Representative Passing Answers

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

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

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

February 2020
MPT-1
220

Applicant Number

THE MPT®
MULTISTATE PERFORMANCE TEST

Downey v. Achilles Medical Device Company

Read the directions on the back cover.
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Downey v. Achilles Medical Device Company

FILE

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FILE

BETTS & FLORES
Attorneys at Law
300 Stanton St.
Franklin City, Franklin 33705

MEMORANDUM

To: Examinee
From: Hiram Betts
Date: February 25, 2020
Re: *Downey v. Achilles Medical Device Company*

Our client, Achilles Medical Device Company (AMDC), is the defendant in a case in which the plaintiffs allege that AMDC manufactured and sold defective walkers during the years 2010–2015. The plaintiffs are attempting to bring the case as a class action; we intend to oppose the motion for class certification.

This case presents a professional responsibility issue regarding contacts with represented persons. Despite the fact that we represent AMDC, the plaintiffs' lawyers are seeking to speak with one former AMDC employee and four current AMDC employees regarding their knowledge of the manufacture and sale of the allegedly defective walkers. An investigator for the plaintiffs' lawyers has contacted these individuals, without first obtaining our consent to speak with them.

Likewise, despite the fact that opposing counsel represents the named plaintiffs, we want to talk to people, including the named plaintiffs, who purchased and used the walkers in question. Doing so would help us prepare our defense.

We need to know whether the Franklin Rules of Professional Conduct (FRPC) permit these communications. (The FRPC are identical to the ABA Model Rules of Professional Conduct.) Please draft a memorandum to me analyzing two issues:

(1) Whether the plaintiffs' lawyers or their representatives may communicate, without our consent, with the current and former AMDC employees regarding their knowledge about the manufacture and/or sale of the walkers. Discuss each individual separately and explain your conclusions.

(2) Whether we, as AMDC's attorneys, or our representatives may communicate with any named plaintiffs or potential members of the class without the consent of opposing counsel.

Do not include a separate statement of facts, but be sure to incorporate the relevant facts into your analysis, discuss the applicable legal authorities, and explain how the facts and law support your conclusions.

BETTS & FLORES
Attorneys at Law

FILE MEMORANDUM

From: Hiram Betts
Date: January 23, 2020
Re: *Downey v. Achilles Medical Device Company*

I just received a call from Ron Gilson, president of Achilles Medical Device Company (AMDC). We represent AMDC in a class-action lawsuit and are in the early stages of litigation. The plaintiffs allege that AMDC negligently manufactured and then sold defective walkers. The plaintiffs claim that, due to manufacturing defects, the walkers collapsed when the plaintiffs tried to use them and that the plaintiffs were injured as a result. Five named plaintiffs, led by Marie Downey, are attempting to bring a class action "on behalf of themselves and all other persons who bought and used AMDC walkers (model 2852) manufactured in 2010 and marketed and sold between 2010 and 2015 and who were injured when attempting to use the walkers." We intend to oppose the plaintiffs' motion for class certification. We would like to contact as many potential members of the class as possible before class certification.

Gilson told me that one former employee and four current employees have been approached by an investigator employed by the plaintiffs' law firm. The investigator has attempted to speak directly with the former employee and current employees without our consent. Gilson is very concerned about these contacts and wants to know if the plaintiffs' lawyers are doing anything wrong.

Gilson provided a list of the former and current AMDC employees. Marilyn DePew, an associate with our firm, has spoken with each of these individuals about their interactions with the plaintiffs' investigator.

Note that Gilson does not believe that there was a problem in the design or manufacture of the walkers. He would like us to contact as many purchasers as possible to find out about their experiences with the AMDC walkers.

BETTS & FLORES
Attorneys at Law

FILE MEMORANDUM

From: Marilyn DePew
Date: January 25, 2020
Re: *Downey v. Achilles Medical Device Company*: Interviews

Ashley Parks, an investigator employed by the law firm that represents the plaintiffs in *Downey v. Achilles Medical Device Company*, contacted one former employee and four current employees of AMDC. I have interviewed those former and current employees and, with their permission, recorded the conversations. What follows are the transcripts of the relevant portions of those interviews.

INTERVIEW WITH RON ADAMS

Q: Mr. Adams, are you a current employee or agent of Achilles Medical Device Company, commonly known as AMDC?

A: No.

Q: Have you ever been an employee of AMDC?

A: Yes, I worked for AMDC from 2003 to 2017. I was director of quality control during that time. Now I am happily retired.

Q: When you were at AMDC, what were your responsibilities as director of quality control?

A: I was in charge of the quality control department. Employees in my department, whom I supervised, inspected every product that left the manufacturing plant and was made available for sale. I am very proud of the work we did.

Q: So the department for which you were responsible would have inspected the walkers that were manufactured in 2010 and sold between 2010 and 2015?

A: Yes.

Q: Do you have any specific knowledge about the walkers that are alleged to have been defective?

A: No, not specifically. I do know that every piece of equipment that left the factory was inspected. If it did not meet company standards, it was rejected. I would like to know what the purchasers are complaining about.

Q: What do you mean by "rejected"?

A: The item was not released for sale and either was put in the trash or was refurbished and then inspected again to make sure it met company standards.

Q: Do you have any knowledge of what is happening in the quality control department at AMDC now?

A: No, not really.

Q: It is my understanding that you were contacted about the class-action litigation regarding the walkers. By whom were you contacted?

A: I received a phone message from Ashley Parks, who said she was an investigator employed by the law firm that represents the plaintiffs in the case of *Downey v. AMDC*. She said she wanted to talk to me about the quality inspection of the walkers.

Q: How did you respond to this request?

A: I haven't called her back yet. Quite honestly, I am happy to talk with her. I didn't do anything wrong.

INTERVIEW WITH GUS BARTHOLOMEW

Q: Mr. Bartholomew, how long have you been employed by AMDC?

A: I have worked there continuously since 2003.

Q: Have you had the same job during all that time?

A: Yes, for all that time, I have been employed as the executive assistant to the president of the company. We have had several presidents during my tenure, but I've stayed in my position.

Q: What are your responsibilities as executive assistant to the president of AMDC?

A: I am basically the president's administrative assistant. I do word processing, answer the phone, organize the president's schedule, get the president organized, and anything else the president wants.

Q: Do you attend meetings of the board of directors of AMDC?

A: Yes, I sit in on the meetings and take the meeting notes. I don't say anything—I just record exactly what is said during the meeting and then provide my notes to the board secretary and president for approval.

Q: Have you taken notes on discussions between the lawyers for AMDC and the board?

A: Yes.

Q: Have any of those discussions involved AMDC's response to the *Downey* litigation?

A: Yes.

Q: Do you have a vote on the matters before the board of directors?

A: No, I do not.

Q: Do you see or hear communications between the president of AMDC and counsel for AMDC?

A: Sometimes. I type and proofread all written letters sent by the president to the company's lawyers. I also open and review any incoming mail from the lawyers. I have access to the president's emails and frequently review them. I do not listen in on my boss's—the president's—phone conversations.

Q: Did anyone contact you about the litigation involving the walkers that AMDC manufactured in 2010 and sold between 2010 and 2015? These are the walkers at issue in the class-action lawsuit *Downey v. AMDC*.

A: I received a phone message from an Ashley Parks. She said she was an investigator who is employed by the plaintiffs' lawyers in the *Downey* case. She said she wanted to talk to me about the case. I haven't returned the call yet.

INTERVIEW WITH AGNES CORLEW

Q: Ms. Corlew, how long have you been employed by AMDC and what is your position with the company?

A: I have been employed since January of 2017, and I am head of the public relations department.

Q: What are your responsibilities as AMDC's head of public relations?

A: I am responsible for the team that responds to all media requests, writes and publishes all written materials about the company, and answers public inquiries about the company. I am, in essence, the voice of the company. I don't make the company's policies, but I frequently communicate the official position of the company to the public.

Q: Is it your job to answer questions about pending litigation?

A: Yes, I answer questions from the press and the public about pending litigation.

Q: Do you play any role in decisions about the litigation?

A: No. I present only the information that has been provided to me and has been approved by the president's office.

Q: Have you ever met with counsel for AMDC regarding the *Downey* case?

A: Absolutely not.

Q: Has anyone associated with the plaintiffs' lawyers in the *Downey* case tried to contact you?

A: My assistant told me that I had a call from Ashley Parks, an investigator who works for the plaintiffs' law firm. I haven't returned the call.

INTERVIEW WITH ELISE DUNHAM

Q: Ms. Dunham, what is your job with AMDC and how long have you worked there?

A: I am the plant manager at AMDC. I have been employed in that position continuously since March of 2009.

Q: What are your responsibilities in that position?

A: I oversee all the manufacturing at the plant. I also make sure that every product meets our quality control standards.

Q: So the director of quality control reports to you?

A: Yes, as does the director of manufacturing.

Q: So you were manager of the plant at the time AMDC manufactured the walkers, model 2852, that are alleged to have been defective in the *Downey* case.

A: Yes, although I honestly don't remember anything about those particular walkers.

Q: Have you been contacted by any of the plaintiffs' counsel or their representatives?

A: I received a note from Ashley Parks, an investigator with the plaintiffs' law firm, saying that she wanted to speak with me. Since then, I've hired a lawyer, and I called Ms. Parks to give her my lawyer's name and contact information.

INTERVIEW WITH PENNY ELLIS

Q: Ms. Ellis, I understand that you are employed by AMDC and have been employed by the company since 2008. But I also understand that your responsibilities have changed over that time period. Could you explain the different responsibilities you have had since you began working at AMDC?

A: Sure. From 2008 to 2016, I was director of marketing for AMDC. Essentially, I was responsible for all sales of all products. Of course, I had a staff that worked for me. In 2016, I changed positions and am now chief financial officer of the company.

Q: So, from 2010 to 2015, did your responsibilities include sales of the walkers that are at issue in the *Downey* case?

A: Yes, definitely.

Q: Do you remember anything specifically about the walkers?

A: No, we had a lot of products that were sold while I was head of marketing.

Q: Currently, do you have any responsibility for sales, marketing, or anything else regarding walkers or any other equipment?

A: No, I manage the company's financial actions, including cash flow and budgeting, and help shape the company policy.

Q: As chief financial officer, are you a member of the board of directors of AMDC?

A: Yes, I serve as treasurer.

Q: Does the board have any involvement in the lawsuit?

A: The lawyers from your firm, Betts & Flores, consult with the board about the litigation and seek input from the board. I really don't know anything about law, so I mainly listen when they discuss the litigation. I would be involved in the financial aspect only if there were a settlement or if there were a judgment against the company.

Q: Are you a voting member of the board of directors of AMDC?

A: Yes. I have a vote on every issue that comes before the board.

Q: Does that include voting on issues related to the *Downey* litigation?

A: Yes.

Q: Have you been contacted by anyone associated with the plaintiffs' law firm in the *Downey* matter?

A: Yes, I was called by a woman named Ashley Parks. She told me that she was an investigator working for the plaintiffs' law firm and that she wanted to speak with me about the walkers. I told her I would call her back. What should I do?

LIBRARY

Excerpts from the Franklin Rules of Professional Conduct

Rule 1.0(f)

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

. . .

Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

> **Comment [1]:** This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.
>
> . . .
>
> **Comment [3]:** The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.
>
> . . .
>
> **Comment [7]:** In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

. . .

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

. . .

