Dawes: No, I won't. I got a copy of the application form from a friend, and it doesn't ask anything about your criminal record. As far as the local VA office knows, it'll look like I have a clean record.

Rice: But if they start paying you money and find out about it later, they'll stop your benefits. And then they'll come after you for everything they paid you. And there's a good chance they'll also charge you with a crime.

Dawes: How can they do that? I won't have lied to them. I just didn't tell them.

Rice: I'll have to check, but I'm fairly confident they can prosecute you for not telling them the whole story.

Dawes: So you're telling me that if I apply for benefits, you're going to tell them about my probation and all that.

Rice: Hold on. Let's slow down. I'm not sure I can even help with your application at this point.

Dawes: What? Why not?

Rice: Before we go any further, I'll need to do some research. Give me a day to look into it and make sure of what you need to know. Can you come back tomorrow?

Dawes: Are you going to report me to the police?

Rice: No, I'm not. But I have to figure out what happens if you go ahead and apply without saying anything to the VA. We'll talk tomorrow.

Dawes: Okay. Tomorrow. Look, I really need your help; I can't handle the VA on my own.

Rice: I understand. I'll see you tomorrow.

Van Every & Rice LLP
Attorneys at Law

FILE MEMORANDUM

FROM: Simone Rice
DATE: March 12, 2020
RE: Second conversation with David Dawes:
research, advice, and declining representation

This memorandum documents my research, decisions, and advice relating to David Dawes's request for help filing for disability compensation. During an initial interview with Dawes yesterday, he said that he may have an outstanding warrant for violating his probation in the State of Columbia. He wanted to apply for VA disability benefits without disclosing that fact to the VA. After we spoke, I told him I would do some research and get back to him.

I called an attorney I know in Columbia and who could readily check on any outstanding warrants against Dawes. He confirmed that a warrant for a probation violation had been issued in August 2016, and that the warrant remains in effect.

Based on that information, I checked my understanding of the VA's rules about paying disability benefits to a veteran with an outstanding criminal warrant. I confirmed that both the VA statute, 38 U.S.C. § 5313B, and its regulation, 38 C.F.R. § 3.665(n), prevent the payment of disability compensation to any veteran who is a "fugitive felon." A "fugitive felon" includes a person who has an outstanding warrant that has been issued against them for a probation violation. I also confirmed that if the VA starts paying benefits to the veteran and later discovers the outstanding warrant, the VA will terminate benefits immediately and will try to recover all the benefits paid to the veteran during the period of the warrant.

I also confirmed that Dawes could be charged with a crime for applying for benefits without disclosing the warrant. Under 18 U.S.C. § 1001, willful falsification, concealment, or cover-up of a material fact when applying for benefits is a felony punishable by up to five years in prison and fines.

Dawes was right to notice that the application form for disability compensation did not contain any questions about his criminal record. So he would not have to make any misrepresentations about his record. But the criminal statute also applies if the person “knowingly and willfully conceals or covers up” a material fact. Given the rules about “fugitive felons,” Dawes’s failure to mention his record would be material to his eligibility for VA benefits.

This research led me to consider whether I should decline to represent Dawes if he insisted on not disclosing the warrant. I concluded that I could not represent him if he did that. Franklin Rule of Professional Conduct 1.16 makes clear that “a lawyer shall not represent a client . . . if . . . the . . . prospective client seeks to use or persists in using the lawyer’s services to commit or further a crime” Rule 1.2 states that “[a] lawyer shall not . . . assist a client . . . in conduct that the lawyer knows is criminal”

After doing this research, I met again with David Dawes. I advised him as follows:

- (1) He has an outstanding warrant for a probation violation in Columbia.
- (2) He has an ongoing obligation to report to his probation officer in Columbia and to deal with the consequences of not complying with his probation.
- (3) He will not be eligible for disability benefits from the VA until the warrant has been voided or otherwise resolved.
- (4) If he filed for VA benefits without disclosing the warrant and then received benefits, he would violate a federal criminal statute and be subject to prosecution for a felony.
- (5) If the VA granted him benefits and later discovered the warrant, the VA would terminate his benefits and try to recover all the money it had paid him, and could prosecute him for a felony.
- (6) If convicted in such a prosecution, Dawes would likely be returned to prison.

Having given Dawes this advice, I asked him whether he would work to take care of the warrant and only then apply for VA benefits. I offered him referrals to lawyers in Columbia who could help him with the warrant, potentially pro bono. Dawes said that he “[did] not want to go that route.” After he confirmed this several times, I told him that I would decline to represent him. He thanked me, and the meeting ended.

Van Every & Rice LLP
Attorneys at Law

FILE MEMORANDUM

FROM: Simone Rice
DATE: July 24, 2026
RE: Conversation with Attorney Andy Rawlins

Today I received a phone call from Andy Rawlins, an acquaintance who practices in the Federal Public Defender's office. He represents David Dawes and asked if I had received a subpoena from the US Attorney's office. I confirmed that I had.

Rawlins told me that Dawes had filed for VA benefits six years ago, about a month after I spoke with him. Within three months, the VA granted Dawes 100% benefits and on July 1, 2020, started paying him full benefits, which increased each year because of cost-of-living adjustments. By the start of this year, Dawes was receiving close to \$4,000 a month. The total amount the VA paid him for the five years and ten months came to roughly \$260,000.

The VA eventually discovered that Dawes had an outstanding warrant in Columbia and cut off his benefits starting May 1, 2026. Soon after that, the VA began efforts to collect the back-due amount.

About two weeks ago, Dawes was arrested and later indicted under 18 U.S.C. § 1001 for concealing the outstanding warrant to obtain government benefits. The VA has the authority under its enabling statute to collect all the money it paid to Dawes, regardless of whether he is convicted.

According to Rawlins, Dawes insists that he did not know that he was doing anything wrong when he applied for VA benefits. Rawlins said that the statute under which the prosecution has charged Dawes requires them to prove that Dawes "knowingly and willfully" concealed material information. Based on current information, he thinks he can raise a reasonable doubt about whether Dawes knew about the fugitive-felon rules before he applied for benefits.

Finally, Rawlins stated that, under questioning by federal agents, Dawes told the prosecution that he consulted with me about a month before he filed for VA benefits and that I declined to take his VA benefits case. Based on his review of the information provided by the government in discovery and his conversations with the US Attorney, Rawlins does not believe that the prosecution has any other information about what Dawes and I discussed.

Rawlins did not ask me about the content of my conversations with Dawes, and I did not volunteer anything. He asked what I planned to do about the subpoena, and I told him I would have to think about it. I promised to let him know one way or the other.

LIBRARY

Franklin Rules of Professional Conduct

Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- ...
- (6) to comply with other law or a court order[.]

Comment to Rule 1.6:

...

[15] A lawyer may be ordered to reveal information relating to the representation of a client by a court. . . . Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.

Rule 1.9: Duties to Former Clients

...

(c) A lawyer who has formerly represented a client in a matter . . . shall not thereafter:

...

- (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.18: Duties to Prospective Client

. . .

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

. . .

United States v. Coving
(15th Cir. 2019)

In 2018, the US Attorney for the District of Franklin indicted Joe Coving for kidnapping his minor daughter and transporting her across state lines to Olympia. Coving hired Marvin Jackson as his attorney. During the representation, Coving disclosed the child's location to Jackson, assured him that the child was safe and well cared for, and said that he had taken the child because he had lost a contentious custody battle. Jackson advised Coving that Coving had a legal obligation to disclose the child's location and that the failure to do so would result in felony charges for obstruction of justice. Coving refused to disclose the information and told Jackson not to do so.

Jackson then moved to withdraw from representation on ethical grounds. His motion stated that Franklin Rule of Professional Conduct 1.6 prevented him from disclosing the reasons for his withdrawal. The US Attorney issued a subpoena to Jackson, requiring him to produce documents describing what he knew, including any details about the child's location. Jackson moved to quash the subpoena. The district court interviewed Jackson privately in chambers about his communications with Coving. Based on that interview, the district court determined that the evidentiary privilege for lawyer-client communications did not apply because the communications in question fell within the crime-fraud exception to that privilege. The court ordered Jackson to comply with the subpoena and to identify the child's location. Jackson requested leave to file this appeal, which the district court granted.

On appeal, Jackson does not contest the district court's determination on the attorney-client privilege. Rather, Jackson argues that his ethical obligations prevent him from disclosing information about the child's location. As an initial matter, we note that the District of Franklin has adopted the Franklin Rules of Professional Conduct (which are identical to the ABA Model Rules of Professional Conduct) to govern the conduct of attorneys practicing in that district.

Jackson correctly notes that Rule 1.6(a) prevents an attorney from revealing "information relating to the representation of a client." This rule contains exceptions that, if applicable, permit but do not require an attorney to disclose. If no exception applies, however, the rule prevents disclosure.

Rule 1.6 permits disclosures that are reasonably necessary to prevent “reasonably certain death or substantial bodily harm.” Rule 1.6(b)(1). We agree with Jackson that, given Coving’s assertion that his daughter was and is “safe and well cared for,” Jackson did not have a reasonable basis to conclude that death or substantial bodily harm is “reasonably certain to occur.”

Rule 1.6(b)(2) also allows an attorney to disclose information reasonably necessary to prevent the client from “committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another.” Jackson correctly notes and the trial court specifically found that the location of the child does not implicate financial interests or property. For this reason alone, this exception does not permit Jackson to disclose.

Rule 1.6(b)(3) allows an attorney to disclose information reasonably necessary “to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud.” Adopted in 2003, this rule creates an exception to the rule that an attorney cannot disclose a client’s communication about a past crime. That exception is limited, however, to situations in which disclosure of a past crime would prevent or reduce some kind of ongoing financial injury. It does not apply where all the financial losses have already occurred or where, as here, there is no discernable financial loss at all.

Further, both Rule 1.6(b)(2) and 1.6(b)(3) require a showing that the client “has used the lawyer’s services” “in furtherance of” either the future crime or future financial injury. In this case, however, Jackson correctly advised Coving of his legal obligation to disclose the child’s location. Even if we assume that Coving’s refusal to do so led to financial injury to his ex-wife, Jackson’s advice to him did not further either the alleged crime or any financial injury resulting from the alleged crime.

However, Rule 1.6 does permit disclosure of otherwise confidential information “to comply with other law or a court order.” Rule 1.6(b)(6). The district court considered and rejected Jackson’s contention that the attorney-client privilege prevented disclosure, but found that the crime-fraud exception applied. Jackson does not contest this evidentiary ruling on appeal. Nonetheless, in this appeal, Jackson argues that his ethical obligations supersede the rules of evidence and prevent him from complying with the subpoena.

Jackson's argument is misplaced. Rule 1.6(a) prevents disclosure unless one of its exceptions applies. The district court's ruling on the evidentiary privilege resulted in a court order approving the subpoena. The district court's order that Jackson comply with the subpoena and disclose the child's location satisfies the exception in Rule 1.6(b)(6), which permits disclosure "to comply with other law or a court order." We conclude that when directed by a court order and after the court has properly assessed the evidentiary privilege for attorney-client communications, an attorney must disclose otherwise confidential information to the court.

Affirmed.

In re Grand Jury Proceedings
(15th Cir. 2023)

An unnamed corporation under investigation for immigration crimes appeals from an order of the US District Court for the District of Franklin requiring its former attorney to answer questions before the grand jury. The district court found that the communications furthered the corporation's immigration crimes and thus fell within the crime-fraud exception to the attorney-client privilege. We affirm.

The grand jury is investigating whether the corporation and its president violated federal immigration laws by willfully employing several individuals whom they knew to lack the necessary visas or work permits. The government served a subpoena to testify on the former attorney. Both the corporation and the former attorney moved to quash the subpoena. In reply, the government submitted material that the district court reviewed in chambers. The district court summarized the material provided by the government as follows:

The corporation consulted counsel about the employment status of the identified employees shortly after the president learned that the employees likely lacked the necessary immigration approvals and that their continued employment was illegal. The corporation continued to employ these individuals. In the correspondence submitted by the attorney to the immigration service about legalizing these individuals' employment status, the corporation did not disclose that the employees had been working in the corporation's offices for more than a year.

The district court made no finding about whether counsel knew of the illegality of the continuing employment relationship, and the government has not alleged that counsel participated in the ongoing conspiracy. The district court ruled that the crime-fraud exception to the attorney-client evidentiary privilege applied and required the attorney to disclose the substance of the communications with the corporation. The corporation appealed.

Generally, attorneys have a duty not to disclose the confidences of their clients. Consistent with this duty, the evidentiary privilege for attorney-client communications protects confidential communications made between attorney and client for the purpose of obtaining or providing legal assistance. The attorney-client privilege encourages full and frank communication between attorneys and their clients. This privilege applies both during the attorney-client relationship and after that relationship has ended. And to be clear: in

this case, we do not address a lawyer's ethical obligation to maintain client confidentiality, a question that would be resolved under the Rules of Professional Conduct.

