

February 2017

New York State
Bar Examination

MEE & MPT Questions

MEE 1

On June 15, a professional cook had a conversation with her neighbor, an amateur gardener with no business experience who grew tomatoes for home use and to give to relatives. During the conversation, the cook mentioned that she might be interested in “branching out into making salsa” and that, if she did branch out, she would need to buy large quantities of tomatoes. Although the gardener had never sold tomatoes before, he told the cook that, if she wanted to buy tomatoes for salsa, he would be willing to sell her all the tomatoes he grew in his half-acre home garden that summer for \$25 per bushel.

Later on June 15, shortly after this conversation, the cook said to the gardener, “I’m very interested in the possibility of buying tomatoes from you.” She then handed a document to the gardener and asked him to sign it. The document stated, “I offer to sell to [the cook] all the tomatoes I grow in my home garden this summer for \$25 per bushel. I will hold this offer open for 14 days.”

The gardener signed the document and handed it back to the cook.

On June 19, the proprietor of a farmers’ market offered to buy all the tomatoes that the gardener grew in his home garden that summer for \$35 per bushel. The gardener, happy about the chance to make more money, agreed, and the parties entered into a contract for the gardener to sell his tomatoes to the proprietor.

On June 24, the cook, who had not communicated with the gardener since the June 15 conversation, called the gardener. As soon as the cook identified herself, the gardener said, “I hope you are not calling to say that you want my tomatoes. I can’t sell them to you because I have sold them to someone else.” The cook replied, “You can’t do that. I called to accept your offer to sell me all your tomatoes for \$25 per bushel. You promised to hold that offer open for 14 days. I accept your offer!”

Is the gardener bound to sell the cook all the tomatoes he grows that summer for \$25 per bushel? Explain.

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MEE 2

Forty years ago, Settlor, a successful businesswoman, married a less-than-successful writer. Settlor and her husband had two children, a son and a daughter.

Two years ago, Settlor transferred most of her wealth into a revocable trust. Under the terms of the trust instrument, a local bank was designated as trustee, and the trustee was directed to distribute all trust income to Settlor during her lifetime. The trust instrument further provided that “upon Settlor’s death, the trustee will distribute trust principal to one or more of Settlor’s children as Settlor shall appoint by her duly probated last will or, in the absence of such appointment, to Charity.” The trust instrument also stated that Settlor’s power of revocation was exercisable only “during Settlor’s lifetime and by a written instrument.”

Following the creation of the trust, Settlor gave written direction to the trustee to accumulate trust income instead of distributing the income to Settlor as specified in the trust instrument. The trustee did so.

Six months ago, Settlor executed a valid will. The will, exercising the power of appointment created under Settlor’s revocable trust, directed the trustee of Settlor’s trust, upon Settlor’s death,

- (1) to distribute half of the trust assets to Settlor’s daughter,
- (2) to hold the other half of the trust assets in continuing trust and pay income to Settlor’s son during the son’s lifetime, and
- (3) upon the son’s death, to distribute the trust principal in equal shares to the son’s surviving children (grandchildren of Settlor).

Settlor also bequeathed \$50,000 “to my descendants, other than my children, in equal shares,” and she left the residue of her estate to her husband, whom she also named as the executor of her estate.

Two months ago, Settlor died. At Settlor’s death, the trust assets were worth \$500,000 and Settlor’s probate assets were worth \$100,000. Settlor was survived by her husband, her daughter, her son, and her son’s child (Settlor’s grandchild, age 18).

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A statute in this jurisdiction provides that a decedent's surviving spouse is entitled to a "one-third elective share of the decedent's probate estate." There are no other relevant statutes.

1. Was it proper for the trustee to accumulate trust income during Settlor's lifetime? Explain.
2. Under Settlor's will and the trust instrument, what, if any, is Charity's interest in the trust assets? Explain.
3. Does Settlor's husband have a valid claim to any trust or probate assets? Explain.

MEE 3

In 2005, Andrew and Brenda began living together in State A while both were attending college there. Andrew proposed marriage to Brenda, but she refused. However, after learning that she was pregnant, Brenda told Andrew that she wanted to marry him before the baby was born. Andrew was thrilled and told her that they were already married "in the eyes of God." Brenda agreed.

Andrew and Brenda did not obtain a marriage license or have a formal wedding. Nonetheless, Brenda started using Andrew's last name even before their daughter, Chloe, was born. After Andrew graduated from college and started a new job, he listed Brenda as his spouse so that she could qualify for benefits through Andrew's employer. They also filed joint income tax returns.

In March 2007, just after Chloe's first birthday, Andrew and Brenda decided to separate. They had little property to divide and readily agreed to its disposition. Andrew agreed that Brenda should have sole custody of Chloe, and Brenda, desiring the cleanest break possible, agreed that Andrew would not be responsible for any child support. Andrew told Brenda that no formal divorce was necessary because they had never formally married.

In June 2007, Brenda and Chloe moved to start a new life in State B. Andrew sent Chloe an occasional card or birthday gift, but otherwise maintained no contact with Chloe or Brenda. Not long after settling in State B, Brenda met and fell in love with Daniel.

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In 2008, Brenda and Daniel obtained a State B marriage license and wed. Thereafter, Daniel formed a close and loving bond with Chloe. Indeed, with only very infrequent contact from Andrew, Chloe regarded Daniel as her father and called him “Dad.”

In January 2017, Brenda purchased a lottery ticket. The ticket won a jackpot of \$5 million, which was paid that month. Shortly thereafter, Brenda informed Daniel that she wanted a divorce and that she intended to use her lottery winnings to launch a new life with Chloe in a distant state and break off all contact with Daniel. When Chloe learned about this, she became very upset because she continues to regard Daniel as her father.

State A recognizes common law marriage. State B formerly allowed common law marriage until a statute, enacted in 2001, prospectively barred the creation of new common law marriages within the state. Neither State A nor State B is a community-property state.

1. On what basis, if any, would Andrew have a claim to a share of Brenda’s lottery winnings? Explain.
2. Assuming that Andrew and Brenda have a valid marriage, on what basis, if any, would Daniel have a claim to a share of Brenda’s lottery winnings? Explain.
3. If Brenda cuts off all contact between Chloe and Daniel, can Daniel obtain court-ordered visitation with Chloe? Explain.

MEE 4

A shareholder owns 100 shares of MEGA Inc., a publicly traded corporation. MEGA is incorporated in State A, which has adopted the Model Business Corporation Act (MBCA).

The shareholder read a news story in a leading financial newspaper reporting that MEGA had entered into agreements to open new factories in Country X. According to the story, MEGA had paid large bribes to Country X government officials to seal the deals. If made, these bribes would be illegal under U.S. law, exposing MEGA to significant civil and criminal penalties.