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

FRANKLIN BOARD OF PROFESSIONAL CONDUCT
Ethics Opinion 2016-12

We have been asked to give a formal ethics opinion on the interpretation of Franklin Rule of Professional Conduct (FRPC) 4.2. Specifically, we have been asked to provide some guidance as to the interpretation of Comment [7] to the Rule.

Franklin Rule of Professional Conduct 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter" without the prior consent of the represented person's counsel. Rule 4.2 applies equally to organizations and to individuals. Comment [7] to Rule 4.2 states that such unauthorized communications with agents or employees of an organization are prohibited in three situations: (1) where the agent or employee of the organization "supervises, directs or regularly consults with the organization's lawyer concerning the matter"; (2) where the agent or employee of the organization has "authority to obligate the organization with respect to the matter"; and (3) where the agent's or employee's "act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Importantly, Rule 4.2 prohibits such unauthorized communication only with *current* agents and employees of the organization. Counsel may communicate freely with former agents and employees of an organization without the consent of the organization's lawyer regardless of the role the agent or employee may have played in the matter.

The first prong to Comment [7] prohibits unauthorized communication (i.e., communication without prior consent of the organization's lawyer) with a person in the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter. This generally includes the people who are giving and receiving information from the lawyer and directing the lawyer's actions in the matter, as well as those who have power to compromise or settle the matter in consultation with the lawyer. In a corporation, persons under this prong would generally include the "control group"—that is, the board of directors and top management officials. However, the analysis under this prong is functional. One must determine whether particular members of the board and other top officials actually do consult with or direct the actions of counsel concerning the matter.

The second prong prohibits unauthorized communication with a person in the organization who has "authority to obligate the organization with respect to the matter." This includes only

those agents or employees who have authority to enter into binding contractual settlements on behalf of the organization. An agent's authority may be actual or apparent. An agent can bind a principal when given actual authority to do so, either through express words or through implication. In addition, an agent may have apparent authority if it reasonably appears to an outsider that the agent has been given authority to bind the principal. Only those agents or employees who have either actual or apparent authority to settle litigation on behalf of the organization are covered under this prong. Obviously, this prong overlaps with the first prong, as it may include members of the board of directors as well as those agents and employees who have been given explicit authority by the organization's rules or bylaws to settle the matter on behalf of the organization. But this prong, unlike the first, also covers those who have the apparent authority to settle the matter as well as those with actual authority.

The third prong of Comment [7] prohibits unauthorized communication with an agent or employee of the organization whose "act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Whether an agent's or employee's conduct may be so imputed must be determined with reference to the specific facts and circumstances of the case; it is not simply a fanciful construct of potential liability. The focus is on the conduct of the agent or employee and whether, based on that conduct, a fair-minded person could foresee imputation of liability. Communication is prohibited only when the agent's or employee's act or omission is obviously relevant to a determination of corporate liability. In other words, the agent or employee has acted in the matter on behalf of the organization and, save for the separate legal character of the organizational form, would be directly named as a party in a lawsuit involving the matter. By focusing upon acts or omissions, this prong precludes unauthorized communications only with actors, not mere witnesses. If it is not reasonably likely that the agent or employee is a central actor for liability purposes, nothing in FRPC 4.2 precludes unauthorized contact with the agent or employee. Only those agents or employees whose actions or omissions are the subject of the litigation—or those individuals who supervised or approved the actions or omissions of those persons—are covered by the Rule.

Importantly, even if Rule 4.2 does not prohibit counsel from speaking with an employee or former employee of an organization, counsel must be careful not to speak with that agent or employee about any information that might be protected by attorney-client privilege. Attorney-client privilege protects any communications between counsel and client for the purpose of

obtaining legal advice. For purposes of this ethics opinion, the client would be the organization. If a lawyer seeking to speak with an employee or former employee has reason to believe that the employee or former employee is privy to communications protected by the attorney-client privilege, counsel must make every reasonable effort not to breach that privilege. Indeed, counsel is prohibited from asking directly or indirectly about any of those communications.

Mahoney et al. v. Tomco Manufacturing
Franklin Court of Appeal (2010)

Robert Mahoney and 12 other named plaintiffs filed a lawsuit on behalf of themselves and all other persons who purchased allegedly defective lawn mowers manufactured by Tomco Manufacturing. The motion for class certification has been granted, and notice has been given to all persons who purchased the allegedly defective lawn mowers during the applicable time period. The plaintiffs filed a motion seeking an order from the trial court preventing Tomco's lawyers or their representatives from speaking with any current or potential members of the class without the permission of the plaintiffs' counsel. At the time the plaintiffs filed this motion, the potential class members had been given six months to let the court know if they wished to be excluded from the class (typically referred to as "opting out").

Although courts are not bound by the Franklin Rules of Professional Conduct in matters other than attorney disciplinary proceedings, the trial court relied on FRPC 4.2 in making its determination. Rule 4.2 prohibits a lawyer from communicating "about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." This prohibition applies equally to agents of the lawyer or persons acting at the lawyer's behest. *See* FRPC 5.3. Based on Rule 4.2, the trial court issued an order prohibiting Tomco's counsel, or their agents or representatives, from communicating with any persons who purchased a Tomco lawn mower (model 350) during the period 2005–2007; that is, all persons who could have been members of the class.

While we find no error in the trial court's reliance on Rule 4.2, we do find the order to be overly broad. Rule 4.2 prohibits communication only with persons the lawyer "knows" to be represented by counsel. "Knowledge" is a high standard. There must be more than "reason to believe" or "assumption." There must be actual knowledge. Very clearly, the named members of the class are known by Tomco's lawyers to be represented by plaintiffs' counsel. Each of those named class members has an attorney-client relationship with the lawyers representing the class. Tomco's lawyers know about that relationship. However, the trial court's order is overly broad because it also prohibits Tomco's lawyers from communicating with *potential* members of the class. Until the end of the "opt out" period, only the named plaintiffs are considered to be represented by the class counsel.

There is no way that Tomco's lawyers could know whether the potential class members were represented by counsel. Indeed, those potential class members still had six months to decide whether to opt out of the class. To Tomco's lawyers' knowledge, these potential class members were not represented by a lawyer, nor had they entered into a lawyer-client relationship with plaintiffs' counsel.

We therefore hold that the trial court's order is modified to prohibit Tomco's counsel, or their agents or representatives, from engaging in unauthorized communications only with the named plaintiffs in the lawsuit. Communication with potential members of the class, without the permission of the class counsel, is not prohibited by this order. Once the time period for opting out is completed, Rule 4.2 would prohibit Tomco's lawyers from communicating, without opposing counsel's consent, with any class member who has not chosen to opt out of the litigation.

Reversed in part and modified.

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.

The questions presented are: (1) whether Plaintiff's counsel may interview, without consent, current and former employees Ron Adams ("RA"), Gus Bartholomew ("GB"), Agnes Corlew ("AC"), Elise Dunham ("ED"), or Penny Ellis (PE); and (2) whether we, as counsel for the Defendant, may communicate with any named plaintiffs or potential plaintiffs without the consent of Plaintiff's counsel. For the reasons discussed below, RA, GB, and AC are not covered under FRCP 4.2 but ED and PE are. Furthermore, communications with potential plaintiffs without consent is allowed if there is no actual knowledge, however it is prohibited for named plaintiffs.

I. Whether Plaintiff's counsel may interview current and former employees of Defendant without our consent.

Franklin Rule of Professional Conduct 4.2 provides the general rule that "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other or is authorized to do so by law." Comment 7 to FRPC
4.2 provides that represented organizations, such as Defendant, is is equally protected by FRCP 4.2. However, Ethics Opinion 2016-12 states that FRPC 4.2 only prohibits contact with current employees and does not prohibit contact with former employees. FRPC 5.3(c) applies FRPC 4.2 to the actions of an attorney's agents. Attorneys can be held responsible for an agent's unauthorized contacts if the lawyer: (1) orders the unauthorized contact; or (2) ratifies the unauthorized contact with specific knowledge of the unauthorized contact.

Ethics Opinion 2016-12 from the Franklin Board of Professional Conduct lays out a three prong approach for determining whether an attorney is prohibited from communicated with employees of Defendant. The first prong prohibits unauthorized communications "with a person in the organization who supervises, directs, or regularly consults with the organization's lawyers concerning the matter." This prong generally covers both the board of directors and top managerial figures, as well as those with the power to settle litigation in consultation with a lawyer. This is a functional test: the employee must actually consult with and have the power to direct attorneys regarding the matter. The second prong covers employees who have "authority to obligate the organization with respect to matter." An

agent's authority can be actual or apparent. Actual authority requires that the agent can bind Defendant to a settlement through express words or implication. Apparent authority arises where "it reasonably appears to an outsider that the agent has been given authority to bind the principle." The third prong prohibits unauthorized communications with agents or employees whose "act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." This is fact-focused analysis that prohibits unauthorized communications with the employee if: (1) the employee has acted in the matter on behalf of the organization; and (2) if not for the legal status of the organization, the employee would be directly named as a party in a lawsuit involving the matter."

1. Plaintiff is free to contact RA without consent.

As stated in the rule above, FRCP 4.2 is designed to prohibit unauthorized contact only with Defendant's current agents or employees. As RA is no longer employed by Defendant, Plaintiffs do not violate FRPC 4.2 by communicating with him without Defendant's consent.

2. Plaintiff is free to communicate with GB without consent, provided that Plaintiff does not inquire into areas covered by attorney-client privilege.

The first prong of FRPC 4.2 does not apply to GB because he is an executive administrative assistant. He is not a director. He does not have a vote in the organization's decisions. And while he may attend meetings with the attorneys, his role is exclusively to maintain records of the meetings. He lacks the authority to actively bind the organization to settlement or direct the organization's attorneys to act. Therefore, GB does not meet the first prong.

The second prong likewise fails because GB does not have the actual or apparent authority to "obligate the organization with respect to matter." During GB's interview, he stated that he did not have the authority to vote, direct the attorneys to act, or otherwise be able to use his words to settle the litigation. Furthermore, he lacks the apparent authority under the reasonableness standard. Objectively, it would not be reasonably apparent to an outsider that an executive assistant would have the authority to bind the organization to a settlement. Therefore, GB fails the second prong.

The third prong also fails because he does not meet the two part test as stated in the Ethics Opinion. GB had no acts or omissions in the creation of allegedly defective walkers. His actions were restricted to administrative responsibilities for the president of the organization. Nor would his acts as an administrative assistant lead him to be named as a party in the

lawsuit if not protected by the organizational structure. Therefore, the third prong likewise fails.

However, an important caveat is that Plaintiff's counsel may not inquire about matters covered under attorney-client privilege. GB was present in all meetings between the board and their attorneys. GB is unable to disclose the contents of those meetings, and Plaintiff's counsel is prohibited from asking GB about the meetings.

3. Plaintiff's counsel may communicate with AC without Defendant's consent because AC fails all three prongs.

The first prong fails because AC is not a director r other top managerial official. Similar to GB, AC does not have any say in the litigation and does not does not have a vote on the board of directors. Therefore, he is protected under the first prong of FRPC 4.2.

The second prong also fails because AC lacks the authority to obligate the organization regarding the matter. AC states that he is responsible solely for answering public relations questions. He has never even been in a meeting with the organization's attorneys. therefore, there is no actual or apparent authority to bind the organization. He has no authority to determine the organization's actions. Therefore, AC is not covered under the second prong.

The third prong likewise fails because AC's actions did not cause the underlying litigation. AC's duties are externally facing and did not include creating the alleged defective products. Therefore, AC is not protected under FRPC 4.2.