The protection of the attorney-client evidentiary privilege does not extend to communication that furthers continuing illegal conduct, whether present or future. We agree that society has an interest in protecting confidences between client and attorney to enable the client to get thorough, reliable legal advice. But no such interest exists when the client consults the attorney to further the commission of a crime or fraud. The crime-fraud exception ensures that the attorney-client evidentiary privilege does not protect communications made in furtherance of a crime or a fraud.

In this circuit, use of privileged material under the crime-fraud exception requires a three-step judicial process: (1) presentation of the factual basis for a reasonable belief that the exception may apply, (2) *in camera* evaluation of the material by the court, and (3) affording the party opposed to disclosure the opportunity to contest the disclosure. The government must provide sufficient information to support a reasonable belief that the client intended the consultation with the attorney to further an ongoing or planned criminal or fraudulent scheme.

The corporation claims that the material provided by the government fell short of the required showing. It argues that the government must do more than show that its president met with counsel and then later committed some allegedly criminal or fraudulent act. We agree that if all the government had shown was that some communication occurred between lawyer and client and that, later, the client committed a criminal act, that showing would be insufficient to establish the requisite reasonable belief that the communication furthered the crime. Here, however, the government established through nonconfidential sources that the corporation and its president consulted with counsel about the immigration status of the identified employees at a time when they knew that these employees lacked appropriate documentation.

The corporation claims that the exception does not apply because the crime had not been fully completed at the time of the consultation with the attorney and was not complete until the later application to legalize the employees' status. But the crime-fraud exception does not require a completed crime or fraud; it requires only that the client have consulted the attorney in furtherance of one. If the client consults an attorney about a plan to commit

a criminal act but does not commit the crime until after the relationship with the attorney ends, the crime-fraud exception still applies. The client need not have completed the act at the time the client consulted with the attorney. The government needs to prove only that a reasonable basis exists to believe that the attorney's services were used by the client in furtherance of an ongoing crime or fraud or a planned future crime.

The corporation argues further that its communications with the attorney could not have been "in furtherance of" criminal activity because the attorney took no affirmative steps to participate in the crime. But the crime-fraud exception does not require that the attorney participate, even unwittingly, in the client's criminal activity. A communication can be "in furtherance of" criminal conduct even if the attorney does nothing after the communications at issue.

The phrase "in furtherance of" covers the situation where the lawyer gives advice to the client, even if the client later disregards the lawyer's advice. *See, e.g., United States v. Jones*, 28 F.3d 788 (15th Cir. 2014) (the crime-fraud exception applied even when the attorney told the client that her proposed actions would amount to insider trading and the client disregarded the lawyer's advice and proceeded with the action).

Finally, the corporation argues that the government did not allege and the trial court did not find that the attorney committed a crime. Because of this, the corporation claims that the crime-fraud exception does not apply. But application of the exception does not depend on whether the attorney committed or even intended to commit a crime. Indeed, the exception would apply even if the attorney knew of the client's actions or intentions, advised the client not to pursue them, and withdrew from representation because of the client's actions or plans. The fact that the client consulted the attorney in furtherance of criminal or fraudulent activities would be sufficient to meet the required showing to apply the crime-fraud exception to the evidentiary privilege.

For all the foregoing reasons, we affirm the district court's denial of the corporation's motion to quash.

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.

1)

TO: Simone Rice

FROM: Examinee

DATE: July 28, 2026

RE: Memorandum: Subpoena from US Attorney

Simone Rice,

You have tasked me with identifying whether the Franklin Rules of Professional Conduct prevents you from disclosing the documents about your conversations with David Dawes. You also asked me to assess whether the crime-fraud exception to the attorney-client privilege applies to the documents you have on file, and whether the government can successfully compel the documents disclosure based on the information in the government's possession.

I will address each question in the order you laid out in your email.

1. Whether the Franklin Rules of Professional Conduct prevents disclosure to the government of documents on file about the conversation between Simone Rice and David Dawes.

Under the Franklin Rules of Professional Conduct (the "Rules"), a lawyer "shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." [Franklin R. Prof. Conduct, 1.6]. The exceptions laid out in Rule 1.6, that if applicable, "permit but do not require an attorney to disclose. If no exception applies...the rule prevents disclosure." [United States v. Coving, (15th Cir. 2019)]. Further, the Rules also state that a even when a client-lawyer relationship does not ensue, a lawyer who has learned information from a perspective client "shall not use or reveal that information, except as Rule 1.9 would permit with respect to the information of a former client." [FRPC 1.18]. Rule 1.9 states that a lawyer shall not "reveal information relating to the representation except as these Rules would permit or require to a client." [FRPC 1.9].

United States v. Coving is instructive in assessing the issue at hand because it discusses the application of the Franklin Rules of Professional Conduct to documents. In *United States v. Coving*, an attorney, Marvin Jackson, was issued a subpoena that required him to produce documents describing, what he knew, including any details about the crime, which was kidnapping. Jackson was then interviewed in chambers by a judge to determine if the evidentiary privilege for lawyer-client communications did not apply. [Coving, (15th Cir. 2019)]. The court then ordered him to comply with the subpoena. [Id.] The Court goes on to state the first three relevant exceptions under Rule 1.6, which are as follows: "Rule 1.6(b)(1) permits disclosures that are reasonably necessary to prevent 'reasonably certain death or substantial bodily harm.'" [Coving]. The second exception "allows an attorney to disclose information reasonably necessary to prevent the client from 'committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another.'" [Id.]. The third exception "allows an attorney to disclose information reasonably necessary 'to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is

mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud." [*Id.*].

The first exception does not apply in the current situation. There was no reasonable basis to conclude that death or substantial bodily harm was reasonably certain to occur. The second exception may apply because Dawes came to Attorney Rice seeking advice that would result in substantial injury to the financial interests of another. However, the interpretation of the words "to prevent" at the beginning to the exception seem to apply *before* the crime or fraud was committed, and Rule 1.6 is clear that a lawyer "may" reveal information; not the lawyer "must" reveal information. The third exception is similar to the second, but applies to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that "has resulted" from the client's actions. [FRPC 1.6(b)(3)]. The exception is one that prevents an attorney from disclosing a client's communication about a past crime, and "is limited, however, to situations in which disclosure would prevent or reduce some kind of ongoing financial injury." [*Coving*]. It also does not apply where all financial losses have already occurred. This exception may apply to the communications related to Dawes' outstanding warrant for violating his probation requirements, but it most likely will not apply to the illegal receipt of VA Benefits from July 1, 2020, to May 1, 2026. Attorney Rice interviewed and declined to represent Mr. Dawes on or around March 11 and 12 of 2020. [See second conversation with David Dawes: research, advice, and declining representation]. Further, 1.6(b)(2) and (b)(3) require a showing that the client "has used the lawyer's services in furtherance of" the future crime or financial injury. [*Coving*]. Much like in *Coving*, the advice Attorney Rice gave to Mr. Dawes did not further either the alleged crime or any financial injury resulting from the crime; Mr. Dawes was merely advised of his legal obligation to comply with the warrant and resolve it before obtaining VA benefits.

The last instructive exception is Rule 1.6(b)(6) which allows disclosure "to comply with other law or a court order." [FRPC 1.6(b)(6)]. The decision in *Coving* hinges on whether this exception supersedes the rules of evidence and prevents complying with the subpoena. [*Coving*]. The court states that the court order which approved the subpoena allowed disclosure. [*Id.*]. However, there is a three-step procedure that needs to be followed before use of privileged information under the crime-fraud exception is allowed. [*In re Grand Jury Proceedings* (15th Cir. 2023)]. This procedure will be discussed in the next section.

For now, under the Franklin Rules of Professional Conduct, the documents in Attorney Rice's possession about the conversations with Mr. Dawes may be disclosed under Rule 1.6(b)(6), if and when the government follows the three-step procedure and "provides sufficient information to support a reasonable belief that the client intended the consultation with the attorney to further an ongoing or planned criminal or fraudulent scheme." [*In re Grand Jury Proceedings*].

2. Whether the crime-fraud exception to the attorney- client privilege applies to the documents on file.

When an attorney is "directed by a court order and after the court has properly assessed the evidentiary privilege for attorney-client communications, an attorney must disclose otherwise confidential information to the court." [*Coving*]. No interest of confidentiality exists when a client consults an attorney to further the commission of a crime or fraud, and the crime-fraud exception "ensures that the attorney-client evidentiary privilege does not protect communications" related to the crime or fraud. [*In re Grand Jury Proceedings*]. Use of privileged materials, in the District of Franklin, used under the crime-fraud exception requires a

three-step judicial process: "(1) presentation of the factual basis for a reasonable belief that the exception may apply, (2) *in camera* evaluation of the material by the court, and (3) affording the party opposed to disclosure the opportunity to contest the disclosure." [*Id.*]. The client has to intend for the consultation with the attorney to further an ongoing or planned criminal or fraudulent scheme. [*Id.*].

In re Grand Jury Proceedings is instructive on this issue because it decides when communications are "in furtherance" of a crime or fraud. The government must do more than show that the client met with counsel and then later committed some criminal or fraudulent act. [*Id.*] The government in that case had nonconfidential sources that the client consulted with counsel about immigration statutes of identified employees at a time when they knew the employees lacked appropriate documents [*Id.*]. If the client consults with an attorney about a plan to commit a criminal act but does not do so until after the relationship ends, the crime-fraud exception still applies. [*Id.*]. The crime does not have to be completed, and a communication can be "in furtherance of" criminal conduct even if the attorney does nothing after the communications. [*Id.*]. This applies even if the client disregards the advice and proceeded with the action. [see *United States v. Jones*, 28 F.3d 766 (15th Cir. 2014) (crime-fraud exception applied when the attorney told the client that her proposed actions would amount to insider trading and the client disregarded the lawyer's advice and proceeding with the action).]

The communications between Attorney Rice and Mr. Dawes would likely amount to communications that are "in furtherance" of a crime or fraud because Mr. Dawes was advised that his actions were criminal and amount to a Federal felony that required prison time if convicted. [See second conversation with David Dawes: research, advice, and declining representation]. After being advised that if he applied for VA benefits without disclosing the warrant and received benefits, it would amount to a felony, and that Attorney Rice would not represent him without taking care of the warrant, Mr. Dawes went ahead and applied for the benefits anyway. [See second conversation with David Dawes: research, advice, and declining representation].

3. Whether the government can successfully compel disclosure of the documents in Attorney Rice's files under the crime-fraud exception.

The government need only prove that "a reasonable basis exists to believe that the attorney's services were used by the client in furtherance of an ongoing crime or fraud or a planned future crime. [*In re Grand Jury Proceedings*]. This is meant to accompany an *in camera* evaluation by the court and afford opposing counsel an opportunity to contest disclosure. [*Id.*]

Dawes told the prosecution that he consulted with Attorney Rice a month before he filed for VA benefits and that Attorney Rice declined to take the VA benefits case. Further, the public defender Attorney Rice spoke to claims that the prosecution does not have any other information regarding what Dawes and Attorney Rice discussed. After meeting with Mr. Dawes and declining to represent him, Mr. Dawes proceeded to apply for and receive VA benefits within three months of the first meeting in March of 2020. The government knew that Attorney Rice was consulted about representing Mr. Dawes about applying for VA benefits and that that representation was declined followed by Mr. Dawes applying shortly thereafter learning that it was against the law he do so. "[T]he exception would apply even if the attorney knew of the client's actions or intentions, advised the client not to pursue them, and withdrew from representation because of the clients actions or plans. The fact that the client consulted the attorney in furtherance of criminal or fraudulent activities would be sufficient to meet the

required showing to apply the crime-fraud exception to the evidentiary privilege." [*Id.*]

Based on the above rules, the government most likely can successfully compel disclosure of the documents, but before doing so, the court has to conduct an *in camera* review and hear from both parties and their arguments regarding disclosure or non-disclosure.

Let me know if you have any questions regarding my analysis or want me to investigate the questions further,

Thanks, Examinee

END OF EXAM

1)

MEMORANDUM**To:** Attorney Simone Rice**From:** Examinee**Date:** July 28, 2026**Re:** Subpoena from US Attorney**Introduction**

Attorney Rice has received a subpoena from the U.S. Attorneys office concerning veteran David Dawes, who she met with regarding legal assistance to apply for Department of Veteran Affairs (VA) benefits. Attorney Rice plans to contest the subpoena if the Franklin Rules of Professional Conduct protect the communications and no exception applies.