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On May 1, the shareholder sent a letter to MEGA asking to inspect the minutes of meetings of MEGA's board of directors relating to the Country X factories mentioned in the news story, along with any accounting records not publicly available relevant to the alleged foreign bribes. The shareholder explained that she was seeking the information to decide whether to sue MEGA's directors for permitting such possible illegal conduct.

In her letter, the shareholder also demanded that the MEGA board investigate the possible illegal bribes described in the news story and take corrective measures if any illegality had occurred.

On June 1, MEGA responded to the shareholder in a letter, which stated in relevant part:

The corporation will not give you access to any corporate documents or take any action regarding the matters raised in your letter. We cannot satisfy the whim of every MEGA shareholder based on unsubstantiated news stories. Furthermore, given our continuing operations in Country X, the board of directors will not investigate or take any other action regarding the matters raised in your letter because doing so would not be in the best interest of the corporation.

On October 1, the shareholder filed a lawsuit in a State A court. Her petition includes (1) a claim against MEGA seeking inspection of the documents previously requested and (2) a derivative claim against all of the MEGA directors alleging a breach of their fiduciary duties for failing to investigate and take action concerning the alleged foreign bribes.

MEGA's board has asked the corporation's general counsel the following questions:

- (1) Is the shareholder entitled to inspect the documents she requested?
- (2) May the board obtain dismissal of the shareholder's derivative claim if the board concludes that it is not in the corporation's best interest to continue the lawsuit, even though the board has not investigated the allegations of illegal foreign bribes?
- (3) Is the board's decision not to investigate or take further action with respect to alleged illegal foreign bribes consistent with the directors' duty to act in good faith, and is that decision protected by the business judgment rule?

How should the general counsel answer these questions? Explain.

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MEE 5

An inventor retained a woman to act as his agent to purchase 25 computer chips, 25 blue lenses, and 25 lawn mower shutoff switches. The inventor told her to purchase only:

- Series A computer chips,
- blue lenses that cost no more than \$300 each, and
- shutoff switches that could shut down a lawn mower in less than one second after the mower hits a foreign object.

The woman contacted a chip manufacturer to purchase the Series A computer chips. She told the manufacturer that she was the inventor's agent and that she wanted to purchase 25 Series A computer chips on his behalf. The manufacturer told her that the Series A chips cost \$800 each but that she could buy Series B chips, with functionality similar to that of the Series A chips, for only \$90 each. Without discussing this with the inventor, the woman agreed to purchase 25 Series B chips, signing the contract with the chip manufacturer "as agent" of the inventor. The Series B chips were shipped to her, but when she then took them to the inventor and explained what a great deal she had gotten, the inventor refused to accept them. He has also refused to pay the manufacturer for them.

The woman also contacted a lens manufacturer for the purchase of the blue lenses. She signed a contract in her name alone for the purchase of 25 blue lenses at \$295 per lens. She did not tell the lens manufacturer that she was acting as anyone's agent. The lenses were shipped to her, but when she took them to the inventor, he refused to accept them because he had decided that it would be better to use red lenses. The inventor has refused to pay for the blue lenses.

The woman also contacted a switch manufacturer to purchase shutoff switches. She signed a contract in her name alone for switches that would shut down a lawn mower in less than five seconds, a substantially slower reaction time than the inventor had specified to her. When she signed the contract, she told the manufacturer that she was acting as someone's agent but did not disclose the identity of her principal. The switches were shipped to her. Although the inventor recognized that the switches were not what the woman had been told to buy, he nonetheless used them to build lawn mowers, but now refuses to pay the manufacturer for them.

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All elements of contract formation and enforceability are satisfied with respect to each contract.

1. Who is liable to the chip manufacturer: the inventor, the woman, or both? Explain.
2. Who is liable to the blue-lens manufacturer: the inventor, the woman, or both? Explain.
3. Who is liable to the shutoff-switch manufacturer: the inventor, the woman, or both? Explain.

MEE 6

On January 1, 2015, a landlord who owned a multi-unit apartment building consisting only of one-bedroom apartments leased an apartment in the building to a tenant for a two-year term ending on December 31, 2016, at a monthly rent of \$2,000. The tenant immediately took possession of the apartment.

The lease contained the following provision:

Tenant shall not assign this lease without the Landlord's written consent. An assignment without such consent shall be void and, at the option of the Landlord, the Landlord may terminate the lease.

On May 1, 2015, the tenant learned that her employer was transferring her to a job overseas to begin on August 1, 2015. On May 2, the tenant emailed the landlord that she needed to vacate the apartment on August 1, but that she had found a well-to-do and well-respected lawyer in the community who was willing to take over the balance of the lease term at the same rent. The landlord immediately emailed the tenant that he would not consent to the lawyer taking over the lease. He wrote, "I don't rent to lawyers because I've learned from personal experiences with them as tenants that they argue about everything, make unreasonable demands, and make my life miserable. Find somebody else."

On July 25, 2015, the tenant vacated the apartment and removed all her personal property from it. She left the apartment keys in an envelope in the landlord's mail slot. The

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envelope also contained a note in which the tenant wrote, “As you know, I am moving overseas and won’t be back before my lease ends. So here are the keys. I won’t pay you any rent from August 1 on.”

On July 26, 2015, the landlord sent the tenant an email acknowledging that he had found the keys and the note. In that email, the landlord wrote: “Although this is a problem you created, I want to be a nice guy and help you out. I feel pretty confident that I can find a suitable tenant who is not a lawyer to rent your apartment.”

As of August 1, 2015, the landlord had four apartments, including the tenant’s apartment, for rent in the building. The landlord put an “Apartments for Rent” sign in front of the apartment building and placed advertisements in the newspaper and on a website listing all the apartments for rent. However, because of a recent precipitous decline in the local residential rental property market, the landlord listed the apartments for a monthly rent of \$1,000. The landlord showed all four vacant apartments, including the tenant’s apartment, to each prospective tenant.

By September 1, 2015, the landlord was able to rent only two of the apartments at \$1,000. The landlord was unable to rent the two remaining apartments, including the tenant’s, at any price throughout the rest of 2015 and all of 2016, notwithstanding his continued efforts to rent them.

On January 2, 2017, the landlord sued the tenant to recover 17 months of unpaid rent, covering the period August 1, 2015, through December 31, 2016.

Identify and evaluate the arguments available to the landlord and the tenant regarding the landlord’s claim to 17 months of unpaid rent.