4. Plaintiff cannot communicate with ED without the Defendant's consent under the third prong of FRPC 4.2.

The third prong of FRPC 4.2 prohibits communications with unauthorized communications with the employee if: (1) the employee has acted in the matter on behalf of the organization; and (2) if not for the legal status of the organization, the employee would be directly named as a party in a lawsuit involving the matter. Here, ED was the plant manager in charge of ensuring quality control. She acts on behalf of Defendant to ensure that products meet up to their quality control. Because the underlying is a defective products suit, and because ED's actions or inactions could be the difference between the organization letting defective
products out into the market, it is reasonable to assume that ED would be named as a party if

she were not protected by the corporate structure. Therefore, ED meets the 2 part test in the third prong and Plaintiff cannot communicate with her without the organization's consent.

5. Pplaintiff cannot communicate with PE without authorzation under the first prong.

The first prong prohibits communications with directors and top managerial officials who have a direct vote in how the organization proceeds with the litigation. BEcause PE is a voting member of the board of directors, she meets the criterial and Plaintiff cannot communicate with her without the organization's consent.

II. Whether Defendant can communicate with named plaintiffs and potential plaintiff without consent of Plaintiff's attorneys.

The rule garnered from Mahoneyv.Tomco demonstrates that Defendant connot communicate with known Plaintiffs without the consent of the Plaintiff's attorneys. As stated by the Franklin COurt of Appeals, Defendant needs to have actual knowledge of the representation to be prohibited to contact Plaintiffs. Therefore, the Court held that FRPC 4.2 prohibits conduct with named Plaintiffs, but not potential plaintiffs until any opt-out period expires. The court reasoned that attorneys would have actual knowledge that the named plaintiff's were represented by counsel, but had no way to acquire actual knowledge of merely potential plaintiffs until they began communication.

With respect to the current issues, this case provides the guiding principles. Contact with named plaintiffs is prohibited without consent because actual knowledge of the representation exists. Communications with potential plaintiffs is permissible without permission until we gain actual knowledge of the representation.

III. Conclusion

For the following reasons,

communications with potential plaintiffs without consent is allowed if there is no actual knowledge, however it is prohibited for named plaintiffs.

February 2020

MPT-2

220

Applicant Number

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In re Eli Doran

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In re Eli Doran

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COOK AND STONE LLC
Attorneys at Law
872 N. Main Street
Evergreen Heights, Franklin 33837

MEMORANDUM

To: Examinee
From: Robert Cook
Date: February 25, 2020
Re: Eli Doran matter

We represent Carol Richards, the legal guardian of Eli Doran, her elderly uncle. Carol has regularly visited Eli since his wife, Janet, died four years ago. Eli is now 86 years old. Carol has observed Eli's gradual decline in cognitive abilities and, about two years ago, helped him move into an assisted living facility operated by Paula Daws.

Three months ago, Carol was shocked to learn that Eli and Paula Daws had married in January 2019 and that Eli had signed a new will on October 7, 2019, leaving his entire estate to Paula. Carol asked for our help. On her behalf, we instituted guardianship proceedings, and two months ago, the court found Eli incompetent as of that date and appointed Carol as his legal guardian. However, that determination does not resolve the issues of Eli's capacity to consent to marriage to Paula Daws more than a year ago or his testamentary capacity to execute a will four months ago.

We have filed, on Carol's behalf as Eli's guardian, two petitions: first, to annul the January 2019 marriage of Paula and Eli, and second, to set aside the October 2019 will. Yesterday the court held a hearing on both petitions. I attach excerpts of the hearing testimony. Instead of oral closing arguments, the court ordered the parties to submit written closing arguments.

Please prepare the written closing argument to be submitted to the court. Follow our office guidelines in drafting your argument. We will not have a chance for rebuttal arguments, so anticipate the arguments that Paula Daws will present and rebut them. Do not include a separate statement of facts, but be sure to incorporate the relevant facts into your argument.

COOK AND STONE LLC

OFFICE MEMORANDUM

To: All lawyers
From: Robert Cook
Date: September 5, 2017
Re: Guidelines for drafting written closing arguments

Written closing arguments are delivered to a judge. They need to address the applicable law as well as the facts. Be convincing and persuasive but avoid theatrics or overly emotional arguments. Judges respond negatively to exaggerated or unsubstantiated arguments. Convince the judge, as the trier of fact, that we have satisfied all the elements or requirements for each of our claims and have done so by meeting the required burden of proof. Organize the closing argument one claim or issue at a time.

For each claim or issue:

- Draft carefully crafted subject headings that illustrate the arguments they cover. The argument headings should succinctly summarize the reasons the judge should take the position we are advocating and should be a specific application of a rule of law to the facts of the case. For example, <u>improper</u>: Petitioner Is Entitled to Receive Spousal Support. <u>Proper</u>: Because Petitioner Is Unable to Work Due to a Permanent Disability, She Is Entitled to Receive Spousal Support.
- State the legal standards at issue.
- Marshal all the relevant evidence that has been admitted and show how the evidence satisfies the proof requirements for each claim.
- Demonstrate how the witnesses are credible and how those challenging our case are not credible.
- Do not summarize each witness's testimony but refer to the testimony and other evidence to show how they support your argument.

Be clear as to the relief requested. Finally, convince the judge that the relief requested is fair and just.

Excerpts from Hearing on February 24, 2020

Judge: This is a hearing on two matters I consolidated for the purpose of judicial economy. The petitions before me are first, to annul the January 15, 2019, marriage of Paula Daws and Eli Doran, and second, to set aside the will signed by Eli Doran on October 7, 2019.

In a previous ruling, I concluded that Eli Doran was incompetent as a matter of law and entered an order making his niece, Carol Richards, his legal guardian. A determination of incompetence is a legal finding that a person lacks the mental ability to understand problems and make decisions. Competence is similar to but not the same as capacity. The degree of capacity required for a legal transaction varies with the task at hand. Today I will hear evidence on whether Mr. Doran had the capacity to consent to marriage when he married Paula Daws in early 2019 and whether he had testamentary capacity when he signed the October 7, 2019 will.

Representing petitioner Carol Richards as guardian for Mr. Doran is Attorney Robert Cook. Representing respondent Paula Daws is Attorney Dee Andrews. The parties have stipulated that these items may be admitted into evidence: the January 15, 2019 marriage certificate, the October 7, 2019 will, and the will executed by Mr. Doran in 2016. As is the court's practice, I will require counsel to file written closing arguments. Proceed.

EXCERPTS OF TESTIMONY

DIRECT EXAMINATION OF CAROL RICHARDS BY ATTORNEY ROBERT COOK

Q: How do you know Eli Doran?

A: I am Eli's niece. Eli was married to my Aunt Janet, who died about four years ago.

Q: How often did you have contact with Eli?

A: After my aunt died, I regularly took Uncle Eli to the bank, to the barbershop, and on any other errands. We also went out for barbecue, his favorite, usually once a month. And about once a month, I took him to his church and then to dinner at my home. I also took him to his family doctor.

Q: What did you notice about Eli over time?

A: A bit over two years ago, I noticed that he asked questions that he should know the answers to—like where I worked, even though he knew I was retired, and whether I was married, even though he knew I was. He was not dressing well. He was forgetting to pay bills. I saw

them stacked up on the table. I suggested to Uncle Eli that I help him with his finances and that we find someone to help out in his home. He agreed.

Q: Did you find someone who could help?

A: Yes, I hired Vera Wilson, a friend from his church, to cook and clean for him. That worked well. But his checkbook was a mess. Some entries missing, some entered twice or three times. In January of 2018, I asked Dr. Ricci, his family doctor, about Eli.

Q: What did you learn from the doctor?

A: Dr. Ricci said that I should place Uncle Eli in an assisted living facility. I had heard that Paula Daws had a home that might work out, so I called her.

Q: Did you meet with Paula Daws?

A: Uncle Eli and I went to Paula's home. Two men lived there, and they seemed happy. Eli's monthly pension could pay the monthly fee for the facility. Eli moved in almost two years ago. We were able to sell his home quickly. He had paid off the mortgage years ago and put the proceeds of the sale into his savings account. His pension went directly into his checking account. We arranged for monthly direct payments from his checking account to Paula so that he did not have to worry about his finances.

Q: At the time Eli moved into Paula's home, were you his legal guardian?

A: No. I asked Uncle Eli if he wanted to live in a place where someone could help him, and he said yes. There was no court involved.

Q: After Eli moved in, did you continue to see him?

A: Yes. After he moved into Paula's, I brought him to my home for dinner almost every Sunday. He was becoming ever more forgetful. He frequently asked me what day it was, when I had gotten the new car, when I had bought the house. A few minutes later, he would ask the same questions all over again, numerous times during the visit. He often did not recognize my husband or children, though he had known them for years.

Q: When did you learn of the marriage between Eli Doran and Paula Daws?

A: One Sunday, about three months ago, I called Paula to say that I would take Uncle Eli to my home for Sunday dinner. She told me they had married.

Q: Did she say when they had married?

A: Yes, she said some time ago. In fact, I later found out it was a year ago, in January 2019.

Q: Did you discuss this matter with Paula?

A: Not for a while. I was shocked and worried. Eli had once asked Vera, his cleaning lady and cook, to marry him. So I wasn't sure what it meant that Eli and Paula were married. But I became quite worried when Paula told me that Eli had signed a will giving her everything.

Q: Why did that concern you?

A: For one thing, I knew that Eli had had a serious decline in his cognitive abilities and did not know what he was doing. Plus, I had seen Eli's will from 2016. After my aunt died, Eli saw his attorney and executed a will leaving his estate to his church. He loved that church. And I knew that now, having sold his house, he had some savings that could benefit the church. That is when I called you.

Q: Did Eli ever tell you that he and Paula were married?

A: Not at all.

CROSS-EXAMINATION OF CAROL RICHARDS BY ATTORNEY ANDREWS

Q: Since Eli moved into Paula's home, she has become more important to him than you, and you are jealous of Paula, aren't you?

A: No. I wanted him to be safe and cared for and was glad to find a place for him until I learned how Paula was taking advantage of him.

* * *

DIRECT EXAMINATION OF DR. ANITA BUSH BY ATTORNEY COOK

Q: Dr. Bush, what is your specialty?

A: I have a Ph.D. in clinical psychology and practice as a forensic clinical psychologist. I work with patients who have cognitive or mental disorders.

Q: How do you know Eli Doran?

A: Eli Doran was referred to me by his family doctor, who asked me to assess Eli for cognitive functioning. I first saw Eli on May 3, 2018. I interviewed Eli, who was then 85 years old. He did not understand why he was seeing me. He said he was healthy and needed no medicine, though I knew that he took several medications to address some chronic conditions. Eli was not oriented to time. He did not know what day it was or what year it was. He said he lived in his home with his wife, Janet, though I knew she had died two years earlier. Later in the interview, he said he was married to Vera Wilson. I asked who Vera was, and he said she took care of him. I later learned that Ms. Wilson cleaned and cooked for him and that they had never been married. It appeared he equated marriage with

being cared for. His niece Carol Richards came to the appointment with him. I asked who she was, and he replied that she was family and drove him places. I also relied on the medical records from Eli's family doctor, Dr. Leon Ricci.

Q: What did you learn from the medical records that you relied on?