Discussion**I. The Franklin Rules of Professional Conduct prevent Attorney rice from disclosing to the government the documents in their files about the conversations with Dawes.**

Franklin Rules of Professional Conduct 1.6 prevents an attorney from revealing "information relating to the representation of a client" made for the purpose of obtaining or providing legal assistance. Therefore, without an exception, the rule prevents disclosure of such information. In addition, Rule 1.18 provides that even if no client-lawyer relationship is created, a lawyer who has learned information from a prospective client shall not use or reveal that information[.] An exception to Rule 1.6 is Rule 1.6(b)(2), which provides that an attorney may disclose information relating to the representation to prevent a client from committing a crime or fraud that is reasonably certain to occur and result in financial injury to the financial interests of another, in furtherance of which the client has used or is using the lawyer's services. Another exception is Rule 1.6(b)(3), which provides that an attorney may, to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result, disclose information relating to the representation regarding the crime or fraud in furtherance of which the client has used the lawyer's services. However, both Rule 1.6(b)(2) and (3) are dependent on the attorney being able to prevent a future or occurring crime, not one that has already occurred. *United States v. Coving*. Rule 1.6(b)(6) provides an additional exception that a lawyer may reveal information relating to the representation to the extent the lawyer believes reasonably necessary to comply with the law or a court order. See *United States v. Coving* (requiring an attorney to disclose information when directed by a court order to do so, after the court has properly assessed the evidentiary privilege).

Here, David Dawes met with Attorney Rice after hearing that the firm helps veterans for free with filing an initial application for benefits from the Department of Veteran affairs. Dawes approached Attorney Rice with the intent to obtain legal assistance with the application process, falling under Rule 1.6. Although Attorney Rice ultimately decided not to pursue representation of Dawes, Rule 1.8 still protects under attorney-client privilege information learned from a prospective client, creating the same duty as if the attorney had represented the client

prospective client--creating the same duty as if the attorney had represented the client. Therefore, the attorney-client relationship applies unless there is an exception.

Franklin Rule of Professional Conduct Rule 1.6(b)(2)-(3) both provide exceptions to Rule 1.6. However, Rule 1.6(b)(2) specifically requires the attorney to reasonably believe that disclosing the information will "prevent the client from committing a crime or fraud that is reasonably certain to result[,]" where here, the crime has already resulted. Therefore, Rule 1.6(b)(2) is inapplicable. Further, as seen in *United States v. Coving*, Rule 1.6(b)(3) does not apply if all the financial losses have already occurred. Therefore, Rule 1.6(b)(3) is also inapplicable. In conclusion, both Rule 1.6(b)(2) and (3) will not compel disclosure by Attorney Rice due to the fact that disclosure is not reasonably necessary to prevent future substantial injury to financial interests and that the financial losses here have already occurred.

A possible exception is whether Attorney Rice must provide the information subject to a valid court order under Franklin Rule of Professional Conduct Rule 1.6(b)(6). Attorney Rice received a subpoena from the U.S. Attorney's office, which is not a court order. In *United States v. Coving*, the attorney moved to quash the subpoena arguing that 1.6 prevented him from being able to disclose confidential client communications. The district court ordered the attorney to comply with the subpoena, which the attorney appealed. *Id.* The 15th Circuit specifically found that, when directed to by a court order after the court has properly assessed the evidentiary privilege for attorney-client communications, the attorney must disclose otherwise confidential information to the court. *Id.*; Franklin Rule of Professional Conduct 1.6(b)(6). Here, however, Attorney Rice has only received a subpoena from the U.S. Attorney's office, not a order from the court. Further, Attorney Rice has not had the opportunity to have a court properly assess the evidentiary privilege in Dawes' context, therefore failing to meet the requirements for Rule 1.6(b)(6) to apply.

In conclusion, no exception exists to Rule 1.6. Therefore, the Franklin Rules of Professional Conduct prevent Attorney rice from disclosing to the government the documents in their files about the conversations with Dawes.

II. Based on the information in Attorney Rice's possession, the crime-fraud exception applies, as Dawes understood he was seeking advice in furtherance of crime or fraud.

The protection of attorney-client privilege does not extend to communications that further continuing illegal conduct, whether present or future. *In re Grand Jury Proceedings*. Therefore, the crime-fraud exception exists to ensure that the attorney-client privilege does not protect communications made in furtherance of a crime or fraud. *Id.* For the exception to apply, the client must have consulted with the attorney in furtherance of a crime. *Id.* In *In re Grand Jury Proceedings*, for example, the client first learned that they were committing a crime and only thereafter consulted the attorney about the underlying illegal conduct. Therefore, the client sought legal advice to further an ongoing criminal scheme. *Id.* The crime-fraud exception still applies if the attorney informs the client that their proposed actions are illegal and the client disregards the advice and proceeds with the action. *United States v. Jones*. Further, the exception applies when "the attorney knew of the client's actions or intentions, advised the client not to pursue them, and withdrew from representation because of the client's actions or plans." *In re Grand Jury Proceedings*. U.S.C. section 5313B and 3.665(n) disqualify disability compensation to a veteran who is a "fugitive felon"--which includes those who have an outstanding warrant for probation violation. Further, 18 U.S.C. section 1001 provides that it is a crime to apply for benefits without disclosing an outstanding warrant, as it is concealment of a material fact.

Here, during the initial interview, Dawes informed Attorney Rice that he may have an outstanding warrant for violating his probation in the State of Columbia. Attorney Rice advised that Dawes would violate the law if he applies and omits a probation violation warrant. Dawes is not distinguishable from the client in *In re Grand Jury Proceedings*. Dawes' purpose of seeking advice from Attorney Rice was due to his friends informing him that he should be able to get full benefits from the VA based on his back pain, hip pain, sleeping problems, and PTSD. The transcript is clear: Dawes was not aware that seeking benefits would be a crime. In fact, Dawes learned about the violation from Attorney Rice during the consultation. The issue for Dawes is that, after learning that omitting his warrant would be a crime, he still requested that the attorney assist because "[a]s far as the local VA office knows, it'll look like I have a clean record." Therefore, although Dawes was not aware at the start of the consultation, he became aware and still sought the attorney's advice in furtherance of such crime. This is similar to the client in *In re Grand Jury Proceedings*, where the client was aware of the illegality of their conduct and still sought advice in furtherance of such conduct, making the crime-fraud exception applicable to such communications. The fact that Dawes consulted with the attorney in furtherance of what he understood at that time to be criminal or fraudulent activity is sufficient to meet the showing required for the crime-fraud exception. Therefore, based on the information in Attorney Rice's possession, the crime-fraud exception applies, as Dawes understood he was seeking advice in furtherance of crime or fraud.

III. The government cannot compel disclosure of the documents in the files under the crime-fraud exception as they do not have a factual basis for a reasonable belief that the exception may apply.

The use of privileged information requires a three step process: "(1) presentation of a factual basis for a reasonable belief that the exception may apply, (2) in camera evaluation of the material by the court, and (3) affording the party opposed to the disclosure the opportunity to contest the disclosure." *In re Grand Jury Proceedings*. The government therefore must provide sufficient information that supports a reasonable belief that the client intended the consultation with the attorney to further an ongoing or planned criminal or fraudulent scheme. *Id.* For example, in *In re Grand Jury Proceedings*, the government was able to establish through nonconfidential sources that the corporation and its president consulted with counsel about the immigration status at a time where they knew the employees lacked appropriate documentation.

Here, Dawes--under questioning by federal agents--told the prosecution that he consulted with Attorney Rice about a month before he filed VA benefits. Attorney Rice also informed the prosecution that Attorney Rice declined to take his VA benefits case. Attorney Rice's firm is known for assisting veterans with such applications; therefore, the prosecution has a reasonable belief that there is an underlying reason for the denial, such as Dawes seeking Attorney Rice's help with concealing the existing warrant. This is similar to *In re Grand Jury Proceedings*. Here, the government was able to establish through nonconfidential sources (directly from Dawes) that Dawes consulted with counsel about applying for benefits; however, there is no evidence to suggest that the government knew that Dawes was doing so at a time where he knew that doing such would consist of a crime or fraud. Although declining representation likely sparks some interest by the prosecution as to why, there are many reasons why an attorney may decline representation. Therefore, the government is unable to present a factual basis for the reasonable belief that Dawes sought such information in

furtherance of a crime or fraud at a time he knew such was crime or fraud. It is just as reasonable, with the evidence that the government has, that Dawes had no intent to consult Attorney Rice in furtherance of an ongoing or planned criminal or fraudulent scheme (as, for example, he could have learned from Attorney Rice that applying is crime and not sought further advice at all). In conclusion, the government cannot compel disclosure of the documents in the files under the crime-fraud exception as they do not have a factual basis for a reasonable belief that the exception may apply.

Conclusion

Although the Franklin Rules of Professional Conduct prevent Attorney Rice from disclosing to the government the documents in their files about the conversations with Dawes, the crime-fraud exception applies, as Dawes understood he was seeking advice in furtherance of crime or fraud. However, the government cannot compel disclosure of the documents in the files under the crime-fraud exception as they do not have a factual basis for a reasonable belief that the exception may apply.

END OF EXAM

Applicant Number

MPT-2
726

MPT[®]

Multistate Performance Test

Estates of Nguyen

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Estates of Nguyen

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FILE

Littleton & Wallace LLC
Attorneys at Law
42 First Street
Utopia Springs, Franklin 33402

MEMORANDUM

To: Examinee
From: LaVonda Wallace
Date: July 28, 2026
Re: Estates of Linh and John Nguyen

Linh Ha Nguyen and John Khanh Nguyen recently died. Tragically, they were in a car accident a month ago. They are survived by their adult children, Brandon Nguyen and Melissa Nguyen-Stevenson. Linh and John both had relatively simple wills. The wills were probated in the appropriate court in the State of Franklin and were determined to be valid, and Melissa was appointed executor in accordance with her parents' wishes. Melissa retained our firm to represent her in the administration of her parents' estates. She is seeking advice on the distribution of her parents' assets.

Please draft a memorandum to me that explains the correct distribution of the Nguyens' assets under the controlling documents and relevant Franklin law. In your memorandum, please discuss the following topics:

- (1) As a preliminary matter, I believe that the Uniform Simultaneous Death Act of 1993 (USDA 1993), which has been adopted in Franklin, may apply. Clearly explain the applicability or inapplicability of this statute to the Nguyens' deaths.
- (2) Regardless of your conclusion on the statute's applicability, explain the correct distribution of the following assets under the USDA 1993:
 - (a) John's interest and Linh's interest in the home located at 432 Fairview Drive;
 - (b) the proceeds of Linh's and John's life insurance policies; and
 - (c) any other assets under the applicable provisions of John's will and Linh's will.

Last Will and Testament of Linh Ha Nguyen (excerpt)

I, Linh Ha Nguyen, a resident of St. John's County, Franklin, do hereby declare this to be my last will and testament, hereby revoking all prior wills and codicils.

. . .

2.1 I give all of my property, including real property, tangible personal property, and intangible personal property, to my husband, John Khanh Nguyen, if he survives me. If we die simultaneously, or if we die within three days of each other, I give my property in equal shares to my son Brandon Nguyen and my daughter Melissa Nguyen-Stevenson. Otherwise, I give my property in equal shares to my son Brandon Nguyen, my daughter Melissa Nguyen-Stevenson, and Franklin Animal Rescue Inc.

. . .

3.1 I appoint my daughter Melissa Nguyen-Stevenson to be the executor of my estate.

Last Will and Testament of John Khanh Nguyen (excerpt)

I, John Khanh Nguyen, a resident of St. John's County, Franklin, do hereby declare this to be my last will and testament, hereby revoking all prior wills and codicils.

. . .

2.1 I give all of my property, including real property, tangible personal property, and intangible personal property, to my wife, Linh Ha Nguyen, if she survives me. If she does not survive me, I give my property in three equal shares to my son Brandon Nguyen, my daughter Melissa Nguyen-Stevenson, and the University of Franklin Medical Center.

. . .

3.1 I appoint my daughter Melissa Nguyen-Stevenson to be the executor of my estate.

Certified Death Certificate of Linh Ha Nguyen (excerpt)

Name of Decedent: Linh Ha Nguyen

Sex: Female **Age:** 63 **Date of Birth:** August 23, 1962

Birthplace: Ha Tien, Kien Giang Province, Vietnam

Residence: 432 Fairview Drive, Utopia Springs, St. John's County, Franklin

Place of Death: Intersection of Reiter Rd. and Third Street, City of Whitney, Franklin

Date and Time of Death: March 18, 2026, 10:23 p.m.

Cause of Death: Trauma due to automobile accident;
pronounced dead at scene by EMT

Name of Person Certifying Death: Cynthia Nance, M.D.

Title of Person Certifying Death: Attending Physician

License Number: A24795-9983

Was Medical Examiner Contacted? Yes.