MPT 1 – *In re Ace Chemical* (Synopsis)

Examinees’ law firm has been asked to represent Ace Chemical Inc., which is suing Roadsprinters Inc. for its alleged failure to deliver materials to one of Ace’s customers in a timely manner. The issues in the problem relate to three potential conflicts of interest that must be resolved before the firm can accept Ace Chemical as a client: 1) the firm’s Columbia office represents the Columbia Chamber of Commerce, of which Roadsprinters is a member; 2) Samuel Dawes, who would be the litigation partner in charge of the Ace

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litigation, once represented Roadsprinters in a trademark registration; and 3) the firm's Olympia office would like to hire an attorney who is currently employed by the Franklin office of Adams Bailey, the law firm representing Roadsprinters. Examinees' task is to draft an objective memorandum analyzing the three potential conflicts of interest. If a conflict exists, the memorandum should provide a recommendation for how the firm should handle the conflict. The File contains the instructional memorandum, a file memorandum summarizing the potential conflicts, and a newspaper article spotlighting Samuel Dawes. The Library contains excerpts from the Franklin Rules of Professional Conduct (which are identical to the ABA Model Rules), a Franklin Ethics Opinion, and a Franklin Supreme Court case.

MPT 2 – *In re Guardianship of Henry King* (Synopsis)

Examinees are associates at a law firm representing Ruth King Maxwell, who is petitioning to be named guardian for her elderly father. Ruth's brother, Noah King, currently has their father's health-care and financial powers of attorney; he opposes the petition and has requested that the court appoint him as guardian instead of Ruth. Examinees' task is to draft proposed findings of fact and conclusions of law in the guardianship of Ruth's father, with the goal of preventing Ruth's brother from being named guardian. As part of completing the task, examinees must address two legal issues: whether and in what circumstances the trial court has the legal authority to override a prior nomination of a proposed guardian, and whether Noah King's conduct as health-care agent and holder of the financial power establishes "good cause" to override the nomination. The File contains the instructional memorandum, office guidelines on how to draft findings of fact and conclusions of law, and excerpts from the hearing transcript containing relevant testimony by Ruth and Noah. The Library contains excerpts from the Franklin Guardianship Code. It also contains two cases: *Matter of Selena J.*, concerning the statutory priorities for appointment as guardian; and *In re Guardianship of Martinez*, concerning whether "good cause" exists to remove a guardian.

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February 2017

New York State
Bar Examination

Sample Answers

FEBRUARY 2017 NEW YORK STATE BAR EXAMINATION

SAMPLE CANDIDATE ANSWERS

The following are sample candidate answers that received scores superior to the average scale score awarded for the relevant essay. They have been reprinted without change, except for minor editing. These essays should not be viewed as "model" answers, and they do not, in all respects, accurately reflect New York State law and/or its application to the facts. These answers are intended to demonstrate the general length and quality of responses that earned above average scores on the indicated administration of the bar examination. These answers are not intended to be used as a means of learning the law tested on the examination, and their use for such a purpose is strongly discouraged.

ANSWER TO MEE 1

The gardener is not bound to sell the cook all the tomatoes he grows that summer for \$25 per bushel. At issue is whether the offer from gardener to cook was revocable, whether it was effectively revoked, and whether the merchant's firm offer rule applies.

A contract requires an offer from an offeror, an acceptance from an offeree, and consideration. The facts in this case concern the sale of goods, so Article 2 of the Uniform Commercial Code is the governing law. Under the UCC, a contract for all the goods that one party produces, or for all the goods that one party requires is a requirements contract. Requirements contracts are valid, and the offer here is for such a contract - the sale of all tomatoes grown in gardener's home garden this summer for \$25 per bushel.

Once an offer is made, it can terminate by lapse of reasonable time, express words or conduct of the offeror, express words or conduct of the offeree, or if the offeree learns that the offer is no longer capable of being accepted. Offers are freely revocable by the offeror unless they are options, which are offers that an offeror keeps open in exchange for consideration from the offeree, usually the payment of money. If an option is not supported by consideration, it is a freely revocable offer.

In this case, the gardener and the cook spoke about the possibility of a contract on June 15, and later that day, the cook reduced the offer to writing in a document which stated 'I offer to sell to the cook all the tomatoes I grow in my home garden this summer for \$25 per bushel. I will hold this offer open for 14 days.' The document was signed by the gardener. This offer resembles an option - a promise to keep the offer open, but critically, it is unsupported by consideration. There was no payment of money from or other legal detriment to the cook which could have satisfied the condition of consideration.

Notwithstanding that the offer was reduced to writing and signed by the gardener, it was not a valid option, and so gardener was able to freely revoke it. Gardener did in fact revoke the offer to cook on June 24 when the cook spoke to gardener. Although gardener had accepted another offer for the subject matter of the contract - all tomatoes produced by gardener, the offer to cook was not revoked until gardener stated 'I can't sell them (my tomatoes) to you because I have sold them to someone else.'

After the gardener stated this, the cook attempted to accept the offer by stating 'I accept your offer!', but the offer was already revoked by the express words of the gardener. Accordingly, no contract arose between the gardener and the cook because there was no acceptance of the gardener's offer before it was revoked. As there is no contract, the gardener is not bound to sell the cook all the tomatoes he grows that summer for \$25 per bushel.

The cook may argue that the UCC's Merchant's Firm Offer Rule applies. That rule states that if a merchant makes an offer, and signs a writing promising to keep the offer

open, he must keep that offer open for acceptance notwithstanding the lack of any consideration. The offer is not revocable for the period indicated in the writing, or if no period is indicated, for three months. A merchant is any person routinely engaged in buying or selling goods commercially.

The Merchant's Firm Offer Rule will not apply to the gardener, as the gardener is not a merchant. The gardener had never sold tomatoes before, and prior to the conversation with the cook had only grown tomatoes for home use and to give to relatives. The gardener is also identified as an amateur gardener, with no business experience. Absent an ongoing business involvement in the selling of tomatoes, the gardener cannot be considered a merchant under the UCC, and the Merchant's Firm Offer Rule will not apply.

Notwithstanding the signed writing in this case, the offer to the cook was effectively revoked by the gardener before the cook could accept, and so no contract arose. As there is no contract, the gardener will not be bound to sell the cook his tomatoes.

ANSWER TO QUESTION 1

The gardener is not bound to sell the tomato he grows that summer for \$25 per bushel to the cook.

At issue is whether the gardener's signed offer was revocable.

Article 2 of the UCC governs contracts for the sale of goods while the common law governs other contracts. As the case at hand concerns the sale of tomatoes which are goods, the UCC applies.

Gardener's first offer on June 15

An offer to enter into a bilateral contract is a communication clearly expressing the will to be bound by a contract, which states the essential terms of an agreement, and which is directed to a particular person or group of persons. The only essential term in a goods contract under the UCC is the quantity. However, the UCC recognizes that output and requirement contracts are valid and sufficiently ascertainable, and that in those cases, the exact quantity of goods to be sold is not essential. As such, the first gardener's offer to sell all his summer tomato production for \$25 to the cook was a valid offer - the gardener was «willing» to be bound, the offer was addressed to the cook and it was an output contract (all tomatoes produced that summer).