A: Dr. Ricci was Eli's physician and had seen him regularly over 15 years. Dr. Ricci described Eli as a retired federal meat inspector, attentive to his medical conditions and usually accompanied by his wife until she died. Soon after her death, Dr. Ricci noticed that Eli was forgetting his medications. Then, about three years ago, Dr. Ricci had conducted the Mini–Mental State Exam, MMSE as we call it. The MMSE score for someone of Eli's age, education, and health should be at least 23, but Eli's score was 21, showing some cognitive deficiencies. About two years ago, Dr. Ricci learned from Carol Richards that Eli was becoming even more forgetful. Dr. Ricci diagnosed Eli as having dementia, type unspecified. Dr. Ricci recommended that Carol find a place where Eli could receive daily care and supervision of his medications.

Q: Did you conduct any assessments when you saw Eli on May 3, 2018?

A: I conducted several assessments that are recommended for testing intellectual capacity. I conducted the MMSE, and Eli's score had declined to 19, a significant drop from when Dr. Ricci tested him. I also evaluated him on the Independent Living Scale. I found that Eli could not pay a bill or verbalize a reasonable understanding of a will. He did not know what it meant to call 911 in an emergency or what a fire alarm was.

Q: What did you conclude from these assessments?

A: Eli suffered from multiple cognitive dysfunctions. These included memory impairment that was severe. He had a significant disturbance in executive functioning, including no ability to plan, problem-solve, reason, or think abstractly.

Q: Doctor, can you explain what that means in terms of Eli's ability to live and function?

A: Eli was incapable of any abstract thinking and incapable of ordinary judgment or reasoning. He lacked the ability to meet his most basic needs and provide for his safety and health. He could not live alone, drive, or manage his medicine or his money. Eli was significantly impaired in his ability to care for himself. He needed 24-hour supervision. I learned that he had moved into an assisted living home where he was cared for. That was a good idea.

Q: Did you continue to see him and assess him?

A: Yes, I saw Eli again on June 21, 2019. I continued to assess his mental state, asking where he lived. He again said that he lived with his wife, Janet. He said that his parents lived in Ohio and that he might visit them sometime, but in fact his parents had been deceased for many years. I asked who had brought him to the appointment, knowing that it was Carol. Eli said that she was his driver. He denied that he was related to her.

Q: How did his performance compare with the first visit?

A: His memory was worse. His cognitive abilities had declined. I repeated the MMSE and his score had dropped to 17, another significant drop.

Q: Did your conclusion about Eli change from the first visit?

A: The only change was that Eli's cognitive deficiencies were far worse. Eli has a permanent, progressive condition. It only gets worse.

Q: Does Eli have periods of being lucid?

A: I doubt that he has moments of lucidity but if he does, that is not the same as having the ability to exercise judgment.

Q: Doctor, considering Eli's condition in January 2019, do you have a professional opinion as to whether Eli possessed the mental capacity to consent to marriage?

A: I have an opinion. He did not possess the mental capacity to consent to marriage. He cannot think abstractly about anything or make any rational judgments. Eli equates marriage with being cared for.

Q: Do you have a professional opinion, considering Eli's condition on October 7, 2019, whether Eli had the capacity to execute a will?

A: He did not.

Q: In October 2019, did Eli know who his relatives were or who might have a claim on his estate?

A: No. He did not know who his niece was. He thought he lived with Janet, his deceased wife.

Q: Doctor, in October 2019, did Eli know the nature and extent of his property, his estate?

A: No.

CROSS-EXAMINATION OF DR. BUSH BY ATTORNEY ANDREWS

Q: Doctor, you did not see Eli on January 15, 2019, did you?

A: No. I saw him twice: May 3, 2018, and June 21, 2019.

Q: And you did not see him on October 7, 2019, did you?

A: No.

Q: You are not a medical doctor, are you?

A: No, I am not. His medical doctor sought my expertise to evaluate Eli's cognitive status.

Q: Doctor, under Franklin law, if an elderly person is in danger of being abused or exploited, you are required to call Franklin Elder Protective Services, are you not?

A: Yes.

Q: You did not make that call, you did not report Eli as in need, did you?

A: No. He was getting the care he needed.

* * *

DIRECT EXAMINATION OF PAULA DAWS BY ATTORNEY ANDREWS

Q: When did you meet Eli Doran?

A: Almost two years ago, Carol Richards and Eli Doran came to my home to see if Eli could live there. I had two other men living there; they needed assistance in their daily living.

Q: Other than providing a room, what other services do you offer?

A: I provide a very clean home, three meals a day, and laundry service, and I supervise their medications. Each man has a bedroom, and there is a TV room where they eat, watch TV, and socialize.

Q: What did Eli and Carol tell you when you met with them?

A: Carol did most of the talking and said that Eli's doctor wanted him to live somewhere where he would be sure to take his medicine. We discussed the fee, and Carol said he could afford that. Carol and Eli arranged for direct payment to me each month, and he moved in.

Q: Tell us about the marriage.

A: Eli was always very pleasant and kind to me. One night as I brought his laundry to him, he said, "You take good care of me. We should get married." I laughed it off. But a few days later, he took my hand and said, "We should get married." I asked if he was serious, and he said, "You are nice. I love you." The next day, I called my minister and got a license, and we were married on January 15, 2019.

Q: And tell us about the will.

A: One day, I said, "Eli, you have a lot of stuff in your room," and he said, "When I am gone, I want you to have it all." Again, I laughed it off, but for several days, he said, "I want you to have what I have." I asked him, "Do you want to make a will?" and he said, "Yes." I went online and found a will kit for him, but he said, "You do it," so I filled it in. My daughter and son-in-law witnessed Eli signing it—two witnesses as required!

Q: Did you force Eli to make this new will?

A: Of course not. I have had several men living in my home, and none of them ever signed a will while they lived with me. Eli kept saying, "I want you to have what I have—you are so kind."

CROSS-EXAMINATION OF PAULA DAWS BY ATTORNEY COOK

Q: Ms. Daws, isn't it true that when Carol Richards first met with you, she told you that Eli had had serious memory loss and could no longer make his own decisions?

A: Well, I don't remember that she said he could not make his own decisions, but she did say that he could not live on his own.

Q: You did not go to Eli's minister for the wedding, did you?

A: I did not know who his minister was.

Q: You did not invite his niece, Carol Richards, to the wedding, did you?

A: No.

Q: In fact, you did not tell Carol or anyone about the marriage until very recently, correct?

A: Yes, that is correct. Eli is a private man and doesn't like a lot of fuss about things.

Q: The will that you filled out for Eli on October 7, 2019, provided that all of Eli's estate was to go to you, isn't that right?

A: Yes. Like I said, Eli said he wanted me to have everything.

Q: You did not take Eli to his lawyer to have a new will drafted, did you?

A: I did not know he had a lawyer.

Q: Ms. Daws, you have quite a bit of credit card debt, don't you? About $15,000 or so?

A: Yes, but so does everyone.

* * *

DIRECT EXAMINATION OF REV. JOSEPH SIMMS BY ATTORNEY ANDREWS

Q: Rev. Simms, how did you meet Eli Doran?

A: Paula Daws, a longtime member of my congregation, told me that she had met a gentleman who brought her much happiness and that she was in love. She said that she and Eli, the gentleman, wanted to marry. I met them on Wednesday in the church parlor. Eli seemed to be very pleasant and very much in love. I told them I would marry them.

Q: Explain what you mean.

A: After a few pleasantries, I asked Eli how they met, and he said that he was living at Paula's and that she was taking good care of him and he loved her. I asked why they wanted to marry. He said that he loved her and the way she cared for him. Later that week I married them with my wife and my secretary as witnesses.

Q: Would you have married them if you questioned Eli's mental capacity?

A: Of course not. Eli seemed to be very aware that he was getting married. Older people need companionship, and marriage can provide that.

CROSS-EXAMINATION OF REV. JOSEPH SIMMS BY ATTORNEY COOK

Q: Rev. Simms, you have not been trained to diagnose cognitive functioning, have you?

A: No, but I have counseled many folks and am aware of conditions associated with aging. Eli seemed to know what he was doing as well as many others I have married.

Q: You did not conduct any assessments to determine Eli's cognitive abilities, did you?

A: No. I am not a doctor.

Q: The extent of your contact with Eli was these two visits in January of 2019, correct?

A: Yes.

* * *

DIRECT EXAMINATION OF MARY DAWS JOHNSON BY ATTORNEY ANDREWS

Q: Were you present when Eli Doran signed his will?

A: Yes, I was.

Q: Was he aware of what he was doing?

A: I said, "Eli, do you want my mother to have your stuff when you die?" and he said, "Yes, she takes good care of me."

Q: What, if anything, have you observed about your mother since her marriage to Eli?

A: She is very happy. She loves taking care of him.

CROSS-EXAMINATION OF MARY DAWS JOHNSON BY ATTORNEY COOK

Q: If this will is valid and something were to happen to your mother after Eli's death, you would inherit what your mother inherited from Eli, right?

A: I guess so. I don't really understand this legal stuff.

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In re the Estate of Carla Mason Green
Franklin Court of Appeal (2014)

Leslie Beck, the personal representative of the estate of Carla Mason Green (Mason), appeals from a trial court order denying her petition to annul the marriage of her sister Carla Mason and Michael Green.

On October 10, 2012, Carla Mason, age 50, was in the hospital with stage-IV cancer. That evening Mason married Michael Green. The only issue raised by Beck is whether Mason lacked the capacity to consent to the marriage because of the medications she was taking and their effect on her ability to make decisions.

A marriage that complies with the licensing and officiating requirements of the Franklin Uniform Marriage and Dissolution Act (FUMDA) is presumptively valid. This presumption comports with strong public policy favoring the validity of marriage. It can be overcome only with clear and convincing evidence. This is a more demanding standard than the standard for a preponderance of the evidence because the right to marry is constitutionally protected. Evidence is clear and convincing in a case such as this if it establishes that it is substantially more likely than not that a party lacked capacity to consent to marriage.

The capacity to consent to marriage, a requirement of a valid marriage, is defined as the ability to understand the nature, effect, and consequences of marriage and its duties and responsibilities. Each party to the marriage must freely intend to enter the marital relationship and understand what marriage is. Capacity to consent is measured at the time of the marriage.

The trial court appropriately ruled that the petitioner was required to present clear and convincing evidence. After a hearing, the trial court concluded that petitioner Beck had failed to present clear and convincing evidence that Mason did not possess the capacity to consent to the marriage. The reviewing court will overturn the trial court's conclusions only if they are clearly erroneous. A summary of the testimony follows.

For several weeks, Mason, who had terminal cancer, had taken medications to control the pain from the cancer. On the morning of October 10, Mason and Leslie Beck met with Mason's oncologist in Mason's hospital room to discuss terminating treatment and beginning hospice care in her home. Mason was alert; she participated in the discussion and made the decision to terminate treatment.

On the evening of October 10, respondent Michael Green arrived at the hospital, along with a minister, who had a marriage license. Mason signed the license application, and the minister married Mason and Green, witnessed by a nurse and a medical assistant. These steps met the requirements of FUMDA. On October 11, Mason went home under hospice care. On October 12, Mason executed a Power of Attorney (POA) giving her sister, Leslie Beck, authority to make medical decisions for her. Green regularly visited Mason while she was in the hospital and while she was at home under hospice care. On November 1, Mason died.

Mason's oncologist testified that the prescribed pain medication had a high probability of creating mental changes in any patient. These changes could interfere with the patient's thought processes, including the decision to marry. On cross-examination, he admitted that while confusion can arise in patients receiving these medications, patients can and do have periods of lucidity and alertness. The oncologist also testified that on the morning of October 10, when he met with Mason and her sister to discuss transfer to hospice, he believed that Mason had the capacity to make decisions about her medical care and treatment.