Certified Death Certificate of John Khanh Nguyen (excerpt)

Name of Decedent: John Khanh Nguyen

Sex: Male **Age:** 64 **Date of Birth:** October 2, 1961

Birthplace: West Morriston, St. John's County, Franklin

Residence: 432 Fairview Drive, Utopia Springs, St. John's County, Franklin

Place of Death: St. John's County Medical Center

Date and Time of Death: March 20, 2026, 10:03 p.m.

Cause of Death: Multiple organ failure due to injuries from automobile accident

Name of Person Certifying Death: Cynthia Nance, M.D.

Title of Person Certifying Death: Attending Physician

License Number: A24795-9983

Was Medical Examiner Contacted? Yes.

Deed to 432 Fairview Drive, Utopia Springs, Franklin

General Warranty Deed

Made the 14th day of May, 2009

BETWEEN

Laura Drake Williams (Grantor)

And

Linh Ha Nguyen and John Khanh Nguyen, a married couple (Grantees)

WITNESSETH

That the Grantor, in consideration of THREE HUNDRED FIFTY THOUSAND DOLLARS paid by the Grantees to the Grantor, the receipt whereof is hereby acknowledged, does hereby grant and convey to the Grantees, as joint tenants with right of survivorship and not as tenants in common:

[Legal description of the 432 Fairview Drive property]

. . .

The grantor shall and will Generally Warrant the property hereby conveyed.

In witness whereof, the Grantor has caused this Deed to be executed as of the day and the year written above,

Laura Drake Williams

State of Franklin
County of St. John's

On this, the 14th day of May, 2009, before me, a Notary Public, the undersigned officer, personally appeared Laura Drake Williams, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same for the purposes therein contained.

In witness whereof, I have hereunto set my hand and notarial seal.

Jane Mirren
Notary Public
My commission expires 2/28/2028

Franklin Mutual Life Insurance Policy (excerpt)

Insured: Linh Ha Nguyen

Death Benefit: \$500,000

Beneficiary Designation: My husband, John Khanh Nguyen, if he survives me. If he does not survive me, I designate my children, Brandon Nguyen and Melissa Nguyen-Stevenson, as beneficiaries in equal shares.

Columbia Insurance Company Life Insurance Policy (excerpt)

Insured: John Khanh Nguyen

Death Benefit: \$600,000

Beneficiary Designation: My wife, Linh Ha Nguyen, if she survives me. If my wife and I die simultaneously, or if we die within three days of each other, I designate my estate to be the beneficiary of this policy. Otherwise, I designate my children, Brandon Nguyen and Melissa Nguyen-Stevenson, as beneficiaries in equal shares.

LIBRARY

Excerpt from Walker's Treatise on Trusts and Estates

§ 9 Simultaneous Death. The Uniform Simultaneous Death Act (USDA) is a model law designed to address inheritance issues that arise when two or more individuals die simultaneously or in close succession to each other. Simultaneous or close succession deaths often complicate the distribution of estates, especially when determining the order of inheritance.

Historical Background. The USDA was first promulgated in 1940 by the Uniform Law Commission to provide a standardized approach for states to resolve inheritance questions in cases of simultaneous death. The original act was widely adopted across the United States. In 1993, the Act was revised to incorporate a 120-hour (five-day) survival requirement, aiming to simplify estate administration and prevent assets from passing through multiple estates in quick succession.

Policy Provisions. The core provision of the USDA 1993 stipulates that if an individual does not survive another by at least 120 hours, the individual is deemed to have predeceased the other for purposes of asset distribution. This rule applies unless a will, trust, or other governing instrument explicitly states otherwise. The Act covers various scenarios, including intestate succession, wills, joint tenancies, and life insurance policies. By implementing the USDA, states aim to reduce legal disputes between beneficiaries and prevent the need of multiple probate proceedings associated with simultaneous deaths or close succession deaths, ensuring a more straightforward and efficient distribution of assets.

Practical Effect. The USDA often arises when spouses die within 120 hours of each other and each spouse has designated the other as the primary beneficiary in their wills. In this situation, if the spouses die within 120 hours of each other, the law treats each spouse as if that spouse had predeceased the other. As a result, and regardless of the order of deaths, neither spouse's assets pass to the other spouse or the other spouse's estate, if the bequest to the other spouse was subject to a survivorship contingency. Rather, the assets go to each spouse's secondary (or contingent) beneficiary or beneficiaries in each of the spouses' wills.

**Excerpts from Franklin Probate Code
Uniform Simultaneous Death Act (1993)**

§ 1 Definitions. In this Act,

(1) "Co-owners with right of survivorship" includes joint tenants, tenants by the entireties, and other co-owners of property or accounts held under circumstances that entitle one or more to the whole of the property or account on the death of the other or others.

(2) "Governing instrument" means a deed, will, trust, insurance or annuity policy,

. . . .

§ 2 Requirement of Survival by 120 Hours Under Probate Code. Except as provided in Section 6, if the title to property, the devolution of property, [or] the right to elect an interest in property depends upon an individual's survivorship of the death of another individual, an individual who is not established by clear and convincing evidence to have survived the other individual by 120 hours is deemed to have predeceased the other individual. . . .

§ 3 Requirement of Survival by 120 Hours Under Governing Instrument. Except as provided in Section 6, for purposes of a provision of a governing instrument that relates to an individual surviving an event, including the death of another individual, an individual who is not established by clear and convincing evidence to have survived the event by 120 hours is deemed to have predeceased the event.

§ 4 Co-Owners with Right of Survivorship: Requirement of Survival by 120 Hours. Except as provided in Section 6, if it is not established by clear and convincing evidence that one of two co-owners with right of survivorship survived the other co-owner by 120 hours, one-half of the property passes as if one had survived by 120 hours and one-half as if the other had survived by 120 hours

§ 5 Evidence of Death or Status. In addition to the rules of evidence in courts of general jurisdiction, the following rules relating to a determination of death and status apply:

. . .

(2) A certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie evidence of the fact, place, date, and time of death and the identity of the decedent. . . .

§ 6 Exceptions. Survival by 120 hours is not required if

(1) the governing instrument contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case;

(2) the governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period or expressly requires the individual to survive the event for a specified period; but survival of the event or the specified period must be established by clear and convincing evidence;

. . .

§ 8 Uniformity of Application and Construction. This act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this act among states enacting it.

In re Estates of Skow
Franklin Court of Appeal (2007)

David and Mary Skow, a married couple, died in 2004 within minutes of each other. David and Mary were married on June 3, 1995. Each had children from a prior marriage. David had two children: Max Skow and Janet Dyre. Mary had three children: Nancy Bard, William Bard, and Cindy Bard. We will refer to these groups as “David’s children” and “Mary’s children” respectively.

Disputes arose over the distribution of the estates between David’s children and Mary’s children. The Albion County Probate Court resolved the disputed issues in favor of David’s children. Mary’s children appeal. We affirm.

David and Mary died from carbon monoxide poisoning apparently caused by a leak in the furnace exhaust in their home. A neighbor found them unconscious and unresponsive. The neighbor called 911, and the Skows were taken to Carrigan Hospital. Attempts to revive them were unsuccessful. According to their certified death certificates, David died at 9:32 p.m. on November 4, 2004, and Mary died at 9:36 p.m. on November 4, 2004.

David and Mary both had wills. David’s will left his property to “my wife Mary, if she survives me, and, if she does not survive me, then in equal shares to my children, Max Skow and Janet Dyre.” Mary’s will left her property to “my husband David, if he survives me, and if he does not survive me, then in equal shares to my children and stepchildren, Nancy Bard, William Bard, Cindy Bard, Max Skow, and Janet Dyre.” Thus, the wills differed in that David’s listed only his children as contingent beneficiaries while Mary’s listed both her children and David’s children as contingent beneficiaries.

Mary’s children argue that David’s property should go to Mary’s estate because Mary survived David by four minutes. If this were to be the case, then David’s property would be distributed between all five of David’s and Mary’s children. David’s children argue that from a legal perspective, David and Mary died simultaneously and that under the terms of the Uniform Simultaneous Death Act (1993) (“USDA 1993”), David’s property would go to David’s children.

The Franklin legislature enacted a statute adopting the USDA 1993 in 1995. The Uniform Law Commission enacted the first version of the Uniform Simultaneous Death

Act in 1940. Prior to the 20th century, it was rare for people who were married or close family relations to die simultaneously. With the invention of the automobile and air travel, simultaneous deaths became increasingly common. The Uniform Simultaneous Death Act was enacted to help the legal system solve problems that arise when people who should inherit from each other die simultaneously.

The 1940 version of the Uniform Simultaneous Death Act focused on whether the people at issue literally died simultaneously, leading to often detailed testimony about, for example, which of two people killed in an automobile accident died first. The USDA 1993 that is the current law in Franklin changes the focus from literal simultaneous death to whether the people at issue died within 120 hours (or five days) of each other. Put another way, the USDA 1993 effectively expands the concept of simultaneous death from people who die exactly at the same time to people who die within 120 hours of each other. The USDA 1993 version avoids some of the practical difficulties that arose from the 1940 version while remaining true to the likely intent of the drafters of survivorship provisions—if a document requires survivorship, it is likely that the drafter had in mind that the person survive an event (typically, but not always, the death of another person) by more than 120 hours.

Our first task is to determine whether the USDA 1993 applies by its terms to the Skows' deaths. Sections 2 through 4 of the USDA 1993 address simultaneous death by requiring proof by clear and convincing evidence that the person survived the event by 120 hours. In other words, the USDA 1993 presumes that the person *did not* survive the event by 120 hours and requires this presumption to be rebutted by proof of survival with clear and convincing evidence. Section 5(2) provides that a certified or authenticated copy of a death certificate provides “prima facie evidence of the fact, place, date, and time of death and the identity of the decedent.”

In this case, the record includes the certified death certificates of both David and Mary Skow. These certificates indicate that Mary died four minutes after David. There is no other evidence in the record on the times of their deaths. Thus the Skows died within 120 hours of each other under the terms of the USDA 1993 for two independent reasons. First, the USDA 1993 creates a presumption that one person did not survive the other

by 120 hours. Second, the certified death certificates provide prima facie evidence of the times of their deaths that is not rebutted on this record.

In this case, we are interpreting the provisions of the Skows' wills. David named Mary as the primary beneficiary of his will but required Mary to survive him to take under the will. Similarly, Mary named David as the primary beneficiary of her will but required David to survive her to take.

The USDA 1993 covers this exact situation. Section 1(2) of the USDA 1993 includes wills within the definition of "governing instrument." Section 3 provides that "Except as provided in Section 6, for purposes of a provision of a governing instrument that relates to an individual surviving an event, including the death of another individual, an individual who is not established by clear and convincing evidence to have survived the event by 120 hours is deemed to have predeceased the event." None of the exceptions in Section 6 apply here.

Because there is no evidence that Mary survived David by 120 hours, Mary is deemed to have predeceased David for the purpose of interpreting David's will. As a result, Mary failed to meet the survivorship requirement in David's will. David's property would therefore go to the contingent beneficiaries in his will: his children Max Skow and Janet Dyre. Similarly, because there is no evidence that David survived Mary by 120 hours, David is deemed to have predeceased Mary for the purpose of interpreting Mary's will. David failed to meet the survivorship requirement, and Mary's property would go to the contingent beneficiaries of her will: her "children and stepchildren, Nancy Bard, William Bard, Cindy Bard, Max Skow, and Janet Dyre."

Mary's children argue that because Mary literally survived David (although by only four minutes), she should be deemed to have survived David for the purpose of David's will. This argument fails because of the provisions of the USDA 1993. The court below correctly applied the USDA 1993 and reached the correct legal result.

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.

2)

MEMORANDUM

To: LaVonda Wallace

From: Examinee

Date: July 28, 2026

Re: Estates of Linh and John Nguyen

This memorandum seeks to explain the correct distribution of the Nguyens' assets. Linh and John Nguyen, a married couple, were tragically killed in a car accident. They were survived by their daughter and son, Melissa Nguyen-Stevenson and Brandon Nguyen. Melissa is the executor of her parents' estates. Both Linh and John had simple wills which were declared to be valid in the State of Franklin. Melissa has asked advice on the distribution of her parents' estates. This memorandum addresses the applicability of the Uniform Simultaneous Death Act and how that statute, in addition to the governing documents executed by Linh and John, should control the distribution of their assets.