Acceptance of an offer occurs when the offeree manifests his intent to be bound by the offer. Here, the cook did not accept the offer by saying that he was «very interested». Those are mere words of interest and not words which manifest a clear intent to be bound.

Gardener's second offer on June 15

When the gardener signed the document prepared by the cook, he effectively made a second offer to the cook - it is valid as it has the same terms as the first offer. The main issue is whether that offer was irrevocable.

Generally, offers are freely revocable by the offeror unless the offer is an option contract. An option arises when an offeror promises to keep his offer open for a certain period of time in exchange for valid consideration. A valid option will not be revocable until the expiry of its term. Here, there was no such option. While the gardener did provide that his offer would be open for 14 days, the cook did not give consideration to the gardener for the gardener to keep the offer open. Thus, the gardener could freely revoke the offer.

Under the UCC, a merchant's firm offer is an offer to buy or sell goods which is signed by a merchant and which on its terms states that it will be kept open for a period of time. A merchant's firm offer is irrevocable even if no consideration is given to the merchant to keep the offer open. Here, while the offer was made in writing, was signed by the gardener and stated that it was irrevocable for 14 days, it is not a firm offer as the gardener is not a merchant. In fact, the gardener was merely an «amateur» with «no business experience» who grew tomatoes for «home use and to give to relatives». He was not engaged in the commercial sale of tomatoes. His offer is thus not irrevocable.

Finally, an offer will also be irremovable if the offeree detrimentally relies upon it and such reliance was reasonable. Nothing in the facts indicate that the cook detrimentally relied on the offer; thus, it is revocable.

Revocation of the offer

An offeror may revoke a revocable offer any time before the offeree accepts the offer. Revocation can occur through words or conduct, so long as the offeree has notice of the revocation. Here, as soon as the cook had identified herself when calling the gardener on June 24, the gardener unequivocally revoked his offer by clearly stating that he couldn't sell his tomatoes to the cook. Those words, while not expressly revoking the offer, are sufficient to imply that the offer is no longer open as the gardener has decided to sell his tomatoes to another party.

While the cook did unequivocally accept the offer, the acceptance was too late as the offer had validly been revoked by the gardener before. Had the cook accepted the offer

before the gardener had told him he had revoked it, the cook's acceptance would have created a valid contract and the gardener would be bound to sell his bushels to the cook.

ANSWER TO MEE 2

1. At issue is whether the trustee's accumulation of trust income during Settlor's lifetime as directed by the settlor was not breach of the trustee's fiduciary duty. When the courts look to the trustee's duty of loyalty and fiduciary duties owed to the settlor, it looks at the trust document for the scope of the trustee's power. Here, the trust instrument provided that all trust income should be distributed to Settlor during her lifetime. However, following the creation, Settlor gave written direction to the trustee to accumulate trust income instead of distributing the income to Settlor as specified in the trust instrument.

Therefore, the trustee did not breach any of his fiduciary duties when it accumulated the trust income because it was following the Settlor's direction, who can amend and revoke the trust at any time. Furthermore, since this amendment was in writing, it was valid.

2. At issue is whether Settlor validly amended the previous revocable trust by the execution of her will.

The trust document stipulated that "upon Settlor's death, the trustee will distribute trust principal to one or more of Settlor's children as Settlor shall appoint by her duly probated last will or, in the absence of such appointment to Charity". Settlor's valid execution of the will exercising the power of appointment created under Settlor's revocable trust, directed the trustee of Settlor's trust, upon Settlor's death to distribute half of the trust assets to Settlor's daughter and to hold the other half of the trust assets in continuing trust and pay income to Settlor's son during the son's lifetime. However, the distribution of the trust principal was to occur upon Settlor's son's death. This means that the distribution of trust principal was not appointed in her will because it was not Settlor's children, but the Settlor's grandchildren (the children of the son). Therefore, according to the terms of the original trust instrument, the distribution of the trust principal would have been to go to Charity giving Charity the sole interest in the distribution of the trust principal.

However, although Settlor's power of revocation was exercisable only "during Settlor's lifetime", it could be revoked "by a written instrument". It would be construed by the court that Settlor's valid will prevail as the will, as a written document, validly amended the original instruction in the terms of the trust instrument to the new terms in the valid will. Furthermore, the court puts an emphasis into what Settlor intends the most

recent to her death and the will is the most recent document prior to Settlor's death. Furthermore, the will was executed during Settlor's lifetime which means which was within the time frame of her exercisable power of revocation.

Furthermore, the revocable trust that Settlor originally created is not valid because Settlor herself is the sole beneficiary. This is illegal and the court will construe this as an invalid trust. However, the court will create a resulting trust upon the terms of Settlor's valid will with the local bank that Settlor originally designated, as the trustee.

Therefore, Settlor validly revoked the previously revocable trust and created a new resulting trust in the execution of her will and the Charity does not have any interest in the trust principal.

3. a) At issue is whether the Settlor's husband have a valid claim to any trust properties. **Since the trust did not intend to give any interest to the husband and does not mention the husband in any of its terms, the husband will not have a valid claim to the trust properties.**

b) At issue is whether Settlor's husband has a valid claim to probate assets. The statute in the jurisdiction provides that a decedent's surviving spouse is entitled to a "one-third elective share of the decedent's probate estate". **Therefore, the husband has this one-third elective share from Settlor's probate estate which amounts to \$33,333.33.** Settlor bequeathed \$50,000 to her descendants, other than her children in equal shares. The husband is not a descendant of Settlor because they do not have blood relations. Settlor was survived by her husband, her daughter, her son and her son's child (Settlor's grandchild, age 18). Since Settlor intended \$50,000 to go to her descendants other than her children in equal shares, this excludes the husband, daughter and son, with only the son's child remaining. This is a class gift to her descendants. **Therefore, the class will close when Settlor's children dies and \$50,000 will be divided accordingly giving \$0 from \$50,000 to the husband.** The residue of Settlor's estate was left to the husband. Therefore, the remaining \$16,666.66 will go to the husband. **In conclusion, the husband will have a valid claim to probate assets and will be able to obtain the total of \$50,000.**

ANSWER TO MEE 2

The first issue is whether it was proper for the trustee to accumulate trust income during Settlor's lifetime. With regard to a revocable trust, a settlor may create such a revocable trust with certain specifications and then may alter terms of this trust later during her lifetime so long as the alteration is in a writing signed by the settlor and given to the trustee. The trustee must then honor the alteration as it supersedes any prior

conflicting specifications and honor the prior non-conflicting specifications as they were originally written by the settlor.

Here, Settlor created a revocable trust and under the terms of the trust instrument, a local bank was designated as trustee. The instrument directed the trustee to distribute all trust income to Settlor during her lifetime. Following creation of the trust, Settlor gave written direction to the trustee to accumulate trust income instead of distributing the income to Settlor as specified in the trust instrument. The trustee did so. While the trustee's actions conflict with part of the original trust instrument, they are in accordance with Settlor's later written directions to the trustee. So long as this alteration (of having the trust income accumulated) is signed by Settlor, the trustee properly accumulated the trust income because this alteration directly conflicts with the prior specification. The trustee's actions with regard to the trust income did not conflict with any other parts of the trust instrument.