The nurse on duty at the hospital on the evening of October 10 testified that Mason was "oriented to person, place, and time and that her mood was appropriate to the situation." The nurse testified that Mason's mood brightened when Green arrived and that Mason asked the nurse to witness the marriage.

The hospice nurse present when Mason executed the POA on October 12, two days after the wedding, testified that Mason was "alert and oriented." Mason told the hospice nurse, "I want Leslie to make decisions so that I can die in peace." Mason then signed the POA without any objection from Beck as to Mason's capacity to consent to the POA.

To support her petition, Beck relies on *In re Marriage of Simon* (Fr. Ct. App. 2005), in which the court annulled the marriage of Henry and Nancy Simon after Henry married Nancy while she lived in a residential facility. Beck reads the *Simon* case as concluding that Nancy's medication made her unable to consent to marriage. However, critical to the court's decision in the *Simon* case was not the medication but the fact that three weeks prior to the marriage, Nancy suffered the fourth of a series of strokes. Her doctors determined that the strokes were disabling and that she was incapable of receiving or evaluating information and should not make any decisions for herself or others. The doctors testified to this at trial.

Unlike in *Simon*, the evidence here supported the trial court's finding that Mason had the capacity to make decisions such as to consent to marriage. Mason's oncologist believed she had the capacity to consent to stopping medical treatment and going home. Her sister, the petitioner here, apparently believed that Mason had the capacity to make decisions when Mason signed the POA. The trial court's findings were not erroneous.

Also, in the *Simon* case, Nancy and Henry knew each other for only a few weeks prior to Nancy's fourth stroke. Henry was a medical technician employed at the facility where Nancy lived; he administered a few treatments to Nancy before her final stroke when the doctors ceased these treatments. Nancy and Henry had no prior romantic or other relationship. Henry arranged for them to marry after Nancy's fourth stroke and just two weeks before Nancy's death. The court found that not only was Nancy incapable of consenting to marriage but at the time of the marriage, she had no understanding of what marriage is.

In contrast, Mason and Green had been engaged to be married for two years. They had planned for marriage and a life together. They had discussed where they would live in retirement. Mason broke off the engagement when Green was transferred to another town, but they stayed in contact. Later, Mason contacted Green for support when she learned of the cancer. The evidence supported the court's finding that Mason understood what marriage was and what it involved.

Petitioner failed to present clear and convincing evidence that Mason lacked the capacity to consent to marriage. Therefore, the presumption that the marriage is valid is not rebutted.

Affirmed.

In re the Estate of Dade
Franklin Court of Appeal (2015)

Petitioners Jill and Samuel Dade appeal from the trial court's decision denying their petition to set aside the 2010 codicil to Matthew Dade's will. As claimants, the Dades had the burden of proving that Matthew lacked testamentary capacity when he executed the codicil.

In 1999, Matthew executed a will leaving his estate to his adult children, the petitioners. In 2010, he drafted a codicil to his will in which he provided bequests of $100,000 each to his nephew William Speck, his niece Ann Murphy, and his housekeeper Tanya Hall. The codicil did not disturb the gift in the will of the "rest and residue of the estate" to Samuel and Jill. Matthew died in 2012. The estate has been valued at $1,000,000; the three gifts created in the codicil were the only specific bequests. The Dades contended that Matthew lacked testamentary capacity when he executed the 2010 codicil due to a long history of alcoholism. They asked the court to set the codicil aside and probate only the 1999 will.

The law requires that the testator have testamentary capacity. That means that the testator must, at the time of executing the will, be capable of knowing the nature of the act he is about to perform, the nature and extent of his property, the natural objects of his bounty, and his relation to them. A will executed by a testator who lacks testamentary capacity is void. The time for measuring testamentary capacity is the time when the instrument, in this case the codicil, is executed. A party who seeks to prove the lack of testamentary capacity must do so by a preponderance of the evidence.

Jill and Samuel each testified at trial that Matthew had a history of alcoholism, beginning in 2000, two years after his wife (their mother) died. They testified that Matthew had a noticeable decline in cognitive ability, a loss of short-term memory exhibited by the inability to recall names, places, or events during periods of inebriation as well as abstinence from alcohol; that during the last 10 years their father often spoke to their mother as though she was present in the home, even long after she had died; and that their father forgot to pay bills and sometimes forgot to keep appointments such as for the doctor or oil changes for the car.

Dr. Rosemary Cooper testified that in 2005, she had diagnosed Matthew with alcoholism, primarily based on his report that for weeks at a time he would drink from noon until he fell asleep. She testified that Matthew reported that he had these drinking periods around holidays and his wedding anniversary. At other times, he did not drink at all. On cross-examination, Dr. Cooper

stated that she was Matthew's family doctor and was not an expert in cognitive decline. Dr. Cooper also testified that she did not question Matthew's report of his long periods of sobriety.

Murphy and Speck did not dispute that Matthew was an alcoholic, but each testified to visits with their uncle when he was quite lucid. They each testified that they often visited with him, separately, between 1999 and 2012. During those visits, Matthew discussed his finances and correctly stated his worth, identifying the extent and value of his investments. Murphy testified that Matthew regularly provided updates about Jill and Samuel, and their spouses and children. Speck testified that on several occasions between 2005 and 2012, Matthew expressed the need to reward Hall, his housekeeper, for her years of service.

Matthew's lawyer, who drafted both the 1999 will and the 2010 codicil, is deceased.

The Dades argued that the diagnosis of alcoholism was sufficient proof of Matthew's legal incompetence and inability to execute the codicil. This argument is unpersuasive. In *In re the Estate of Tarr* (Fr. Sup. Ct. 2011), the court held that a determination of legal incompetence alone was not sufficient to find that the testator lacked testamentary capacity. A determination of incompetence is a legal finding that a person lacks the mental ability to understand problems and make decisions. Competence is similar to but not the same as capacity. The degree of capacity required for a legal transaction varies with the task at hand. Thus, even if the testator was legally incompetent, the petitioner still had to prove that the testator lacked testamentary capacity.

Assessments of credibility are critical to determinations of testamentary capacity; we will defer to trial court determinations of credibility. The trial court made a credibility determination that because Samuel and Jill Dade were interested in protecting the original gift to them, their testimony about their father's ability when he drafted the codicil was colored by their interest.

Here, the trial court did not err in finding that the Dades failed to show that Matthew did not know the natural objects of his bounty, that is, those individuals likely to receive a portion of his estate based on their relationship to him. While adding the new bequests, Matthew did not disturb the provision giving the majority of the estate to his children. The evidence also showed that Matthew was informed about his children and their families and aware of the value of his estate. The court found that even if Matthew was periodically disabled due to alcoholism, Matthew told his physician that he had long periods of sobriety between 1999 and 2010, and the physician's testimony was credible. The trial court properly found that the Dades failed to meet their burden of proof.

Affirmed.

In re Eli Doran

Franklin Probate Court

Closing Arguments:

COMES NOW, Petitioner, Carol Richards, legal guardian of Eli Doran, by and through her represented counsel in support of her petitions to annul the January 2019 marriage of Eli Doran and Paula Daws, and to set aside Eli Droan's October 2019 will, states the following:

I. Eli Doran did not have the requisite capacity to consent to marriage when he married Paula Daws in January, 2019; and therefore, that marriage should be annulled as a matter of law.

A marriage that complies with the licensing and officiating requirements of the Franklin Uniform Marriage and Dissolution Act is presumptively valid. *In re the Estate of Carla Mason Green*, Frankling Ct. of Appeals, 2014, at 11. This presumption can only be overcome with clear and convincing evidence. Evidence is clear and convincing in a case such as this if it establishes that is substantially more likely than not that a party lacked capacity to consent to marriage.The capacity to consent to marriage, a requirement of a valid marriage, is defined as the ability to understand the nature, effect and consequences of marriages and its duties and responsibilities. Each party must freely intend to enter the marital relationship and understand what marriage is. Capacity to consent is measured at the time of the marriage.

Petition has demonstrated by clear and convincing evidence that Eli Doran's cognitive decline had become so severe prior to the marriage that Eli could not have had the capacity to consent. Dr. Anita Bush, PhD., forensic clinical psychologist. Interviewed Eli on May 3, 2018. Eli was 85 years old. He did not understand why he was seeing Dr. Bush. pg. 5. Did not know what day it was or what year it was. He said he lived in his home with his wife, Janet, who had died two years earlier. Later in that same interview, Eli said he was married to his cook and cleaning lady, Vera Wilson. Two years prior to Dr. Anita's interview, Dr. Ricci, Eli's physician of 15 years, diagnosed Eli with dementia.

In Dr. Anita's professional opinion in her capacity as an expert medical witness, Eli equated marriage with being cared for, and no longer understood the legal significance of a formal

marriage contract. Eli suffered from multiple cognative disfunctions including severe memory impairment, and a significant disturbance in executive functioning which included a complete lack of ability to plan, problem-solve, reason, or think abstractly.

Respondent will likely argue that Eli was lucid at the time of the marriage and since capacity is measured on the day of marriage then the marriage was valid. For example, in *In re the Estate of Marla Green*, a patient was found to have the requisite capacity to marry because she experienced periods of lucidity and her cognitive decline was primarily the result of medications. Patients on medications in this case can and do have periods of lucidity and alertness. The patient in question was oriented to person, place and time, and that her mood was appropriate to the situation. However, the facts of *Marla Green* differ significanty from Eli's condition. Eli had been experiencing a severe and steady cognitive decline over the past two years prior to the marriage from his dementia. Eli's situation is much more analogous to *In re Marriage of Simon* (Fr. Ct. App. 2005), where the court annulled a marriage between a patient who lived in a residential assisted living facility and her medical technician. The patient had suffered a series of debilitating strokes prior to the marriage, and the parties in *Simon* only knew each other for a few weeks prior to the marriage. They had no prior romantic relationship and the patient had no understanding of what marriage was. As in *Simon,* Eli and Paula had only known each other a short time and had no prior romantic relationship. Further, Paula, like the medical tech in *Simon* was treating Eli and was arguably in a position of power / undue influence. Eli could not take care of himself or meet his basic needs - Paula was aware of this when Carol described Eli's condition in arranging the live in care.

Lastly, when Eli proposed to Paula, he said "You take good care oh me. We should get married." Paula laughed off. When Rev. Joseph Simms asked Eli of why we wanted to marry, Eli said "She was taking good care of him and he loved her. He said that he loved the way she cared for him. Simms was not trained to diagnose cognitive functioning and did not conduct any assessments to determine Eli's cognitive abilities. Only contact with Eli was the short office visit and the marriage ceremony. Even if Eli did have brief moments of lucidity, which is highly doubtful, those would not be the same as having the ability to exercise judgment. In Dr. Bush's professional opinion, Eli did not have the legal capacity to marry. He equated marriage with care and did not truly understand the significance. Paula was told that Eli could not live on his own; she did not go to Eli's minister for the wedding or even bother to inquire / contact Eli's minister; she did not invite Carol Richard, Eli's niece; and did not tell

anyone about the marriage until very recently. Paula knew, as the Court should find, that Eli did not have the requisite capacity to marry and that such a marriage should be annulled. Therefore, the Court should follow Dr. Anita's and Dr. Ricci's medical findings, consider the suspicious circumstances as in *Simon* and find that Eli lacked the requisite capacity to marry, and the Court should annual the marriage.