1. Applicability of the Uniform Simultaneous Death Act of 1993**1(a) - General rule**

The Uniform Simultaneous Death Act of 1993 was designed to address inheritance issues that arise when two or more individuals die simultaneously or in close succession to each other, and would've inherited from each other (Walker's Treatise on Trusts and Estates). The core provision of the Uniform Simultaneous Death Act (USDA) of 1993 stipulates that if an individual does not survive another by at least 120 hours, the individual is deemed to have predeceased the other for purposes of asset distribution (Walker's Treatise on Trusts and Estates). Franklin's Probate Code applies the USDA specifically in that "an individual who is not established by clear and convincing evidence to have survived the other individual by 120 hours is deemed to have predeceased the other individual" (USDA 2). This rule expands the literal concept of simultaneous death to people who die within 120 hours of each other. This rule applies unless a will, trust, or other governing instrument states otherwise (governing instrument applies to deeds, wills, trusts, and insurance/annuity policies (Franklin Probate Code USDA 1(2))). As a result of this, and regardless of the orders of their deaths, neither spouse's assets pass to the other spouse or the other spouse's estate if the bequest was subject to a survivorship contingency. Rather, it will pass to each spouse's secondary beneficiary. The rule requires proof by clear and convincing evidence that the person survived the event by 120 hours. It essentially presumes that the person did not survive the event by 120 hours. A certified or authenticated copy of a death certificate provides "prima facie evidence of the fact, place, date, and time of death."

Here, the record includes the certified death certificates of John and Linh Nguyen. The Certified Death Certificates show that Linh died on March 18 at 10:32 pm and John died on March 20 at 10:03 pm, and that they died from trauma and multiple organ failure, respectively. John lived

approximately 48 hours longer, which is less than 120 hours. Therefore, the USDA presumption applies that one did not survive the other by 120 hours. There is no clear and convincing evidence that one survived the other by 120 hours, as required by section 3 of the USDA. Each will be deemed to have predeceased the other under the USDA presumption. The certified death certificates provide prima facie evidence of the times of their deaths, and there is no evidence rebutting that presumption.

1(b) - Exception

The USDA adopted by Franklin has specific exceptions. The survival by 120 hours rule is not required if (1) the governing document contains language dealing explicitly with simultaneous deaths or deaths in a common disaster, or (2) the governing instrument expressly indicates that an individual is not required to survive an event (including the death of another) by any specified period.

The exception will apply to several of the Nguyen's distributions because some of their governing documents contain language dealing with simultaneous death. Specifically, John's life insurance policy deals with simultaneous death, and Linh's will deals with simultaneous death.

Thus, the USDA will apply to the distribution of John and Linh's assets, but several of the governing documents may override the statutory presumptions.

2. Distributions of Nguyen Assets

2(a) -- Joh's interest and Linh's interest in the home at 432 Fairview Drive

Generally, joint tenancy involves co-owners with rights of survivorship. This means that the surviving joint tenant is entitled to the whole property on the death of the other joint tenant (USDA section 1(1)). As it applies to co-owners with Rights of Survivorship, if it is not established by clear and convincing evidence that one of two co-owners with the right of survivorship survived the other co-owner by 120 hours, one-half of the property passes as if one had survived by 120 hours and one-half as if the other had survived by 120 hours (USDA 4).

As explained above, John lived 48 hours longer than Linh. There is no evidence rebutting that presumption, so the 120 rule applies and will result in their deaths being considered simultaneous (USDA 2). The Deed to 432 Fairview Drive, Utopia Springs, Franklin granted title to Linh Ha Nguyen and John Khanh Nguyen "as joint tenants with rights of survivorship and not as tenants in common." Since they were expressly granted rights of survivorship by the conveyance, the USDA section 4 provision applies and the property will be passed in halves. One-half of the property will pass as if Linh survived John by 120 hours and the other one-half will pass as if John survived Linh by 120 hours.

In Linh's will, she expressly addressed simultaneous death. Her will first granted her real property to John, if he survived her, but then said "If we die simultaneously, or if we die within three days of each other, I give my property in equal shares to my son Brandon Nguyen and my daughter Melissa Nguyen-Stevenson. The fact that her will "otherwise" gave to Brandon, Melissa, and the animal rescue is irrelevant because the will expressly addressed simultaneous death. Since the will addresses the exact situation implicated here, dying within 3 days of each other, Linh's one-half of the property will pass to Brandon and Melissa.

In John's will, he did not expressly address simultaneous death. It states only that real property was to pass to Linh if she survived John, and if she did not survive him, then in three equal shares to Brandon, Melissa, and the University of Franklin Medical Center. The Walker's Treatise on Trusts and Estates describes that the practical effect of the USDA is that neither spouse's assets pass to the other spouse or the other spouses estate when it was subject to a survivorship contingency. Here, John's bequest to Linh was subject to her surviving him, which did not happen. Since there's no evidence that Linh survived John by 120 hours, she did not meet the survivorship contingency. Therefore, the treatise provides that the assets will instead go to the decedent's secondary/contingent beneficiary in their will. The secondary beneficiary in John's will was to Brandon, Melissa, and the University of Franklin Medical Center. Therefore, John's one-half of the property will pass to those 3 parties.

The resulting interest in the home at 432 Fairview Drive is that Linh's one-half of the property will pass to Brandon and Melissa, and John's one-half of the property will go to Brandon, Melissa, and the University of Franklin Medical Center.

2(b) -- Proceeds of life insurance policies

The USDA relating to the 120 hour rule applies to governing instruments including deeds, wills, trusts, and **insurance**/annuity policies (Franklin Probate Code USDA 1(2)). Both Linh and John had a Franklin Mutual Life Insurance Policy. Since insurance policies are within the bounds of the USDA 120 hour rule, we must determine whether the default presumptions apply of if the governing documents dealt with simultaneous death.

John's policy dealt with simultaneous death. His beneficiary designation was to Linh if she survived him, and then stated "If my wife and I die simultaneously, or if we die within three days of each other, I designate my estate to be the beneficiary of this policy. Since the designation addresses the exact situation implicated here, dying within 3 days of each other, John's \$600,000 death benefit will pass to his estate to be distributed with the residuary clause. The USDA exception in section 6 applies here since simultaneous death is expressly provided for and operable under the facts. The fact that he designated to Brandon and Melissa the benefits if they don't die simultaneously is not controlling since simultaneous death was expressly provided for. His estate will be distributed according to his will, which, as explained above, included a survivorship contingency. The Walker Treatise on Trusts and Estates will control the resulting effect. Namely, that the assets will go to the decedent's secondary beneficiary's if the spouse's bequest was conditioned on survivorship. The secondary beneficiary in John's will was to Brandon, Melissa, and the University of Franklin Medical Center. Therefore, John's \$600,000 death benefit will pass to those 3 parties.

Linh's policy did not address simultaneous death. It states only that the \$500,000 death benefit would go to John, if he survives her. If John did not survive her, it was to go to Brandon and Melissa in equal shares. Since the couple died within 48 hours of each other, the law will treat John as predeceasing Linh. Therefore, the practical effect is that the secondary beneficiaries under the policy will be awarded the death benefits. Since the secondary beneficiaries were Brandon and Melissa, they will share equally in Linh's \$500,000 death benefit.

Thus, John's \$600,000 death benefit will pass to Brandon, Melissa, and the University. Brandon and Melissa will share equally in Linh's \$500,000 death benefit.

2(c) -- Other assets under applicable will provisions

As explained above, when there is no clear and convincing evidence that one survived the other by 120 hours, each is deemed to have predeceased the other (USDA 2). The court in *In re Estates of Skow* analyzed a similar fact pattern to determine how the residuary of assets were to be distributed when David and Mary, a married couple, died within minutes of each other from carbon monoxide poisoning. David had 3 of his own children and Mary had 2 of her own children. Each David and Mary granted their property to their spouse, if the spouse survived them. That court decided that since Mary didn't survive David by 120 hours, Mary is deemed to have predeceased David. Since David didn't survive Mary by 120 hours, David is deemed to have predeceased Mary. As a result, each failed to meet the survivorship provision of the other's will. The outcome of each will interpretation was that the contingent beneficiaries of their respective wills took the residuary since the survivorship condition had failed. The fact that Mary survived David by 4 minutes was irrelevant because the USDA presumption and consequences applied.

A similar result will occur here for the residuary of each of John and Linh's wills. There is no evidence that Linh survived John by 120 hours, so Linh is deemed to have predeceased John for the purpose of interpreting John's will. John's will granted the residuary of real property and both tangible and intangible personal property to Linh, if she survived him. Since she is deemed to have predeceased John, the survivorship condition fails and his contingent beneficiaries will take. His contingency provided that his residuary would go, in 3 equal shares, to Brandon, Melissa, and the University of Franklin Medical Center. Therefore, if John has any interest in real property, tangible, or intangible personal property besides those discussed in 2(a) or 2(b) above, it will pass in 3 shares to Brandon, Melissa, and the University.

As for Linh's will, there is no evidence that John survived her by 120, so John is deemed to have predeceased Linh for the purpose of interpreting Linh's will. Linh's will specifically dealt with simultaneous death because it provided that if John and Linh die within 3 days of each other, then she gives her real property, and tangible and intangible property in equal shares to Brandon and Melissa. Section 6 of the USDA will apply since simultaneous death was expressly provided for, and thus any property not discussed in 2(a) or 2(b) above which Linh has an interest in will pass in equal shares to Brandon and Melissa.

Thus, any residuary interest that John held will pass in 3 shares to Brandon, Melissa, and the University. Any residuary interest that Linh held will pass in equal shares to Brandon and Melissa.

END OF EXAM



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MEE Question 1

In unrelated cases, the federal government charged Buster and Calvin each with two criminal offenses: illegal distribution of methamphetamine (Count 1) and illegal sale of firearms (Count 2). Buster and Calvin each entered into an agreement with the government pursuant to which each would plead guilty to Count 1 and the government would dismiss Count 2.

The same judge conducted separate plea hearings for Buster and Calvin. At each hearing, the judge directly questioned the defendant under oath. The judge asked each defendant whether he was pleading guilty voluntarily, knowingly, and intelligently. Each answered, "Yes." The judge also addressed all the matters that the rules of criminal procedure require a judge to address before accepting a guilty plea. Finally, the judge said to each defendant, "Do you admit that you are guilty of the crime charged in Count 1—illegal drug distribution? If so, tell me what you did and why you are pleading guilty."

In response, Buster stated, "Yes, I admit I'm guilty of drug distribution because I sold two pounds of methamphetamine for \$19,000. I'm pleading guilty somewhat to take responsibility but mostly and especially because the prosecutor told me that, if I plead guilty, FBI agents will stop harassing my mother at her job, telling all her coworkers that I'm a criminal and embarrassing her with loud questions just to get to me. The prosecutor also said that only if I plead guilty would he drop his plan to charge my wife with bribery even though he admits that she has done nothing wrong."

Calvin answered by stating, "No, I'm not guilty. I didn't distribute any drugs. I'm pleading guilty only because the prosecutor promised that if I plead guilty, he will dismiss the gun charge, which is more serious and carries a long prison sentence. Also, he promised to ask you to give me only probation, not send me to prison, if I plead guilty to the drug charge. I've read the statements that four so-called friends of mine made to the police, saying that I sold them drugs. If I go to trial, the jurors will probably believe them and find me guilty. I swear I've never sold drugs to anyone, but I can't risk going to prison, and so I plead guilty to that charge."

The judge told each defendant the same thing: "I accept your guilty plea to Count 1 and find you guilty of illegal drug distribution. I dismiss Count 2 based on your plea deal."

Before sentencing, each defendant unsuccessfully asked the federal district court to rule that his guilty plea was invalid. After sentencing, each defendant timely filed a direct appeal of his conviction.

Buster claims on appeal, "First, the appellate court must set aside the guilty plea because the plea was involuntary. Second, assuming the plea was involuntary, the

appellate court must remand the case with instructions to the district court to enter a judgment of acquittal on Count 1."

Calvin claims on appeal, "The appellate court must set aside the guilty plea and reverse the conviction because the guilty plea resulted from improper governmental coercion or enticement. Alternatively, the appellate court must set aside the guilty plea and reverse the conviction because the judge violated the right not to be convicted by plea when the defendant has expressly denied guilt."

Each defendant properly preserved his claims for appellate review, and no procedural issue prevents the appellate court from addressing the arguments on the merits. The government has not disputed either Buster's or Calvin's factual assertions, made under oath in open court during their plea hearings, regarding their plea negotiations.

1. How should the appellate court decide Buster's two arguments? Explain.
2. How should the appellate court decide Calvin's two arguments? Explain.

1)

1.) Buster's Case

1(a): Whether the plea lacked knowledge, was involuntary, and was intelligent.

As a general rule, a guilty plea must be knowing, voluntary, and intelligent. This means that a defendant must have knowledge sufficient to understand the basis of the guilty plea, must understand their constitutional due process rights, must understand their trial rights, and must understand what is being given up by choosing to enter into a guilty plea. Further, it must be voluntary. This means guilty plea cannot be obtained through coercive pressures by either the prosecution or an officer - this would violate the defendant's rights and the voluntary standard. Finally, the defendant must actually plead guilty. It is not sufficient for a defendant to nod, to allude to a guilty plea, or to engage in any conduct outside of a clear, express statement of intention to plead guilty.