Therefore, it was proper for the trustee to accumulate trust income during Settlor's lifetime.

The second issue is whether Charity has any interest in the trust assets under Settlor's will and the trust instrument. While the original trust instrument usually controls, a settlor's later writings combined with demonstrable intent can supersede conflicting parts of the trust instrument. In the absence of such later writings during the settlor's lifetime, the trust instrument as originally written must control.

Here, when the Settlor first transferred most of her wealth into a revocable trust, the trust instrument provided that "upon Settlor's death, the trustee will distribute trust principal to one or more of Settlor's children as Settlor shall appoint by her duly probated last will, or, in the absence of such appointment, to Charity." Six months ago, Settlor did execute a valid will, and the will, exercising the power of appointment created under Settlor's revocable trust, directed the trustee of Settlor's trust, upon Settlor's death to (1) distribute half of the trust assets to Settlor's daughter, (2) to hold the other trust assets in continuing trust and pay income to Settlor's son during the son's lifetime, and (3) upon the son's death, to distribute the trust principal in equal shares to the son's surviving children.

While Settlor's will bequeaths certain parts and benefits of the trust to her son and daughter, it does not in fact state that trust principal should be distributed to them. It only states that the trust principal shall be distributed to the son's surviving children (Settlor's grandchildren). This is not the same as distributing the trust principal to Settlor's children. Thus, as the trust instrument originally provides, since there is an absence of appointment to Settlor's children, the trustee must distribute trust principal to Charity instead of the son's 18 year old child.

The third issue is whether Settlor's husband has a valid claim to any trust or probate assets. The statute in a jurisdiction regarding such matters will control. Here, there is a statute that provides that a decedent's surviving spouse is entitled to a one-third elective share of the decedent's probate estate. Settlor left the residue of her estate to her husband, whom she also named as the executor of her estate. Settlor's will did not leave any trust assets to her husband and so he will not receive any. However, because of the statute provides for the probate estate, the husband will receive either one- third of the probate estate or whatever Settlor left him (the greater of the two).

ANSWER TO MEE 3

1. The issue is on what basis if any Andrew would have a claim to a share of Brenda's lottery winnings.

The rule is that a common law marriage is a valid marriage when the couple cohabits, they hold each other out as husband and wife, and there is an agreement that the couple intends to be married. Here, Andrew and Brenda lived together since 2005; Brenda expressed the desire to marry Andrew after she became pregnant, and Andrew stated that they were married 'in the eyes of God.' Additionally, Brenda started using Andrew's last name, they filed joint income tax returns, and Brenda was listed as Andrew's spouse in his employment documents. Therefore, all the elements of common law marriage are satisfied here, and the couple was actually married.

The rule is that under the conflicts of laws and full faith and credit clause of the Constitution, states must recognize common law marriages when such marriage is valid in a sister state. Here, Andrew and Brenda had a valid common law marriage in State A; therefore, State B should recognize it as a valid marriage despite the fact that it bars the *creation* of new common law marriages.

According to the doctrine of equitable distribution, the couple's marital property is divided equitably between the couple upon their decision to divorce. This does not mean that the property is divided equally (50-50) but it is rather divided by what is fair according to each individual's financial status, earning capacity, and distribution during the marriage. In order for the division to be done properly, first courts look at what constitutes marital property and what does not. Usually, property acquired during the marriage, is considered marital property.

Here, as already stated, the couple was properly married in State A. When the couple separated, no formal divorce decree was entered, as Andrew thought that it was not necessary since they had not formally gotten married. However, since there was a common law marriage between the two, this means that when Brenda married Daniel, she

was already married to Andrew. Andrew could then argue that since their marriage was not dissolved, the lottery winnings constituted marital property subject to equitable distribution.

Therefore, Andrew could claim a share to Brenda's lottery winning based on the basis that she was still married to him at the time of the winning, and thus the winning constituted marital property.

2. The issue is whether Daniel would have a claim to a share of Brenda's lottery winnings and on what basis, if her marriage to Andrew is deemed to be valid.

The rule is that bigamy is not allowed, and therefore, should one person marry another when she is already validly married to another, then the second marriage is invalid.

The rule is that according to the doctrine of putative spouse, a spouse who was not aware that his/her marriage was void or voidable, she is not at fault and she can still have a claim against the other spouse.

Here, Daniel was married to Brenda and he was not aware of the fact that she was married already married to Andrew. Therefore, her marriage to Daniel is not valid but he still could still have a claim to the proceeds of the lottery winnings if he proves that he reasonably believed to be married to her and he was not aware that their marriage was void.

Therefore, according to the doctrine of equitable distribution of marital property detailed above, Daniel could have a claim to the lottery winnings.

3. The issue is whether Daniel can obtain a court-ordered visitation with Chloe if Brenda cuts off all contact between Chloe and Daniel.

The rule is that adoptive parents have the same rights as biological parents once they adopt the child. Children's biological parents have the right to elect visitation with respect to grandparents or other individuals. When courts review visitation or custody rights, the standard is the best interests of the child. Additionally, when the child is in a position to express her opinion (usually over 7 years old), her opinion is taken into consideration.

Here, Daniel never officially adopted Chloe but he and Chloe established a very close relationship. He acted as her father for all intents and purposes despite the fact that he did not formally adopt her. Daniel was around for the majority of Chloe's life and she called him "dad." Andrew was scarcely around during Chloe's life and he moved out when she was one year-old. Evidence of the close relationship, that when Chloe found out that

Daniel would move out, she became very upset because she continued to consider him as her father. The court will most likely award visitation rights to Daniel, given the close relationship he has with Chloe, Chloe's desire to continue having a relationship with Daniel, as well as the fact that it would be in her best interests to continue a relationship with a father figure.

Therefore, Daniel will likely obtain a court-ordered visitation with Chloe.

ANSWER TO MEE 3

Andrew's Claim to Brenda's Lottery Winnings

Andrew has a claim to a share of Brenda's lottery winnings on the grounds that they entered into a valid common-law marriage in State A in 2005, never divorced, and the lottery winnings are part of the marital estate.

State A recognizes common law marriage. A common law marriage requires two adults to agree they are married, hold each other out to the world as spouses, and co-habit as a married couple. Andrew and Brenda have a valid common law marriage. The agreement to be married can be evidenced by the exchange of present-tense words indicating that they agree to be married at that time, not some time in the future. Brenda told Andrew she wanted to marry him before the baby was born, Andrew said they were already married in the eyes of God, and Brenda agreed; this constitutes a present tense agreement to be married even without a formal wedding ceremony. Brenda and Andrew also held each other as spouses to the world; Brenda used Andrew's last name, and Andrew listed Brenda on their joint tax returns and listed her as his spouse with his employer so she could get his job benefits. Finally, Brenda and Andrew lived together beginning in 2005, fulfilling the cohabitation requirement.