II. Eli Doran did not have the requisite testatmentary capacity to properly execute the will dated October 7, 2019; and therefore, that will is void and should be set aside.

The law requires that the testator have testatmentary capacity which means that the testator, at the time of the will, must be capabile of knowing the nature of the act his is about to perform, the nature and extend of his property, the natural objects of his bounty, and his relation to them. *In re the Estate of Dade*, Fr. Ct. of App., 2015, at 14. A will executed without testamentary capacity is void. *Id.* The time for measuring testatmentary capacity is when the instrument is executed. *Id.* A party who seeks to prove the lack of testamentary capacity
must do so by a preponderance of the evidence. The testator in this case had a noticeable decline in cognitive ability, including speaking to his deceased spouse as if she were
alive. *Id.* However, this testator had long period of lucidity where he was able to discuss his finances and correctly state the worth, the extent, and the value of his investments. *Id. In re the Estate of Tarr* (Fr. Sup. Ct. 2011), the court held that a determination of legal incompetence alone was not sufficient to find that the testator lacked testatmentary capacity. Even if the testator was legally incompetent, the petitioner still had to prove that the testator lacked capacity. Assessments of credibility are *crucial* to to determinations of capacity. The Court also considers whether those who will benefit from a testmentary change as part of its credibility determination. *Id.*

Dr. Bush found that Eli could not verbalize a reasonable understanding of a will. He did not know what it mean it to call 911 or what a fire alarm was. Eli suffered from multiple cognative disfunctions including severe memory impairment, and a significant disturbance in executive functioning which included a complete lack of ability to plan, problem-solve, reason, or think abstractly. He lacked the ability to meet his most basic needs and provide for his health and safety. Again, two years prior in 2016, Dr. Ricci, Eli's physician of 15 years, diagnosed Eli with dementia. When Dr. Bush saw Eli again on June 21, 2019 where he again said that he lived with his wife, Janet. He expected his long deceased parents to visit him. He also denied that Carol, his niece, was related to him. His cognitive abilities had further declined. In Dr.

Bush's professional opinion, Eli did not have the testamentary capacity needed to execute a valid will. Eli did not know the nature and extent of his property or his estate.

Lastly, Paula, her daughter, and her son-in-law, the parties claiming that Eli did have sufficient testamentary capacity all stand to materially benefit if this fraudulent will is upheld. In Eli's previous will from 2016 had left his estate to his church. Eli loved that church. pg. 5. In this new will, all of Eli's estate was left to Paula. In her testimony, Paula admitted that when Eli told her about his "intent to change his will," she laughed it off, just as she had done with his earlier marriage proposal. When pressed further about his testatmentary gift, Eli only repeated the phrase, "I want you to have what I have." Eli did not know the extent of his property; he did not know about his savings, his pension, the funds from selling his home, or his investments. This fraudulent will was prepared by Paula who filled out an online will kit, and her daughter and son-in-law were the only witnesses. She did not take the will to Eli's lawyer or even bother to inquire if Eli had a lawyer; additionally, Paula has ~$15,000 in credit card debt which is further evidence of her pecuniary interest in changing Eli's will. Additionally, Mary Daws Johnson - Paula's Daughter, if the will is valid, she will stand to inherit Eli's estate from her mother's estate.

Eli's cognitive decline was so severe that he could not have had capacity. The Court should find that this will is void for lack of Eli's testamentary capacity.

MULTISTATE ESSAY EXAMINATION DIRECTIONS

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

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

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

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

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

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

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

February 2020
MEE Question 1

On February 1, Construction Company borrowed $500,000 from Bank. Construction Company's president, on behalf of the company, contemporaneously signed and delivered to Bank a security agreement that included the following language:

> To secure the repayment obligation of Construction Company to Bank, Construction Company hereby grants Bank a security interest in all rights of Construction Company to be paid with respect to any contract for the construction or repair of bridges or roads, whether such right exists now or arises in the future.

On March 1, Construction Company entered into a contract with a developer to build roads for a housing development. The contract required the developer to pay $450,000 to Construction Company upon completion of the road-building project.

On September 1, Construction Company defaulted on its obligations to Bank under the loan and the security agreement. Bank immediately sent a letter to the developer. The letter, which was signed on behalf of Bank by its president, read as follows: "In accordance with a security interest granted to us by Construction Company, all payments under your contract with Construction Company should be made to us at [address of Bank]."

This letter was received by the developer on September 3.

On October 1, Construction Company completed its project for the developer and sent an invoice to the developer demanding payment. The developer's treasurer decided to pay Construction Company, and not Bank, because the developer had a contract with Construction Company but not with Bank. The developer's treasurer promptly sent a check for $450,000 to Construction Company, which deposited the check and used the proceeds to pay its employees and subcontractors.

A few days later, when Bank learned that Construction Company had completed the road- building project, Bank sent an email to the developer demanding that the developer pay Bank the $450,000 contract price. Attached to the email was a copy of the security agreement signed by Construction Company and a copy of Bank's September 1 letter to the developer directing it to make all contract payments to Bank. The developer responded that it had already paid Construction Company and was therefore discharged from its payment obligation under the road- building contract. The developer also stated that the security agreement executed on February 1 could not have encumbered Construction Company's right to be paid under the road-building contract because that contract did not exist until March 1.

1. Did Bank have a security interest in Construction Company's right to be paid $450,000 by the developer for the road-building project? Explain.

2. Was the developer discharged from its payment obligation under the road-building contract by virtue of its having paid Construction Company? Explain.

1. Whether the Bank had an attached security interest under the security agreement.

Article 9 governs secured transactions and will treat an agreement as a security agreement regarding its substance and not necessarily its form. A security interest must attach to collateral to be enforceable. For the attachment of a security interest, there must be the following elements (1) the creditor has given value to the debtor, (2) the debtor has rights in the collateral, and (3) there is a valid security agreement authenticated by the debtor. A security agreement needs to be in retrievable and substantially permanent form, and must describe the collateral with reasonable particularity. Broad statements alleging to give the creditor an interest in "all assets" or "all rights" is not sufficient for a valid security agreement.

Applied to the facts here, (1) the construction company did receive $500,000 value from the Bank, and it does appear the Construction Company has rights in the accounts in which the developer owes the Construction Company money. However, the security agreement, though apparently authenticated due to it being delivered by the Construciton Company, and it also has a valid description of collateral. Even though it says "all rights", this is modified by "to be paid with respect to any contract for the construction..." which clearly narrows it down to an account. Therefore, the security interest has attached.

The second issue is whether this can attach even though the account is after acquired collateral and it is an assignment of an account due in the future. A security interest may cover after acquired collateral if it expressly states. An account is recognized as a characterization of collateral under Article 9. An assignment of an account is also governed under Article 9 if it is a single transfer and not simply for collection.

Applied to the facts here, the account is a single assignment and not for collection, and the security agreement specifically states if that right "exists now or arises in the future." Therefore, the security interest does attach to the account event though it is after acquired.

2. Whether the developer is discharged by virtue of having paid Construction Company.

The purpose of Article 9 is to give a creditor a method to recover for the event that the debtor defaults on its obligation. Article 9 does not define a default, but this is defined by the party's contract. Upon default, a creditor that has received the assignment of an account can send notice to the account debtor that the original account owner has assigned the account, is in default, and may only discharge its obligation to the original account debtor by paying the

account assignee (the creditor). Once notice is received, the account debtor can only discharge the obligation by baying the account assignee.

Applied to the facts, Construction Company defaulted on its obligations to Bank, the creditor, on September 1st. The Bank sent a letter to the developer, who previously owed the Construction Company on account for the construction services, regarding such assignment/security interest in the account and the account debtor's obligation to pay the Bank. Therefore, the developer could not discharge its original obligation to the Construction Company, because Construction company had made a valid assignment of the account to the bank, defaulted, and gave the Bank the right to demand the payment instead with proper notice. Therefore, the developer did not discharge its obligation and is now still under the obligation to pay the Bank the full amount of $450,000 owed under the assigned account.

February 2020
MEE Question 2

During a snowstorm, a woman and a man were driving in opposite directions on a state highway when their cars collided head-on in the middle of the road. At the moment of impact, the locking mechanism on the woman's seat belt malfunctioned, and the woman was thrown from her car and seriously injured.

The woman was transported from the scene of the accident in an ambulance owned and operated by AmCo, a private ambulance company. On the way to the hospital, the ambulance driver lost control of the ambulance, which skidded off the highway, causing further injury to the woman and exacerbating the injuries she had suffered in the original accident.

Six months later, the woman filed a tort action in federal district court against the man, AmCo, and CarCo, the manufacturer of the woman's car. The complaint alleges that each defendant is liable for all or part of the woman's injuries. In particular, the complaint alleges that the man caused the original accident by swerving across the median of the highway, that AmCo's driver was driving too fast for the weather and road conditions, and that CarCo is liable because the seat belt in the woman's car was defectively manufactured. The woman's complaint properly invoked the court's diversity jurisdiction, and each defendant was properly served with process. Each defendant filed an answer to the complaint and denied liability.

Seven days after it served its answer, CarCo served a summons and complaint on LockCo, the company that manufactured and supplied the seat belt locking mechanism that CarCo installed in the woman's car. CarCo seeks to join LockCo as a party to the woman's action, alleging that LockCo must indemnify CarCo if the seat belt locking mechanism is found to have been defective and CarCo is held liable to the woman.

1. Under the Federal Rules of Civil Procedure, did the woman properly join the man, AmCo, and CarCo as defendants in a single action? Explain.

2. Under the Federal Rules of Civil Procedure, did CarCo properly join LockCo as a party to the woman's action against CarCo? Explain.

1(a). The issue is whether the man and CarCo can be properly joined as defendants in a single action.

Generally, joinder of parties is permissible when the action arises out of the same facts or activities. Joinder is necessary if the defendant's individual liability may be difficult to separate.

In this case, the woman was in a car accident with the man. The woman was thrown out of her car due to a faulty seatbelt in a car manufactured by CarCo. Because the action involves the same accident, and therefore will involve much of the same evidence, it is proper to join these two defendants. Additionally, the -extent of the injuries caused by the man and those caused by the faulty seatbelt may be difficult to assign to an individual an defendant because the accident and the seatbelt malfunction were both the cause of the woman's injuries in the accident.

Therefore, the woman properly joined the man and CarCo as defendants in a single action because the action arises out of the same accident and the liability of each for the woman's injuries is difficult to assign to the individual defendants.

1(b). The issue is whether the AmCo can be properly joined as defendants in a single action.

Generally, joinder of parties is permissible when the action arises out of the same facts or activities. In the interest of efficiency, a court may permit joinder of parties if the evidence necessary to prove or disprove liability for one defendant is also necessary to prove or disprove liability for another defendant.

In this case, AmCo is being sued for negligently driving and skidding off the road while the woman was in the ambulance. This was immediately after the car accident between the woman and the man. This does not involve all the same facts as the those between the man, woman, and CarCo, but the same proof of the injuries from the original accident is necessary in this claim to show what was caused by the ambulance accident as separate from the accident between the man and the woman.

Therefore, while it is not necessary to join AmCo in the action, it is permissible because many of the same facts necessary to prove liability will be required to be shown in the case against AmCo.

2. The issue is whether LockCo can be properly joined as a third party impleader.

Generally, impleader applies when a defendant claims that a third party is liable for all or part of what the defendant is potentially liable for.