Buster's plea was likely involuntary.

Here, Buster, when asked by the judge, statement that his statement was somewhat voluntary, but mainly due to the fact the prosecutor told him the FBI would stop harassing him family. Further, the prosecutor stated that they would drop a fake charge they had on Buster's wife if Buster plead guilty.

A plea is not voluntary if it is made with coercive pressures. Both of these examples are coercive pressures that resulted in Buster's guilty plea. While he was willing to take some responsibility, that does not negate the bad acts and the threats by the prosecution.

Therefore, Buster's plea should not be found knowing, voluntary, and intelligent. The case should be remanded for a proper trial.

1(b): Whether, if the plea was involuntary, the court must remand with a judgment for acquittal.

A defendant may be acquitted for lack of evidence, acquittal by jury, insanity, etc. Here, Buster is charged with one count of Illegal distribution of methamphetamine and one count sale of firearms. This means there was likely probable cause and proper evidence to charge Buster with these offenses. Further, the prosecutor only stated that the FBI would stop investigating Buster and would not bring a fake charge. While this is not good, it does not go to prove that there was insufficient evidence - or any real reason for acquittal.

Buster, however, was correct for the first start of the statement. The proper remedy in this scenario would be to remand the case to state court and have the case tried in a jury setting on the merits of the case.

2.) How should the appellate court decide Calvin's two arguments?

2(a): Whether the Appellate court should set aside the guilty plea and reverse the conviction due to improper governmental coercion or enticement.

Generally, a conviction may be reversed when a conviction is the result of governmental

Generally, a conviction may be reversed when a conviction is the result of governmental coercion or improper enticement or entrapment on part of the government. To prove government entrapment or enticement, the defendant must show that the government set them up to engage in conduct they wouldn't normally engage in, they engaged in that conduct as a result, and they were subsequently charged.

Here, Calvin is charged with one count of Illegal distribution of methamphetamine and one count sale of firearms. This means there was likely probable cause and proper evidence to charge Calvin with these offenses.

Further, the prosecution only promised that if Calvin pleaded guilty, he would dismiss the gun charge and ask for only probation - not a jail sentence. This is not an enticement or entrapment on part of the government. Rather, the prosecution offered Calvin a proper plea bargain to avoid trial. Plea bargain are standard in the US criminal justice system - a plea bargain does not have to be taken, but many are offered as an alternative, often less harsh form of punishment.

Moreover, Calvin stated that he would plead guilty, as his friends made statements to the police and the jury would probably believe those statements. Therefore, Calvin was accepting the plea deal, not due to enticement, but due to wanting to avoid trial.

Therefore, the appellate court not set aside the guilty-plea and reverse the conviction due to improper governmental coercion or enticement.

2(b): Whether the appellate court must set aside the guilty plea and reverse because the judge violated Calvin's rights.

The appellate court must set aside the guilty plea and reverse due to the judge violating Calvin's right not

As a general rule, a guilty plea must be knowing, voluntary, and intelligent. This means that a defendant must have knowledge sufficient to understand the basis of the guilty plea, must understand their constitutional due process rights, must understand their trial rights, and must understand what is being given up by choosing to enter into a guilty plea. Further, it must be voluntary. This means guilty plea cannot be obtained through coercive pressures by either the prosecution or an officer - this would violate the defendant's rights and the voluntary standard. Finally, the defendant must actually plead guilty. It is not sufficient for a defendant to nod, to allude to a guilty plea, or to engage in any conduct outside of a clear, express statement of intention to plead guilty.

Here, Calvin answered the judge's statement by explicitly stating, "No, I'm not guilty." This means that Calvin did not accept a guilty plea and the judge did not act properly when they entered a guilty plea in as a disposition.

A guilty plea that is not made with the proper knowledge, voluntariness, and intelligence must be set aside - and is made with no basis of guilt. Therefore, Calvin's guilty plea, in which he did not plead guilty, must be set aside.

END OF EXAM

MEE Question 2

Ten years ago, a married couple bought land in State A on which there were two single-family houses, each two stories high. When the couple purchased the land, it was predominantly rural and was zoned for "commercial" use. The municipality's zoning is cumulative.

The couple used one house (House #1) as their residence and the other house (House #2) to operate a catering business. The catering business prepared all food on-site and then delivered the food to customers' locations; it did not serve any food to retail customers on its premises.

One year ago, with an increase in residential development, the local zoning board passed an ordinance that rezoned the district in which the land is located from "commercial" to "residential." A catering business in a single-family house is not a "residential" use. The zoning ordinance contains typical language protecting existing nonconforming uses.

One month ago, the couple signed a contract to sell the land to Betty, who plans to live in House #1 as her primary residence and to use House #2 to operate a retail bakery. Betty would not need to modify House #2 to operate a bakery, and she plans to operate the bakery during hours consistent with those of the couple's catering business. Unlike the catering business, however, the bakery will serve customers food items solely on its premises in House #2.

The sale contract set the closing for 45 days after it was signed and required the couple to have a marketable title subject only to encumbrances of record. At the time that the contract was signed, Betty had no notice of an existing unrecorded covenant on the land restricting all structures on the land to no more than two stories. The contract did not address the risk of loss due to events before closing.

The day before the closing, Betty first learned of the unrecorded covenant. That same day, a fire destroyed House #1. The fire was not the fault of the couple, and House #2 was not damaged.

State A applies the traditional common-law doctrine of equitable conversion with respect to risk of loss.

1. Would the rezoning of the land from commercial to residential prohibit Betty from operating a bakery in House #2? Explain.
2. Would the unrecorded covenant with the two-story restriction prevent the couple from delivering marketable title to Betty at the closing? Explain.
3. Can Betty rightfully refuse to close because House #1 was destroyed by fire? Explain.

2)

Whether rezoning the land from commercial to residential prohibit Betty from operating a bakery in House 2

R. Generally, a zoned area can only be used for the purpose it was zoned for. There is an exception when property is being used in a non-conforming way and then the laws change. This sort of "grandfathering in" applies when the property is continued to be used in a like manner as the original non-conforming use or like it was being used when it was appropriate. This "grandfathering in" of ordinances also can apply to transfers of the property, if they continue to use it in a like manner.

A. Here, the married couple purchased land with two single family houses when the land was predominantly rural and when it was appropriate to use the land for commercial purposes. They ran a catering business and prepared all the food on site where it later delivered to the food while not serving any customers on site. Later, the zoning commission changed the ordinance to make this area solely residential. Thus, the catering business became a non-conforming use, however, since it was grandfathered in the operation of this would be alright under the zoning change, as it contained "typical language protecting existing non-conforming uses."

The property was then transferred to Betty, who plans to operate a retail bakery out of one of the houses. This operation would require no structural modifications, making it, at first blush, seem to be consistent with the way the catering business was ran prior. The hours will remain the same as well. However, Betty does plan to serve customers food items SOLELY on the premises. This likely means an increase in foot traffic and vehicles, which would run anathema to the existing non-conforming use.

C. While the operation of a bakery in and of itself would not violate the new zoning ordinance as it would be grandfathered in, Betty's plan to serve food on the premises would likely run afoul of that. Her plans would increase traffic and interrupt the residential use of the zoned area.

Whether the unrecorded covenant within the two story restricting prevent the couple from delivering marketable title to Betty at Closing

R. A real estate transaction consists of two steps: the contracting and the closing. Once contracted, the parties are essentially in a true contract that will be finalized at the close, when the seller delivers the deed to the buyer. The requirement to deliver marketable title is implied in all conveyances of real property and cannot be circumvented. It states that, at closing, the seller warrants that he is delivering title that is good and free from all encumbrances. Encumbrances includes interests in property like liens, easements, mortgages, and covenants. If, before closing, the buyer learns that the title is unmarketable, it does not give the buyer the right to rescind the contract because seller's have the opportunity to cure the encumbrance, if possible, by the time the deal closes. There are certain exceptions, particularly to easements or covenants for commercial purposes that the buyer would have notice of, but generally any encumbrance makes the title unmarketable.

A. Here, the land Betty wishes to purchase is restricted by an "unrecorded" covenant on the land that all structures be no more than two stories. She had no notice of this covenant, indeed because it is predominantly rural and the only structures on it are two stories tall, falling within the covenant's restrictions. In the contract with the couple, it stated that marketable title included

the covenant's restrictions. In the contract with the couple, it stated that marketable title only had to be applied to "encumbrances of record." While cheeky on the couple's behalf, this is not possible. The warranty of marketable title cannot be circumvented via a contract, and adding disclaimer that it is only good to recorded encumbrances is a hindrance on the buyer's rights. While the couple has a chance to get the title clear by the time of closing, it is likely going to be difficult.

C. Because the land is burdened by an unrecorded covenant and the warranty of marketable title cannot be circumvented via contracting, Betty can rescind the contract if the title is not marketable by closing.

Whether Betty can rightfully refuse to close because House 1 was destroyed by a fire

R. The doctrine of equitable conversion states that the risk of loss of real property passes to the buyer at the time of contracting. Thus, if the parties enter into a contract and something happens in between the time of contracting and the time of closing, that loss is imputed to the buyer. The doctrine of equitable conversion is the default rule, unless otherwise contracted around. There are exceptions to this, of course, like if the seller was responsible for the loss, but generally, acts of god and the like are still attributable to the buyer.

A. Here, the couple entered into a contract with Betty a month ago. During the period between closing and contracting, House 1 burned down. Since State A follows the doctrine of equitable conversion with respect to risk of loss, that loss passes to the buyer, Betty.

C. Under equitable conversion, Betty will not be able to refuse to close because the risk of loss of House 1 transferred to her at the time of contracting.

END OF EXAM

MEE Question 3

Acoustic Studios Inc. (Acoustic) operates several music recording studios. In January, Acoustic leased space in a warehouse to construct additional studios. By April, the studios were almost complete, and Acoustic had begun to schedule clients in those studios for recordings.

One of the final steps in construction of the studios was the installation of soundproof tiles on the walls and ceilings of the studios to ensure that outside sounds would not interfere with recording. On April 10, Acoustic entered into a valid signed agreement with Soundwave LLC under which Acoustic agreed to pay \$40,000 and Soundwave agreed that it would, on or before May 30, deliver and install enough tiles to soundproof the new recording studios. The tiles, which were manufactured exclusively by Soundwave, were particularly suited to Acoustic's needs. The agreement stated that \$38,000 of the price was for the soundproof tiles and \$2,000 was for their installation.

On April 12, Acoustic's president received a call from the chief executive officer (CEO) of Soundwave. "I hate to ask this," said the CEO, "but because we have a long history with you, I hope you'll be understanding. When we agreed to sell you the soundproof tiles and install them for \$40,000, our sales manager forgot to take into account recent significant increases in the cost of raw materials necessary to make those tiles. We're prepared to honor our deal, but it will be a hardship. I'm hoping that you'll agree to raise the deal price to \$48,000, which will just barely cover our actual costs on the tiles."

Acoustic's president agreed to this request. She was aware of recent price increases for soundproofing materials, and she judged the request to be a fair cost increase under the circumstances; moreover, she also valued having a good relationship with Soundwave. The Soundwave CEO drove to Acoustic's headquarters later on April 12, and the parties crossed out the existing pricing terms in the written agreement, writing "\$48,000 total" in their place; both the CEO and the president signed their initials next to the change.

On May 30, when the tiles had not been delivered by mid-morning, Acoustic's president emailed Soundwave's CEO. The CEO immediately emailed back, "I'm afraid I have bad news. We won't supply you with the tiles after all. A longtime customer desperately needs the tiles, so we plan to supply them to that customer instead. We apologize."

Acoustic's president quickly tried to find an alternative source for soundproof tiles that fit Acoustic's needs, but she was unable to find anything suitable. The lack of soundproofing for the new studios would cause Acoustic to be unable to honor several lucrative contracts with musical artists and thereby cause significant financial loss and reputational harm to Acoustic. Soundwave still has the tiles and has not yet delivered them to the other buyer.

1. Does Article 2 of the Uniform Commercial Code apply to the transaction between Acoustic and Soundwave? Explain.
2. Assuming that Article 2 of the Uniform Commercial Code applies to the transaction, if Soundwave delivers and installs the tiles (notwithstanding its CEO's statement to the contrary), is Acoustic bound to pay \$48,000 instead of \$40,000? Explain.
3. Assuming that Article 2 of the Uniform Commercial Code applies to the transaction and Soundwave refuses to supply the tiles to Acoustic, would Acoustic prevail in seeking a court order directing Soundwave to specifically perform its obligations under the agreement to supply the tiles? Explain.