Andrew and Brenda agreed to separate in March 2007 but never obtained a judicial decree of divorce. Andrew can argue that since they never obtained a divorce, they are still married. Even if they now agree to formally divorce, Brenda won her lottery ticket before they officially divorced or filed any separation claim. In some jurisdictions, all property obtained up until a final divorce decree is issued is considered marital property; in others, property acquired only up until a divorce action is filed is considered separate property. In either type of state, the lottery ticket would be considered marital property. Finally, a premarital agreement can classify certain types of property that will be considered separate property; however, there is no evidence Andrew and Brenda entered into a premarital agreement in this case.

Therefore, Andrew can claim a share of Brenda's lottery winnings on the basis that she won the lottery while still in a marriage entered into with him pursuant to State A's common law marriage statute. Should Andrew and Brenda divorce, Andrew would be entitled to equitable division of the marital estate, so while he may not necessarily get 50% (he would be entitled to 1/2 in a community property state, but State A and State B are not community property states), he would be entitled to an equitable share. The equitable division would be determined based on the theory that the marriage was a partnership, and would evaluate factors such as the length of the marriage and the financial and non-financial contributions of each spouse towards increasing the marital estate.

Daniel's Claim to Brenda's Lottery Winnings

Daniel may have a claim to Brenda's lottery winnings on the basis that he was the putative spouse of Brenda, because entered into the marriage in good faith that it would be a valid marriage.

A person can only be married to one person at a time. A person must divorce their spouse (or the other spouse dies) before entering into a new marriage. Assuming Andrew and Brenda entered into a valid common-law marriage in 2006 and did not divorce, Brenda was still married Andrew in 2008 when she and Daniel obtained a State B marriage license and wed. There is a presumption that the most recent marriage is valid, but this can be overcome with evidence of a prior marriage that is still valid. In this case, Brenda and Andrew never divorced; therefore Brenda could not enter into a new marriage with Daniel in 2008.

Even though Brenda and Daniel's 2008 marriage in State B is invalid, Daniel can benefit from the protections of State B's equitable distribution laws provided he entered into the marriage in good faith without knowing that Brenda was already married and that his marriage to her would not be valid.

Daniel has another claim to Brenda's lottery winnings on the basis that State B does not allow common law marriage since enacting a statute prospectively barring the creation of new common law marriages within the state in 2001. Under the Full Faith and Credit clause of the US Constitution, a state is required to give full faith and credit to judicial orders from other states; this includes marriages and divorces. However, it does not require a state to recognize marriages against the state's own strong public policy. Some states have a strong public policy against recognizing marriages between two cousins who are too closely related, and other states have strong public policies against common law marriages. State B does not allow common law marriages to be entered into in State B, but it is unclear whether they have a strong public policy against it. If State B has a strong public policy against common law marriages, Daniel can argue that Andrew and Brenda's marriage is not recognized in State B, therefore Brenda was free to marry Daniel in State B, and he is her spouse entitled to an equitable share of their marital estate.

However, this runs the risk of allowing some people to enter into second marriages in certain states, and forcing other states to choose between two marriages entered into by those people so Daniel's stronger argument is to claim the protection of State B's property division laws on the grounds that he entered into the marriage in good faith, unaware of the legal impediment to him marrying Brenda.

Daniel's claim for court-ordered visitation with Chloe

This issue is whether Daniel has a claim to visitation rights with Chloe when Daniel is not the biological father of Chloe, but is a stepparent Chloe regards as her father.

Biological parents have a substantive due process right to the care of their children. A fit parent's decisions on child rearing are given the most weight. As Chloe's biological mother, Brenda is afforded wide discretion with how to raise her daughter, including who gets visitation rights.

However, the court's main goal in determining custody issues is to determine the best interest of the child. A court may order stepparent visitation when the court determines that it is in the best interest of the child. Daniel will have to argue that his continued relationship with Chloe is so important to her emotional, mental, and or physical well-being that the Court can override Brenda's constitutional rights as a fit parent.

Daniel and Brenda were together from 2008 to 2017, which is 9 years. For those 9 years, Chloe had only infrequent contact with her biological father Andrew, and received no child support from him. Chloe had a close and loving bond with Daniel, regarded him as her father, and called him "Dad". Chloe was very upset when she learned Brenda wanted to break all contact and move far away because she continues to regard Daniel as her father. If Daniel can establish more evidence in his favor, such as that he would have adopted Chloe but for the legal impediment of Andrew still having his parental rights, and that he was such a primary caretaker of Chloe that it is important to continue that relationship, he will have a strong argument in favor of visitation rights.

ANSWER TO MEE 4

I. Document Inspection

The shareholder is entitled to inspect the documents she requested. The issue here is whether shareholder followed proper the proper procedures required to inspect company documents.

Any shareholder is statutorily permitted to inspect the minutes of a corporation's director meetings and accounts if the shareholder has a valid purpose for requesting to do so, and the shareholder sends a written request to the corporation. In this case, both conditions were met. The shareholder wants to investigate possible illegal dealings of the directors and officers in order to determine whether to bring a derivative suit on the corporation's behalf. The shareholder made her request in writing.

II. Dismissal of the Derivative Suit

The corporation may not obtain dismissal of the derivative suit without first investigating the allegations of the illegal foreign bribes.

When a shareholder seeks to file a derivative suit, the shareholder must first request, in writing, that the board bring the suit itself against the offending parties. Some states allow a shareholder to forgo this requirement if the shareholder honestly believes such a request would be futile. In deciding whether or not to bring a suit requested by a shareholder, the board must conduct an independent investigation into the allegations. The investigation must be conducted by independent directors or other independent parties. Following such an investigation, the board may decline to bring suit even if the allegations prove to be true. However, the board may decline to bring the suit only if bringing the suit would not be in the best interests of the organization. This occurs in cases where the suit would bring such a small recovery that the expenses of bringing the suit would outweigh the recovery. However, the board must first conduct an investigation into the allegations and determine whether bringing the suit would be in the best interests of the organization based on the investigation.

In this case, the board may not obtain dismissal of the shareholder's derivative claim without first investigating the allegations. If the board orders an independent investigation and then, on the basis of that investigation, determines that the suit would not be in the best interests of the firm, then the board may obtain dismissal.

III. Duty of Good Faith & Business Judgment Rule

The board's decision not to investigate or take further action with respect to the alleged illegal foreign bribes is not consistent with the directors' duty of good faith, despite the fact that the decision is subject to the business judgment rule. The issue here is whether the directors have met the requirements to be entitled to the business judgment rule.