In this case, CarCo is being sued by the woman because the locking mechanism on the seatbelt malfunction. The car was manufactured by CarCo. LockCo is the company that manufactured and supplied the seat belt locking mechanism in the car. LockCo is potentially liable for the malfunction of the seatbelt and so, is properly joined in the lawsuit.

Therefore, CarCo properly joined LockCo as a party to the woman's action against CarCo because LockCo may be liable for all of part of CarCo's liability.

February 2020
MEE Question 3

Linda owned and operated a clothing store as a sole proprietorship. To increase sales, she decided to offer a same-day delivery service to local customers. Rather than hiring an employee to make deliveries, she decided to use a driver who was an independent contractor to make deliveries on an as-needed basis. Because she did not know anyone who could do this work, she searched a website that listed local delivery drivers.

The website included the drivers' names, their hourly rates, and customer reviews of their work. A driver on the list with the lowest hourly rate by a wide margin used his own delivery van for making deliveries. But 40 recent customer reviews of this driver on a scale of 1 (low) to 5 (high) rated him as 1.5, citing specific instances of misbehavior, untrustworthiness, and bad driving. The website also reported that in the last couple of years, the driver had been sued three times for negligent driving and had been found liable in each case. Nonetheless, Linda decided to use this driver to make deliveries because of his inexpensive hourly rate and because he had his own delivery van.

When she hired the driver, Linda told him that, when making deliveries for the store, he would have to place self-sticking, removable signs advertising the store on both sides of his delivery van. He agreed, but because such signs ranged in price from $100 to $500 per pair, he told Linda that she would have to purchase them for him to use. Because she was too busy to do that, Linda asked him to purchase the signs but not to spend more than $300 for the pair when doing so. Linda gave the driver one of the store's cards, and as a means of identifying the driver as acting for the store, she wrote on the back, "This is my agent to purchase signs for my store."

The driver then went to a local sign shop, showed the shop owner the business card that Linda had given him (including her handwritten note on the back), and purchased a pair of custom- made signs for $450 on credit. Because the signs were custom-made, they were not returnable or refundable. When the completed signs were delivered to Linda, she refused to take possession of them or pay the sign shop for them because their cost exceeded the amount she had told the driver to spend by $150. The driver then made two smaller signs with the store name on them and, with Linda's approval, put them on his van when making deliveries.

Three weeks ago, Linda called a customer and told her, "My driver is on his way to make a delivery to you in a van with the store's name on its side." The customer kept watch at her window, and when she saw the van with the store's signs on it, she went out to the driveway through her garage. As she started to walk toward the van, the driver negligently hit the accelerator pedal, causing the van to hit the customer, who sustained substantial injuries.

Assume that there was an enforceable contract to buy the signs from the sign shop, that the driver's negligence proximately caused the customer's injuries, and that the driver was acting as Linda's independent-contractor agent.

1. Is Linda liable to the sign shop for the purchase price of the signs? Explain.

2. Is the driver liable to the sign shop for the purchase price of the signs? Explain.

3. Even though the driver was an independent contractor, is Linda vicariously liable to the customer for the injuries resulting from the driver's negligence? Explain.

4. Is Linda directly liable to the customer for the injuries the customer sustained? Explain.

1. Yes Linda is liable to the sign shop.

At issue is whether driver had apparent authority to bind linda to the contract.

A principal is liable in contract that his/her agent has entered into on here behalf when the agent has actual or apparent authority. Actual authority is when principal gives express authority to the agent to do something on behalf of the principal. Apparent authority is when the pricipal holds out to a third party that the agent has authority to contract.

Here, Driver had actual authority to buy the signs for up to 350 dollars. However, Sign shop owner did not know this. Driver presented him with a business card and a note that Driver was to purchase the signs this would give the Driver apparent authority. Because Sign shop owner did not know that Driver could only purchase the 350 dollar signs Linda will be liable for the full contract purchase.

2. Driver is most not likely liable to sign shop.

At issue is whether agent is liable to the contract entered into on behalf of the principal.

An agent is typically not liable in contract when entered into on behalf of the principal.
However, an agent can be liable if the principal is undisclosed.

Here, principal is disclosed or at least partially disclosed. Because of the disclosure agent will not be liable even though he was only supposed to contract for 350 and not the 450. He was still conducting business on behalf of principal and had apparent authority.

3. Yes linda could be vicariously liable.

At issue is whether Linda can be held vicariously liable for the acts of an independent contractor.

Typically, the principal cannot be held vicariously liable for the acts of the independent contractor unless they are dangerous or the principal controls the act extensively making the independent contractor an employee. When the principal controls, how the independent contract is to do the job and essentially controls the entire process they are no longer an independent contract.

Here, We know that linda required the driver to use the signs on his vehicle when ever he was making deliveries. but it does not appear as if Linda controlled his routes or any other system of the deliveries. The jury will hear that Linda stated to customer "my driver" essentially she is claiming him as an employee. Ultimately it is a question for the jury if linda will be viciously liable whether she exerted such a level of control that would essentially make her the employer of Driver.

If the court determines whether Driver is an employer then they must analyze whether he was acting within the scope of his employment. Linda will be vicariously liable if driver is determined to be an employee because he was negligent and hit the gas instead of the brake and was within the scopre of his employment. Also, this is a question that should be left up to the jury. .

4. Linda could be held directly liable for the injures sustained by the customer.

At issue is whether linda's negligent hiring of Driver would make her personally liable.

Negligent hiring is when an individual in a hiring capacity knows or should have known that the individual they are hiring is likely to cause injury. And they disregard this and hire them anyway.

Here, Linda knew from the website that Driver had on previous occasions been caught for bad driving, misbehaving, and was not trust worthy. Linda disregarded the fact that Driver was sued three times for negligent driving and was liable in each instance. Because linda disregarded Driver's poor record and still hired him and she is in a hiring capacity. A jury will most likely find linda directly liable for negligently hiring driver thus making her personally liable for for customers injuries.

February 2020
MEE Question 4

A man and a woman were waiting in line at a public park for tickets to attend an outdoor performance of a play. They soon began arguing about sports, and as their conversation became more animated, the man began shouting at the woman and poking her shoulder with his finger. As the man poked harder and harder, the woman responded by punching the man in the nose.

The woman was arrested at the scene and charged with battery.

At trial, the prosecutor intends to elicit the following testimony from an eyewitness who was standing in the line:

Before the man arrived, I saw the woman talking to a friend. The friend said to the woman, "You and I have waited so long for these tickets, if anyone annoys us today they will not be seeing this play—they'll be going to the hospital!" The woman nodded her head and gave the friend a thumbs-up signal.

I recognized the woman. I live in her neighborhood, and I probably see her at least twice a week. Every time I see her, she is arguing with people, acting out, and generally causing problems.

Assuming that the eyewitness is permitted to testify for the prosecution, defense counsel plans to

(1) cross-examine the eyewitness about her five-year-old conviction for shoplifting, a crime punishable by a maximum sentence of six months in jail; and

(2) cross-examine the eyewitness about a letter recently written by the eyewitness to the man saying, "Thanks for 10 years of a great friendship."

The jurisdiction's rules governing crimes and affirmative defenses follow common law principles. The evidence rules of the jurisdiction are identical to the Federal Rules of Evidence.

The woman's friend is unavailable and will not testify at trial.

1. Assuming that the prosecution proves the elements of battery, can the woman establish a common law affirmative defense based on these facts? Explain.

2. What portions of the eyewitness's testimony, if any, would be admissible? Explain.

3. What portions, if any, of the defense counsel's cross-examination should the court permit? Explain.

Do not discuss any constitutional issues.

1. The Woman Does Not Have a Common Law Defense

The issue here is whether the woman has a proper self-defense defense. One may use self-defense when there is an immediate danger of physical harm from another. However, the use of self-defense must be limited to the degree necessary; this means the force must be equal to that of the force being used at the time.

Here, the man was poking the woman's shoulder with his finger. This action was immediate danger of physical harm from another, the man. However, the woman responded by punching the man in the nose. Punching someone in the nose is not equal force to being poked in the shoulder. While the woman did have a right to use self-defense against the man to the degree equal to poking someone in the shoulder, she did not have a right to punch the man in the nose for his actions. This was improper escalating the physical violence past the point of self-defense.

Therefore, the woman cannot establish a common law affirmative defense based on these facts.

2. The Eyewitness's Testimony

The Testimony Regarding the Friend's Statements

Relevance

The first issue is whether the statement made by the friend is relevant. Only relevant evidence is admissible; irrelevant evidence is inadmissible, pursuant to Rule 402. A statement is relevant when it has a tendency to make any fact of consequence more or less likely. Relevance is a low bar.

Here, the statements made by the friend indicate that the woman was ready for a fight. However, the crime of battery does not require any premeditation. This statement does not make it any more or less likely that the woman caused harm to another person. However, if the woman raised a defense of self-defense this statement may be relevant to show that the woman was not responding to protect herself, but in fact seeking a fight. This statement

would be relevant if the defendant maintained self-defense. Because relevance is such a low bar, this statement would likely be relevant.

Hearsay

The next issue is whether the statement the friend said is an exclusion from the rule against hearsay as an adoptive admission of the defendant. The rule against hearsay states that out-of-court statements, used for the truth of the matter asserted, are not admissible. However, one of the exclusions to hearsay, under 801(d)(2) is an opponent party statement. If the statement is made by the opposing party, then it is not hearsay and may be admissible. One may also adopt a statement by affirming ones agreement with a statement, such that it is akin to making that statement oneself.

Here, the prosecution would be entering the friend's statement as an out-of-court statement used for the truth of the matter it asserts; this is hearsay by definition. However, after the defendant responded to her friend by nodding and giving a thumbs-up. This action, a clear indication of agreement, will likely be seen as an adoptive admission of the statement made by the friend. It is likely this gesture indicates an adoptive admission, which means the statement will be a statement by a party opponent, the defendant, and fall under an exemption from the rule against hearsay.

Therefore, the witnesses statements regarding what the friend said and the defendant's agreement is likely admissible as it is relevant and falls within an exclusion of the rule against hearsay.

The Testimony Regarding Seeing the Woman Previously

The issue here is whether this is improper character evidence. Offering evidence of someone's character is improper, and inadmissible under Rule 404, if it is being offered purely to show propensity; in other words, one cannot introduce evidence purely to show that the person acted in conformity with that character trait again.

Here, the only relevant purpose for the witness's testimony about seeing the defendant regularly, would be to show that she is an angry or problematic person. However, this would then be using the evidence improperly as character evidence and stating that the defendant acted in conformity with that character on the day at issue. This is inadmissible under Rule 404.

Therefore, the witness's statement regarding her seeing the defendant at other times and what she has witnessed, will not be admissible as it is improper character evidence.

3. **Defense Counsel's Cross-Examination**

The Eyewitness's Prior Conviction

The issue here is whether the eyewitness's prior conviction is a proper topic and method for impeachment. A witnessed can be impeach with a prior conviction if that conviction if a crime of dishonesty, or if it is punishable by up to 1 year in jail.

Here, shoplifting is not a crime of dishonesty as it is not committing a dishonest act. Additionally, shoplifting has a maximum sentence of six months in jail. As such, this prior conviction does not fall into either category for proper impeachment. Essentially, admitting this prior conviction would be irrelevant as it would not properly reflective upon the trustworthiness of this witness.

As such, defense counsel's cross examination question regarding the eyewitness's prior conviction is inadmissible.

The Eyewitness's Letter from the Man

The issue here is whether this letter is relevant and whether it is inadmissible hearsay. The rules for relevance and hearsay have been previously stated. One's own out-of-court statement is also hearsay if used for the truth of the matter asserted.