3)

1. The issue is whether the UCC or common law applies to the transaction between Acoustic and Soundwave.

The threshold issue for every contract dispute is determining which law applies to the contract at issue. Contracts for the sale of goods are governed by Article 2 of the UCC, whereas contracts for services or the sale of real estate are governed by the common law. Where a contract is mixed, that is, calls for both the sale of goods and the provision of services, the court will apply the UCC or common law after determining the "predominant purpose" of the contract. When determining the predominant purpose of the contract the court will consider whether the goods or services are mere incidental or ancillary to the provision of the other, the costs for the goods versus the services, and the relative importance to the contracting parties for obtaining the goods or the services. In a mixed contract the court may instead decide to apply the UCC to the provisions relating to the sale of goods, and the common law to the provisions regarding the rendering of services. Moreover, where a contract is governed by the UCC, if no UCC provision addresses the issue at hand the common law will be used to fill such gaps.

In this case, Acoustic entered into a contract with Soundwave whereby Acoustic agreed to pay \$40,000 to Soundwave. The contract provides that \$38,000 of the purchase price was for the purchase of soundproof tiles, and \$2,000 was for the installation of those same tiles. Moreover, the tiles were specially manufactured by Soundwave and were particularly suited for Acoustic's needs; the soundproof tiles would be used by Acoustic in their recording studios for recording their client's music. Here, it is likely that the UCC will control. First, and most clearly, the cost between the tiles and the installation is drastic. Acoustic would be paying 19 times more for the tiles than for their installation. Although not dispositive, this is strong evidence of the predominant purpose of the contract. Moreover, Acoustic seems to have more of an interest in obtaining the tiles than having the tiles installed. As the facts provide, Acoustic needs the tiles to honor lucrative contracts with their customers, and Soundwave is the only individual that produces such tiles. Similarly, nothing indicates that Acoustic would not be able to have someone else install the tiles, whereas they are unable to obtain the tiles from other sources. Therefore, a court would likely find that the predominant purpose of the contract is for the sale of the tiles, and not for their installation. Thus, Article 2 of the UCC will likely control any disputes arising from this contract.

2. The issue is whether Acoustic is bound to pay \$48,000 or \$40,000 if Soundwave upholds their end of the contract.

Under the UCC contract modifications need not be supported by new consideration, unlike under the common law, and instead, need only be made in good faith. Contracts for the sale of goods over \$500, however, are subject to the statute of frauds, and must be contained in a writing, identifying the essential terms of the contract, and signed by the party to be charged. Where a contract is subject to the statute of frauds and is later modified, that modification need not be in writing unless it would otherwise place the contract within the statute of frauds. Under the statute of frauds, the only essential term of a sale of goods contract is the quantity of goods

to be sold. Thus, if the contract identifies the parties, and the quantity of goods to be sold, the contract will satisfy the statute of frauds.

In this case, Acoustic originally agreed to pay \$40,000 for the delivery and installation of Soundwave's soundproof tiles. After the contract was signed, however, Acoustic received a call from the CEO of Soundwave, who stated that the price of raw materials has significantly increased, that the sales manager had forgotten about this increase, and that as a result, performing under the existing contract would result in hardship to Soundwave. That being said, Soundwave stated that they were prepared to follow their obligations under the contract, but asked Acoustic if they would be willing to increase the price under the contract to \$48,000. Later, the CEO drove to Acoustic's headquarters, and the president of Acoustic found the modification to be fair and reasonable and agreed to the modification. Both parties crossed out the existing price terms in the contract, replaced it with a price of \$48,000, and initialed the change. Here, this modification was made in good faith. As stated in the facts, Acoustic was aware of the recent price increase and found the increased price to be fair. Thus, under the UCC, the modification is enforceable, even though no new consideration supports the modification. Moreover, although this modification originally occurred over the phone, the statute of frauds is not an issue. Both parties crossed out the existing price term and initialed the increase price term. Therefore, the contract was signed by the party to be charged (Acoustic) and would be enforceable. Thus, Acoustic is obligated to pay the \$48,000 under the modified agreement, and not the \$40,000 originally agreed upon.

3. The issue is whether Acoustic would prevail in seeking a court order to compel Soundwave to specifically perform its obligations under the agreement to supply the tiles.

Where a contract has been breached, the non-breaching party may seek specific performance of the contract. Specific performance requires that the other party carry out their obligations under the contract. When considering whether to grant specific performance as a remedy, a court will consider the hardship a party will face without such a remedy, the uniqueness of the goods at issue, the ability of the breaching party to specifically perform, as well as whether the court would be able to adequately supervise such performance. Because of the difficulty involved in the oversight of performance of a services contract, courts rarely, if ever, grant specific performance for a service contract.

In this case, Soundwave informed Acoustic that they would be unable to perform under the contract, as a longtime customer needs the tiles. Although Acoustic searched for an alternative source for similar tiles, they were unable to find a provider of any tiles suited for their needs. Moreover, if Acoustic is unable to acquire such tiles, they will be unable to honor several of their lucrative contracts and will suffer significant financial loss. Here, a court would likely grant a request for specific performance. First, the goods sought by Acoustic are unique, and Acoustic is unable to purchase the tiles from any other source. Moreover, Acoustic would suffer significant hardship if significant performance is not granted, as they are unable to acquire similar goods, and would suffer significant financial loss. Further, nothing is preventing Soundwave from performing, they still have the tiles in their possession, and could easily deliver

those tiles to Acoustic. Finally, specific performance could be easily supervised by the court, Soundwave must merely deliver the tiles called for under the agreement. Thus, Acoustic would likely prevail if they seek an order for specific performance. That being said, Acoustic is almost certain not to prevail on a request for the provision of the contract calling for the installation of the tiles. As stated above, specific performance for services is rarely if ever granted, and nothing here indicates that such a remedy would be appropriate. Accordingly, Acoustic would likely prevail on a request for specific performance for the purchase of the tiles, but would almost certainly fail if they sought specific performance for their installation.

END OF EXAM

MEE Question 4

Plaintiff, a citizen of State A, worked for Defendant, a citizen of State B, at a factory operated by Defendant in State A. Plaintiff worked for Defendant for 20 years and then retired on December 31, 2022.

In early 2025, Plaintiff began to notice that he was suffering mild hearing loss. His doctor determined that the hearing loss was untreatable and would progressively worsen. The doctor said that the loss resulted from Plaintiff's having worked without proper ear protection in a noisy factory for many years.

On June 1, 2025, Plaintiff sued Defendant in the federal district court of State A, properly invoking the court's diversity jurisdiction. Plaintiff alleged that Defendant had acted negligently in failing to provide Plaintiff with proper hearing protection in the workplace and in failing to warn Plaintiff of the risk of hearing loss. Plaintiff further alleged that those negligent acts caused Plaintiff's hearing loss, resulting in more than \$200,000 in harms to him beginning on February 1, 2025, when Plaintiff first began to notice his hearing problem.

Defendant's answer admitted the basic facts of Plaintiff's employment by Defendant but denied that Plaintiff's hearing loss had been caused by Defendant's actions or that Defendant had behaved negligently. Defendant raised no defenses in its initial answer.

In State A, the statute of limitations for tort claims is two years. In 2021, State A's highest court ruled, in a case involving injuries caused by an allegedly defectively performed surgery, that the limitations period would run from the date of discovery of the injury, rather than the date the injury occurred. Other states have also adopted date-of-discovery rules, although the rules vary and are sometimes limited to particular kinds of injuries.

One year after Plaintiff filed suit and during discovery, Plaintiff admitted that the injury that had caused his hearing loss had occurred more than two years before suit was filed. Defendant then filed a motion to amend its answer to include the affirmative defense that the statute of limitations had run on Plaintiff's tort claim.

Plaintiff objected to the amendment, relying on a provision of State A law that prohibits any party from amending pleadings after discovery has begun. The district court granted Defendant's motion to amend, and Defendant amended its answer.

Defendant moved for summary judgment based on its statute-of-limitations defense and Plaintiff's admission that his injury had occurred more than two years before suit was filed. Defendant argued that State A should follow the traditional date-of-injury approach

to determining when the tort limitations period begins running. Under that approach, Defendant argued, the undisputed facts showed that the statute of limitations had run because Plaintiff's complaint was filed on June 1, 2025, more than two years after Plaintiff stopped working in Defendant's factory.

Ten days after Defendant's motion for summary judgment was served on Plaintiff, Plaintiff filed a response. Plaintiff argued that summary judgment was inappropriate because, under State A law, the limitations period runs from the date of discovery of an injury (early 2025), which was less than two years before Plaintiff filed suit. Plaintiff's response also asked the court to impose sanctions against Defendant under Federal Rule of Civil Procedure 11, arguing that Defendant's motion for summary judgment was frivolous because State A's rule provides that a torts limitations period begins to run on the date of discovery.

1. Did the district court properly grant Defendant's motion to amend its answer despite the fact that State A law forbids amendments once discovery has begun? Explain.
2. Should the district court grant Plaintiff's request for sanctions against Defendant under Rule 11 of the Federal Rules of Civil Procedure? Explain.

4)

1. The issue is whether the District Court properly granted Defendant's motion to amend its answer despite the fact that State A law forbids amendments once discovery has begun.

When a federal court sits in diversity, whether the court should apply the law of the forum state or federal law turns on whether the state law is substantive or procedural. First, the federal court must determine whether the federal law conflicts with state law. If there is no conflict, the federal court may apply both laws simultaneously as the outcome is not affected. However, where the state and federal law conflict, the federal court must determine which law to apply. First, the court must determine if there is a federal rule on point. If there is a federal rule on point, and the rule is arguably procedural, the federal court should apply the federal rule unless the federal rule modifies, abridges, or enlarges a substantive right of the parties. If there is no federal rule on point, however, the court should apply the state law where the state law is outcome determinative, unless there is a countervailing federal interest in not applying the state law. Laws which modify the statute of limitations, burden of proof, or elements of a claim are generally accepted to be substantive. The federal rules provide that a party may amend their pleadings once as a matter of right within 21 days of service of the pleading if no response is required, or within 21 days of a response to that pleading if a response is required. The federal rules of civil procedure provide that even where a party may not amend their pleading as a matter of right, the court shall freely grant leave for a party to amend their pleadings if the interest of justice so require.

In this case, State A law provides that the statute of limitations is two years after the discovery of the injury. In contrast, the traditional approach for statutes of limitations is that the statute of limitations begins to run after the injury occurs. Here, Defendant originally included in their answer no affirmative defenses, but later sought to amend their complaint to add the affirmative defense that the statute of limitations had run. Under the law of the forum state, State A, a party is prohibited from amending their pleadings after discovery had closed. The federal rule for amendments contains no such limitation. Thus, the laws of State A and the federal rules are in conflict. Therefore, the court must determine whether to follow the law of State A, or apply the federal rules. Here, there is a federal rule on point; the rule which allows amendments whenever justice so requires. This rule is arguably procedural, as it affects the timelines for amendments to pleadings. Similarly, the rule does not modify, abridge, or enlarge a substantive right, such as the statute of limitations, the burden of proof for the claim, or the elements of the claim at issue. Thus, the rule regarding amendments is likely procedural, and the court should apply the federal rule.

In this case, Defendant sought to amend their answer approximately one year after suit had been filed. Because the amendment would occur well over the 21 days after service of the pleading, that is, the answer, the defendant does not have the right to amend the pleading. Instead, Defendant must obtain leave of the court to amend their pleading, and the court should freely grant that pleading if the interest of justice so requires. Here, the court likely acted properly in granting Defendant leave to amend. Although Defendant will likely fail on their

argument that the statute of limitations has run, as the State A rule is almost certainly substantive and thus controls, Defendant should be granted leave to make such an argument and have the court determine the outcome. Because the federal rule relating to amending a pleading is rather generous, it was likely proper for the court to grant Defendant leave to make such an amendment. Thus, the court properly granted Defendant's motion to amend their answer despite the fact that State A law forbids amendments once discovery has begun.

2. The issue is whether the district court should grant Plaintiff's request for sanctions against Defendant under Rule 11.

Under Rule 11, any attorney submitting a paper to the court must sign and certify that paper. The attorney's certification certifies that the paper is not being brought for an improper purpose, is supported by existing law or a non-frivolous argument to extend the law, that all factual assertions are supported by known facts or if so specified are likely to be supported by future discovery, and that all denials are supported by known facts or if so specified a genuine belief that there is not enough information to admit the existence of those facts. Where one party believes that the other has violated one of these provisions, they may seek sanctions from the court under Rule 11. Before seeking such sanctions, however, the party must serve a copy of the motion for sanctions on the party allegedly violating the provisions of Rule 11 and provide them with 21 days to ameliorate the deficiency. If the served party does not correct the pleading within 21 days, the moving party may then file the motion for sanction with the court and seek an order for sanctions.