All directors owe a duty of care to the organization on whose board they sit. Under the duty of care, directors must act in good faith as a reasonable person would in running their own company. To prove a violation of the duty of care when directors have failed to act, as opposed to some affirmative act taken by the directors, a plaintiff must prove

causation between the director's inaction and the resulting harm to the corporation. The business judgment rule is a lenient standard under which a court will not second guess the business decisions of a director as long as the business decision was reasonable. A reasonable basis usually requires some form of inquiry or investigation by the directors seeking the application of the business judgment rule.

Additionally, the business judgment rule applies to business decisions, and not legal ones. In this case, the potential illegal bribes are not business decisions but rather, violations of the law. A decision to not investigate or take further action has legal ramifications for the corporation. Therefore, the decision should not be entitled to the lenient standard of the business judgment rule.

Even if the court does find that the decision not to investigate is a business decision, in this case, a plaintiff seeking director liability on the basis of the violation of duty of care and duty of good faith can prove causation because. Should the allegations be true, MEGA may be subject to significant civil and criminal penalties. A failure to investigate on the part of the directors would cause such penalties because directors would fail to stop such actions and fail to mitigate damages. Additionally, in this case, the board's decision not to investigate or take further action would not enjoy the benefit of the business judgment rule. Without investigating or taking any further steps, the directors are acting unreasonably. The business judgment rule assumes that the directors have done some level of homework in making their business decision.

ANSWER TO MEE 4

(1) Inspection of documents

The shareholder is entitled to inspect the documents she requested.

At issue is what rights a shareholder of a publicly traded company has to investigate the books and records of the company in which he/she owns shares.

In general, a shareholder is entitled to inspect the books and records of a company of which she is a shareholder. The shareholder must: (1) make a formal request in writing and (2) state the purpose or the request. The company must then provide access to the records within 5 days. The shareholder is permitted to bring an attorney, accountant, or other similar professional with her to help understand the materials.

Here, the shareholder made a formal request in writing by letter on May 1st to view the company's books and records. The shareholder further articulated the purpose of her request - namely, to investigate the claims made by a leading financial newspaper

reporting that MEGA had potentially paid bribes related to MEGA's business in Country X. Finally, the shareholder limited her request only to those financial records and board meetings relevant to this particular topic (i.e., bribery in Country X).

Of course MEGA may need to provide some of the materials in a redacted or otherwise modified way to prevent the spread of highly confidential information. But in general, the company must comply with the request of a shareholder to view the company's books and records.

(2) Derivative claim

The board may obtain a dismissal of the shareholder's derivative claim, but only if it has made a good faith, full, and fair investigation of the allegedly illegal foreign bribes.

At issue is what standard a board must meet before it may properly dismiss a shareholder's derivative suit as "not in the corporation's best interest."

In general, a shareholder may bring a derivative claim against the corporation itself if the shareholder believes the board of the company is not fulfilling its obligations. If the shareholder wins the claim, any winnings (excluding legal fees, filing fees, and other administrative fees) go to the corporation itself. If the shareholder loses, the shareholder must often pay the legal fees of the corporation absent a showing that the claim was brought in good faith and well founded.

When confronted with a shareholder derivative suit, a board may dismiss the suit as against the corporation's interests. However, this option is only available if such a decision is made: (i) by disinterested directors, (2) fulfilling their fiduciary duties. If the decision is made by interested directors in an abuse of their fiduciary power, the board's attempt to dismiss the derivative claim will not be upheld.

Here, there is no indication that the board excluded interested directors from the decision on whether or not to dismiss the derivative claim. Further, and most more importantly, there is evidence that the directors' decision to try to dismiss the derivative claim is being made in bad faith and in breach of the director's fiduciary duties. Specifically, the directors' letter stated that "the board of directors will not investigate or take any other action regarding the matters raised in your letter because doing so would not be in the best interest of the corporation." The board has not taken the necessary steps to investigate the allegations, to inform itself of the necessary information to determine if the conduct of the company in Country X is legal, to determine if bribes are being paid, etc. The board may dismiss a derivative claim if the claim is not in the best interest of the company, but the company may certainly not decline to investigate an allegation if it believes that investigating the allegation might uncover unlawful behavior on the part of the company that would not be favorable to the company. To the contrary, it is a board

member's fiduciary obligation to inform her of the necessary information needed to determine if a derivative claim is or is not in the company's best interest. Failing to do such investigation would be a breach of duty of care, duty of loyalty, and good faith.

In sum, the board may not obtain dismissal of the shareholder's derivative claim on the grounds that the claim is not in the best interest of the company unless and until the company has undertaken a good faith investigation of the grounds of that claim to fulfill their fiduciary duties (particularly of care, but also of loyalty).

(3) Business judgment rule

The company's decision not to investigate or take further action with respect to alleged illegal foreign bribes is not consistent with the directors' duty to act in good faith and will not be protected by the business judgment rule.

At issue is what steps a board must take to fulfil its fiduciary obligations and trigger the deference afforded by the business judgment rule.

A director serving on a corporate board must fulfill her fiduciary obligations by: (i) acting in good faith, (ii) fulfilling her duty of care (the duty to act as a reasonably prudent person in the circumstances), and (iii) fulfilling her duty of loyalty (acting in the best interest of the company). Under the business judgment rule, if a board makes a decision (i) in good faith (i.e., satisfying the duty of loyalty and acting as a reasonably) and (ii) in an informed manner (i.e., satisfying the duty of care), then the court will defer to the decision of the board as long as the board can articulate a "rational basis" for their decision. This is a very deferential standard to board members.

However, in the case at hand, a decision to fail to investigate serious allegations of wrongdoing would violate director's obligation to fulfill their fiduciary duties and would not trigger the application of the business judgment rule. Very serious accusations have been leveled against the company related to illegal bribes in a foreign country. A reasonably prudent board member in a similar circumstance would inform themselves of relevant information regarding these allegations to find out whether the allegations are true. A failure to take such steps to investigate alleged wrongdoing in Country X, with bribery, or with other wrongdoing would be a violation of a director's obligation to act in good faith and to fulfill her duty of care. It therefore does not matter if the board can articulate a reasonable basis for its actions because the obligation to act in an informed and good faith manner has already been violated.

As such, the business judgment rule would not be triggered by the board's behaviors, and the protections often afforded to boards by the business judgment rule would not protect the board's decision to fail to investigate or take further actions with respect to the illegal foreign bribes happening in Country X.

ANSWER TO MEE 5

1. An agency relationship exists when a principal manifests intent to grant authority to an agent to act on the principal's behalf, and the agent accepts the responsibility. Here, the inventor clearly manifested such authority: he retained a woman to ask as his agent, and gave her express instructions as to his requirements for purchase. At the very least, the woman impliedly accepted the inventor's grant of authority when she went out to fulfill his orders. Therefore, a valid agency exists as between inventor (principal) and woman (agent).