Here, the letter from the eyewitness to the man is certainly relevant. This letter shows that the eyewitness has a long friendship with the man, which shows bias as a witness. This bias reflects on the witness's credibility and credibility is always at issue. However, the letter is an out of court statement which will be used for the truth of the matter it asserts - to prove the witness's friendship with the man. This letter does not fall under any exemptions or exceptions to the rule against hearsay. While defense may certainly question the witness about his relationship with the man because this shows bias, defense counsel may not use this letter as it is inadmissible hearsay.

Therefore, defense counsel's cross-examination regarding the eyewitness's letter to the man is inadmissible.

February 2020
MEE Question 5

A homeowner entered into two separate contracts with a contractor for the renovation of her kitchen and the remodeling of her bathroom. The homeowner has refused to pay the contractor on both contracts because of dissatisfaction with his work.

Under the kitchen contract, the contractor had agreed to renovate the homeowner's kitchen for $50,000, payable in installments. The final installment of $8,000 was due 10 days after completion of the project. The kitchen contract called for repainting the cabinets, installing new appliances bought by the homeowner from a third party, and replacing the flooring in the kitchen with linoleum, which is a floor covering made from natural materials. When the contract was negotiated, the contractor had asked the homeowner why she wanted "such old-fashioned flooring instead of more modern resilient flooring like vinyl." The homeowner had responded, "We are a green household, and it is very important to us to use linoleum, which is a green product, unlike vinyl. Moreover, I grew up in a house with a linoleum floor in the kitchen, and I really want to be reminded of my youth when I walk into the kitchen."

Despite the clear contract language, the contractor installed vinyl flooring in the kitchen. The vinyl flooring looks similar to the contractually required linoleum but is not as durable. Before the final payment was due, the homeowner discovered that the flooring was vinyl rather than linoleum and confronted the contractor. The contractor stated, "I knew that you wanted linoleum, but that's a crazy idea. Vinyl was a lot easier for my workers to install, and it looks as good as linoleum. So I made an executive decision to go with vinyl." The homeowner announced that she would not make the last installment payment unless the contractor removed the vinyl flooring and replaced it with linoleum. Removing the vinyl flooring and replacing it with linoleum would be labor-intensive and would cost the contractor approximately $10,000. The market value of the house, however, would be the same whether the kitchen had vinyl flooring such as that installed by the contractor or linoleum flooring as called for in the contract.

Under the bathroom contract, the contractor had agreed to remodel the homeowner's bathroom for $25,000. The contract called for the existing bathtub to remain along one wall and a new vanity (cabinet and sink) to be installed along the opposite wall. The contract called for a 30-inch space between the vanity and the bathtub (so that a person could easily walk between them).

After the contractor said he was finished, the homeowner measured the space between the vanity and the bathtub and discovered that it was only 29 inches. The homeowner then announced that she would not pay the last installment of the contract price ($10,000), which was due upon completion of the remodeling, unless the contractor "did something" to make the space at least 30 inches wide. The only way to make the space at least 30 inches wide would be to remove either the vanity or the bathtub and to obtain and install a smaller custom-made model. This would cost the contractor about $7,500. The market value of the house with only a 29-inch space between the vanity and the bathtub, however, would be $500 less than with a 30-inch space.

The homeowner had selected the contractor because of the contractor's reputation for high- quality installation. In both contracts, the price was based mostly on labor costs because the cost of materials and fixtures was relatively small.

Assuming that the contractor will do nothing to address the homeowner's concerns:

1. How much more, if anything, is the homeowner required to pay the contractor under the kitchen contract? Explain.

2. How much more, if anything, is the homeowner required to pay the contractor under the bathroom contract? Explain.

1. (a) The issue is whether the contractor's willful breach of an express contract provision excuses the homeowner from complete repayment.

The contract for the remodeling of the homeowner's kitchen is primarily a contract for services, not goods. Therefore, the contract is governed by common law, not the Uniform Commercial Code. Under the common law, in order to demand payment on a contract, the demanding party must have substantially performed their portion of the contract. A breach of an express provision of the contract, that is not cured by the breaching party, will subject the breaching party to damages - usually discounting the contract price in proportion of the value of the breach (expectation damages). However, when the breaching party willfully and purposefully breaches an express contract provision, court will usually punish this behavior by awarding more damages to the nonbreaching party than in a case of accidental breach. Here, the contractor willfully and purposefully breached the contract by installing vinyl floors, instead of linoleum floors, as called for by the contract. The contractor knew how important the linoleum floors were to the homeowner and unilaterally decided to install vinyl floors anyway due to his personal preference and the ease of installment. The fact pattern states that removing the vinyl floors and replacing them with linoleum would be labor-intensive and would cost the contractor approximately $10,000. The market value of the house, however, would be the same whether the kitchen had vinyl flooring such as that installed by the contractor or linoleum flooring as called for in the contract. If this was a case of accidental breach by the contractor, a court would most likely not award any damages to the homeowner, as there is no change in market value based on the type of flooring installed. The buyer's expectations would be equalized in this case, despite the accidental breach because the market value of the home, therefore the benefit of the bargain is the same monetary value. However, in cases of willful breach of an express contract provision a court would likely order that the contractor rip up the vinyl floors, and incur the cost of installing linoleum, per the express contract provisions. The court would likely order the homeowner to pay the remaining balance of $8,000 after the contractor has done so, and would not order more payment to the contractor by the homeowner. Therefore, unless the court orders the contractor to rip up the vinyl flooring and install linoleum per the contract, the homeowner does not owe the contractor any more money under the kitchen contract and can likely sue the contractor for damages based on the cost of replacing the vinyl with linoleum.

2. (a) The issue is whether the contractor's accidental breach of an express contract provision excuses the homeowner from complete repayment.

The contract for the remodeling of the homeowner's bathroom is primarily a contract for services, not goods. Therefore, the contract is governed by the common law, not the Uniform Commercial Code. The contract for the bathroom remodel in this case had an express contract provision that there must be 30 inches between the vanity and the bathtub. After installment of the new bathroom fixtures and the remodeling was completed, the homeowner measured the space between the bathtub and the vanity and found that the contractor only left a 29 inch space between the bathtub and the vanity. This is a breach of contract. However, it was not a willful breach, as the breach the contractor made concerning the kitchen flooring. This was an accidental breach, and the contractor substantially performed under the contract. The contractor is entitled to payment under the contract, however, the homeowner is entitled to expectation damages for the breach of contract. Here the facts indicate that the only way to make the space at least 30 inches wide would be to remove either the vanity or the bathtub and to obtain and install a smaller custom-made model. This would cost the contractor about $7,500. The market value of the house with only a 29-inch space between the vanity and the bathtub, however, would be $500 less than with a 30-inch space. Based on these facts, the homeowner should pay $9,500 of the remaining $10,000 due on the bathroom contract in order to match the benefit of the bargain contracted for. This would be the proper measurement of expectation damages in this case due to the $500 FMV loss pursuant to the 29-inch space between the tub and the vanity as opposed to a 30-inch space between the tub and the vanity. No court would order a contractor to incur $7,500 of expenses for an accidental minor breach such as this.

February 2020
Indian Law Question

John Bear Robe and Alice Smith are husband and wife. They married in the year 2000 and have two children; namely, Tyler Bear Robe, who is nine years old, and Sarah Bear Robe, who is seven years old. John Bear Robe is an enrolled member of the Cheyenne River Sioux Tribe. Alice Smith is a non-Indian. The minor children are not members of the Cheyenne River Sioux Tribe, but both are eligible for enrollment. Each possesses one-fourth (1/4th) Cheyenne River Sioux blood, which is sufficient blood quantum for enrollment under the Cheyenne River Sioux Tribe Constitution.

All members of the family are lifelong residents of the Cheyenne River Sioux Reservation and maintain a permanent address there. Dad recently started attending the South Dakota School of Mines in Rapid City, South Dakota.

Last week, the South Dakota Department of Social Services commenced an abuse and neglect action against Mr. Bear Robe and Ms. Smith in Circuit Court in Rapid City, which is in Pennington County. The abuse and neglect petition asserts jurisdiction with venue in Pennington County, and alleges extreme neglect of the children, Tyler and Sarah Bear Robe, by their parents, John Bear Robe and Alice Smith. The parents have been provided notice that the Department intends to remove both Tyler and Sarah Bear Robe from their family and place them in foster care while the matter is pending. The Circuit Judge assigned to this case has asked you, the law clerk, to identify who has jurisdiction over this matter and why.

The issue is whether the Circuit Court in Rapid City has property jurisdiction to hear this case.

The purpose of the Indian Child Welfare Act is to stop the dilution of the Native American population by putting in tribal safeguards against the removal of Indian children. The standard under the Indian Child Welfare Act is the best interests of the child, however this standard can be heightened depending on the proceeding taking place under the Act. The Indian Child Welfare act applies to children under 18 years of age, who are members of an Indian tribe, or are eligible to become members of an Indian tribe through a biological parent member of the tribe. In this case, Tyler and Sarah Bear Robe are the biological children of John Bear Robe, who is a registered member of the Cheyenne River Sioux Tribe. Tyler and Sarah Bear Robe are not members of the tribe, but possess the sufficient blood quantum to become registered members of the tribe. The Indian Child Welfare Act covers four types of cases: termination of parental rights, foster care placement, pre-adoptive placements, and adoptive placements. This case concerns a removal from the family home into temporary foster care, and therefore falls under ICWA. There are some cases under ICWA that give the tribal courts exclusive jurisdiction to hear the case, these are: (1) The child is a member of the tribe and resides on tribal land; (2) The child is eligible to be a member of the tribe and resides on tribal land; and (3) the child is a ward of the tribal court. The family, consisting of John Bear Robe, Alice Smith, Tyler Bear Robe, and Sarah Bear Robe are residents of the Cheyanne River Sioux Reservation. They are all lifelong residents of the reservation. In this case, the tribal court would have exclusive jurisdiction over this removal and foster care placement due to the fact that both Tyler and Sarah Bear Robe are eligible members of the Cheyanne River Sioux Tribe and are residents of the Cheyanne River Sioux Reservation. The Circuit Court does not have jurisdiction to hear this case, as the exclusive jurisdiction lies with the Cheyanne River Sioux tribal court under the provisions of the Indian Child Welfare Act.

The three cases listed above are the only types of cases which give the tribal court exclusive jurisdiction under ICWA. All other cases are given concurrent jurisdiction between the tribal courts and circuit courts. If a concurrent jurisdiction case is filed in circuit court, the Indian tribe and the Indian parent(s) must receive notice. After receiving proper notice, either the tribe and/or the Indian parent can request that the case be transferred to the tribal court. The non-Indian parent may oppose the transfer, and the circuit court may deny the transfer for other proper reasons (e.g., there are other non-Indian children at issue in the case). If the circuit court denies the transfer, the circuit court must still apply ICWA provisions to the Indian child at issue. In order for proper removal from the reservation, the circuit court must show that all available methods, opportunities, and measures were used in order to keep the Indian child on the reservation, and they failed. The order of preference for placement of an Indian child under ICWA is as follows: (1) Extended family of Indian child; (2) Indian- approved foster home; (3) State-approved foster home; (4) Tribe-approved institution. In order for a circuit court to terminate the parental rights of an Indian parent, the circuit court must prove that removal is in the best interests of the child beyond a reasonable doubt. This is a high proof-burden.