In this case, Defendant filed a motion for summary judgment asserting that the statute of limitations had run under the general rule that the statute of limitations begins to run at the date the injury occurs. Plaintiff, however, believes that State A law should control, which states that the statute of limitations begins to run on the date the injury was discovered. If Defendant prevails, Plaintiff's claim would be barred by the statute of limitations, and if Plaintiff prevails, the claim would not be barred. Ten days after Defendant filed their motion for summary judgment, Plaintiff filed a response which also sought sanctions against Defendant under Rule 11. First, it is questionable if Defendant's conduct would truly be sanctionable. Although State A law is rather clear, Defendant could likely show that the argument that the general rule for statute of limitations is non-frivolous, and that State A law should not control. Whether or not that argument is compelling, however, Plaintiff's motion for sanctions is procedurally defective. Plaintiff never served Defendant with a motion for sanctions, and similarly, never afforded Defendant 21 days to ameliorate the allegedly sanctionable conduct. Because Plaintiff has failed to meet the required showing under Rule 11, the court should not grant Plaintiff's request for sanctions, and should deny Plaintiff's motion.

END OF EXAM

MEE Question 5

Derek, who has a general dentistry practice in Small Town, State A, attempted to perform a root canal procedure on a patient. The procedure failed, resulting in the patient's needing a tooth extraction and a tooth implant. The patient sued Derek, alleging malpractice.

The patient's lawyer asked several other Small Town dentists with general dentistry practices to serve as an expert witness on the patient's behalf, but none wanted to testify against a local dentist, and each declined. The patient's lawyer then met with another State A dentist who specializes in root canals and who lives in a similarly sized town 150 miles away. The specialist has no particular knowledge of the practice of dentistry in Small Town. The specialist has agreed to serve as an expert witness and testify that Derek negligently performed the root canal procedure.

The patient suffered the following harms: the loss of her tooth, additional dental bills, three days of lost wages, and physical pain. Because of an earlier trauma, she has also experienced unusually significant and ongoing emotional turmoil because, with an artificial tooth, she no longer feels "whole." These feelings have led the patient to seek psychological counseling at her own expense.

Angry about her experience and hoping to warn other patients about possible harm, the patient posted a message on an online forum. The forum was used by only five or six residents of Small Town, who accessed it only occasionally. On that forum, the patient posted a message that accurately described the details of her root canal procedure and her resulting injuries. She concluded her post by stating that Derek was "a real numbskull." One person responded to the patient's post by thanking her and stating that he had canceled scheduled procedures with Derek as a result of the patient's post. Derek is considering asserting a defamation counterclaim against the patient.

1. What is the standard of care that will be applied to determine whether Derek is liable for malpractice? Explain.
2. Given that no local general dentists will testify against Derek, can the testimony of the out-of-town specialist establish the standard of care? Explain.
3. Assuming that the patient proves the liability elements of her malpractice claim, for which harms can the patient recover damages against Derek? Explain.
4. Does Derek have a defamation claim against the patient? Explain.

5)

1. What is the standard of care that will be applied to determine whether Derek is liable for malpractice?

The issue here is what standard of care applies to a dentist

The general rule is that in a negligence action, the defendant must exhibit the care of a reasonable person in like circumstances. However, there is a special rule for professionals. That rule is that a professional must exhibit the care of a reasonable professional in the persons profession in good standing. This is a heightened standard of care that is often used for doctors, lawyers, and dentists. Typically this is a local standard and the professionals standard of care will be compared to others in the community.

In this case, Derek is a dentist. Because a dentist is considered a professional, a heightened standard of care will apply. Therefore, Derek will be held to the standard of a dentist in his local that is in good standing.

2. Given that no local general dentists will testify against Derek, can the testimony of the out-of-town specialist establish the standard of care?

The issue here is whether the out of town dentist can establish the duty of care owed by Derek in this case.

The general rule is that the standard of care for professionals such as dentists is based on other professionals in the field in good standing that are local.

In this case, no local dentists agree to testify against Derek. However, a dentist from a neighboring town is willing to testify regarding the standard of care. The facts tell us that the neighboring dentist lives about 150 miles away but has no particular knowledge of the practice of a small town dentist. Because a root canal procedure is pretty standard nation wide, and the guidelines for dentists are probably similar in that regard, the dentist will likely be allowed to testify as to the standard of care. For one, the neighboring dentist specializes in root canals and lives in a similarly sized town about 150 miles away. The court would likely find that this dentist is a qualified expert with knowledge on the subject of root canal operations and allow him to testify to establish the standard of care in this case.

In conclusion, the court should allow the dentist to testify as to the standard of care.

3. Assuming that the patient proves the liability elements of her malpractice claim, for which harms can the patient recover damages against Derek?

The issue here is whether the patient will be able to recover both actual damages for the harm caused due to the loss of her tooth, as well as the emotional damages that stemmed from an earlier trauma.

The general rule is that in tort, a plaintiff may recover all foreseeable damages stemming from the negligent conduct of a defendant. However, there is a limitation on this rule. A plaintiff cannot recover solely for emotional damages under a claim of negligence. However, under the eggshell plaintiff doctrine, the plaintiff may be able to argue that she is entitled to recover emotional

damages as well. The eggshell plaintiff doctrine states that a defendant takes the plaintiff as he finds them. Therefore, a defendant will be liable for injuries that occurred because of a plaintiff's latent or underlying conditions even if not foreseeable to the defendant.

In this case, there is no question that if the plaintiff can establish a prima facie case for negligence by showing duty, breach, causation and damages that she will recover for the loss of her tooth, additional dental bills, the lost wages, and physical pain. This is because applying the rule above, the plaintiff is entitled to recover all damages stemming from the defendant's negligence. The issue is only whether the plaintiff can recover for the emotional damages that she suffered because of an earlier trauma. The facts state that because of a previous incident, the plaintiff no longer feels "whole" with her artificial tooth and this has caused her to suffer emotional damages. Additionally, these emotional damages have caused the plaintiff to seek counseling.

Although these damages stem from a previous incident and are strictly emotional, the defendant will likely be liable under the eggshell plaintiff doctrine. Under eggshell plaintiff doctrine, Derek takes his patients as he finds them. It is not relevant that the underlying condition that caused the plaintiff to suffer emotional damages was not foreseeable. Therefore, Derek will be liable for the emotional damages as well under the eggshell plaintiff doctrine.

4. Does Derek have a defamation claim against the patient?

The issue is whether Derek has a claim for defamation

The general rule for defamation is that a plaintiff must show that the defendant conveyed a defamatory statement to a third party other than the plaintiff, and that the third party understood the statement. Additionally, the plaintiff must have acted with some level of fault as to the falsity of the communication and most likely must prove that the statement was in fact not true. Lastly, the plaintiff must show that their reputation was damaged. If the plaintiff is not a public figure, the majority rule is that the defendant must have been at least negligent as to the falsity of the statement. Libel is written defamation and special damages are not required because damages are presumed

In this case, the patient posted a statement online that the dentist was a "numbskull." The statement was published to at least one individual other than the plaintiff who understood it, and it was written, so damages were presumed. However, Derek will likely not be able to succeed on a defamation claim. First off this statement is likely not defamation because it is an opinion and not a statement of fact. Second, there is no indication that this statement was false at the facts indicate it accurately described the root canal procedure. Although Derek lost a client because of the statement, there is no viable defamation claim here because the elements are not satisfied.

END OF EXAM

**July 2026
Indian Law Question
ICWA**

A.W. is a three-year-old child. Her mother, Sarah, is an enrolled member of the Oglala Sioux Tribe, a federally recognized Indian tribe. A.W.'s father, Daniel, is not an enrolled member of any tribe.

A.W. was born on the Pine Ridge Indian Reservation and lived there with her parents until she was two years old. At that time, Sarah and Daniel moved with A.W. to Rapid City, South Dakota, outside the reservation boundaries.

After the move, Sarah struggled with substance abuse. Daniel was later arrested for domestic abuse against Sarah. Following an investigation by the Department of Social Services, A.W. was removed from Sarah's and Daniel's custody, and the State initiated an abuse and neglect proceeding.

The State notified the Oglala Sioux Tribe of the proceeding. The Tribe confirmed that A.W. was eligible for membership with the Tribe. The Tribe intervened in the proceeding.

A.W. was originally placed with John and Emily Johnson, a non-Indian foster family, in Rapid City, because she has a rare medical condition requiring specialized treatment three times per week at a pediatric clinic in Rapid City, and no relatives of Sarah or Daniel lived near Rapid City.

The Johnsons cared for A.W. for twelve months. During that time, A.W. became strongly bonded with the Johnsons and began referring to them as "Mom" and "Dad." The Johnsons have managed all of A.W.'s medical appointments and have developed relationships with her medical providers.

Sarah's and Daniel's parental rights were eventually terminated, and the State began considering adoptive placements for A.W. The Oglala Sioux Tribe objected to any adoptive placement outside the ICWA placement preferences and requested that A.W. be placed according to ICWA's placement preferences.

Three possible placements were identified by the State:

1. Rose — Maternal Grandmother

Rose is an enrolled member of the Oglala Sioux Tribe and lives on the reservation. She has maintained a close relationship with A.W. since birth and frequently cared for A.W. before removal. Rose has a stable home and support from extended family members.

2. The Whitecloud Family — Tribal Foster Placement

The Whiteclouds are enrolled members of the Oglala Sioux Tribe and have been approved by the Tribe as an adoptive placement for Indian Children. They have no prior relationship with A.W.

3. The Johnsons – Current Placement

The State opposed any change in placement. The State argues that A.W.'s best interests require remaining with the Johnsons because: she has lived with them for twelve months; she is bonded to them; they have provided stability; they are familiar with her extraordinary medical needs; and moving her would cause emotional harm.

Analyze all legal issues arising under the Indian Child Welfare Act, including ICWA's applicability to A.W. and the governing adoptive placement preferences. In your answer, compare and evaluate each proposed placement under ICWA's statutory hierarchy, and determine whether good cause exists to deviate from those preferences.

MEE 6 – Indian Law

ICWA

ICWA was passed by Congress in response to the generations of removal of Native/Indian children from Indian parents (many times via kidnapping and without cause), causing generational trauma. To ensure that this ended, ICWA applies to all children under 18 years that are old/non-married. These individuals must be enrolled or eligible for enrollment in a Tribe, and at least one parent must be an enrolled member of a Tribe.

A.W. is 3 and the Oglala Sioux verified she is eligible for membership; therefore ICWA applies.

Next we should consider, under ICWA, the termination of parental rights of Indian parents. In order for parental rights to be terminated, the court must show a finding of severe risk of harm to the Indian child. It is not clear that the finding of the court used that rubric standard, as only domestic abuse was attributed to the father.

Regarding placement options and the hierarchy of placements of Indian children, ICWA is clear. First, the preference is related Indian relatives; next, unrelated Tribal members; and lastly, unrelated members of a different Tribe. Placement with an Indian, regardless of Tribe, ensures the counter-sins of the past (and after ICWA at least in this form). The placement with a non-Tribal family is not in contention under ICWA.

The argument for the Johnsons is an argument that relies on savior/white-colonial ideals that go against the sovereign political ideals of Tribes and non-Tribal Indians alike. The argument relied upon, presumably by the State and the Johnsons, will be a “best interest of the child” argument due to the apparent ability to provide for special needs of the child.

The other argument will rely on the “emotional harm” of moving A.W., which is not a proven point but instead presumed. ICWA preempts the state here, and “best interest” standards are to be applied only after a set of placements with equal standing are given as options. Best interest standards don’t overrule ICWA.

The maternal grandmother, Rose, is at the top of the ICWA hierarchy as a related Tribal member, and she has a close relationship with the child. Rose provides the necessary political + cultural environment, and the Tribe supports a Tribal placement.

Furthermore, her home is stable and has support from others to assist in the traditional rearing of an Indian child.

The argument against Rose might be that she is (appears) single based on the facts, and she might be old. But those are not de-factors under ICWA and are also addressed by the assistance of family.

The Whitecloud family would be a safe and adequate family for A.W., and as they are located second on the hierarchy, if Rose were unable to take care of A.W., they would be sufficient. The Tribe has approved them as adoptive placements, but they are not related to A.W. and therefore not as good for A.W. as Rose.

In the best interest of A.W., the Tribe, and following ICWA, Rose would be the best permanent placement, with the Whiteclouds being a sufficient backup. The Johnsons can continue a relationship with A.W. — various SD State cases find this appropriate — but due to the history underlying ICWA and federal Indian policy, the harm of placing an Indian child with a white family outweighs their current arrangement or the State's wishes.