An agent's authority is express when the principal clearly and expressly defines the terms of the agent's authority. Here, the principal expressly told the agent that he wanted her to buy 25 Series A computer chips. Therefore, the agent is expressly authorized to buy 25 Series A computer chips only from the chip manufacturer

Liability is assessed based on the level of disclosure the agent communicates to a third party as to the nature of her authority. An agency is fully disclosed when the agent notifies the third party that she is an agent, and when she identifies the principal. In such a case, the principal is liable for the agent's acts. In the transaction with the chip manufacturer, the agent fully disclosed the nature of her agency relationship to the chip manufacturer. However, the agent went beyond her authority when she bought Series B chips from the manufacturer. Furthermore, she acted without apparent authority, since the principal made no manifestation to the chip manufacturer that the agent had authority beyond what express authority he gave her. As such, the principal is not bound by the agent's actions, since the agent acted outside her authority and there was no apparent authority to bind her. In this case, the agent is liable.

2. In the transaction with the blue lens manufacturer, the agent acted according to the express authority granted to her by the principal: she was directed to buy 25 blue lenses that cost no more than 300 each, and in fact bought 25 blue lenses that cost 295 each. Therefore, she acted within authority expressly granted to the principal, and the principal will be bound to this transaction.

However, the agent failed to disclose both that the identity of the principal and the fact that she was acting as an agent. When both the relationship and the principal's identity is undisclosed, the third party may sue the agent personally for enforcement of the contract. Here, the inventor refused to pay the contract, even though it was entered into by the agent with valid authority. As such, the agent may be sued for breach.

Principals have a duty to cooperate with the agent's valid exercise of authority, and when they don't, agents may seek contribution or indemnification. Here, the agent validly entered into a contract on behalf of the principal, and the principal did not cooperate with

the contract. As such, even though the agent is liable to the lens manufacturer, the agent is indemnified by the principal.

3. In this final transaction, the agent did not act according to the express authority granted her, but rather made a purchase that violated principal's express. However, after she entered into a contract without authority, the principal nonetheless accepted the goods. When the principal had capacity to enter into a contract at the time it was made by the agent, the principal may later ratify the contract, even if the agent at the time did not have authority to enter into it. Ratification may be expressed or implied, where a principal does not refute a contract and instead uses the goods supplied. Here, the agent did not have authority, but the principal later ratified the contract regardless, and was competent to do so at the time. As such, the contract is valid.

Here, however, the agent only partially disclosed the nature of the agency relationship to the switch manufacturer: she said she acted as an agent, but did not identify the principal. As such, the agent, the principal, or both may be sued by the manufacturer under the terms of the contract. Since the principal ratified agent's contract, however, he retroactively granted agent authority to enter into the switch contract. As such, even if the agent is sued, she may seek indemnification from the principal.

ANSWER TO MEE 5

Inventor can be liable for the actions of Woman if there is a principal-agent relationship as to each contract. To establish an agency relationship, there must be: assent between the parties, an intention to benefit the principal, and the principal must have control over the agent.

Further, in order to enter into an enforceable agreement on behalf of the principal, the agent must have authority to do so. There are three types of authority: express, implied, and apparent. Express authority is the authority expressly given by the principal to the agent. Implied authority is when the agent reasonably believes that she has the authority to conduct the transactions necessary to achieve the goal given by the principal under express authority. Apparent authority is when the principal cloaks the agent in authority by some conduct directed at a third party.

Here there is no issue of apparent authority, but rather whether the express and or implied authority of the agent binds the principal to the three contracts.

(1) The woman alone will likely be liable to the chip-manufacturer

The woman had express authority to purchase 25 Series A computer chips. Instead, without discussing with inventor, she purchases Series B computer chips, with similar but different functionalities. The fact that she told the manufacturer that she was the inventor's agent is irrelevant as to whether the inventor is liable under the contract. Only conduct from the principal, here inventor, to the manufacturer would create apparent authority. Further, the woman's action in purchasing the Series B chips was outside of the express or implied authority granted to her. Accordingly, there was no authority for the transaction, and thus the Inventor did not assent to the woman purchasing the Series B chips. Because of the lack of assent, through authority, principal- inventor will not be bound to the terms of the contract.

However, Woman, who negotiated and signed for the chips, will still be liable. She entered into an enforceable contract to purchase series B computer chips, knowing full well that she only had authority to purchase Series A chips. Accordingly, she will still be bound by the agreement, and will be liable to chip manufacturer.

(2) Both the woman and the inventor will be liable to the blue-lens manufacturer

In this transaction, the woman properly used the authority granted to her in purchasing the blue lenses for under \$300. There was assent, because the Inventor gave her express authority, the contract was there to benefit the inventor, and inventor directed, or controlled, the terms of the contract and specific product to the woman. Accordingly, there was a principal-agent relationship, and inventor is bound by the contract entered into by the agent.

However, even though the inventor is bound by the contract, the fact that Woman did not disclose to the blue lens manufacturer that she was acting as inventor's agent means that the lens manufacturer likely has no idea that inventor exists, or that woman was an agent. In such a situation, the party seeking to enforce the contract can enforce the contract against the agent in her personal capacity, because it does not know if the principal. Accordingly, even though the woman did not intent to be bound individually, and even though the inventor is bound by the agreement, because the seller does not know if inventor's existence, it can enforce the agreement against the woman as well as the inventor.

(3) Both the woman and the inventor will likely be liable to the switch manufacturer

The contract with the switch manufacturer presents a hybrid issue of the other two, where the woman acted outside of her authority, and the principal was not fully disclosed to the manufacturer.

Generally, as discussed above, where the agent acts outside of their authority, the principal is not bound by the actions of the agent. However, here, even though the switches purchased by woman were outside of the authority expressly granted by inventor for her to purchase, the inventor ratified the contract when he nonetheless accepted the switches and used them to build lawn mowers. Accordingly, by ratifying the contract, inventor has retroactively authorized the woman to enter the transaction, and waives the ability to argue that he is not bound by the agent's actions due to a lack of assent or authority on the part of the woman.

However, the woman can likely still be held liable on the contract, even though it was ratified by the inventor. The woman only partially disclosed the identity of the principal. As discussed above, where the other party cannot readily identify who the principal to the transaction is, it can choose whether to hold the agent personally liable or to try to go after the principal. Unlike the situation in #2, here the switch manufacturer knows that the woman is acting as *someone's* agent, but does not know who. Nonetheless, where the principal is only partially disclosed, the other party can still enforce the agreement against the agent, as if the principal was undisclosed, or, it can choose to find the principal and enforce the agreement against him instead.

ANSWER TO MEE 6

1. Tenant's arguments

Unreasonable withholding of consent

Tenant will argue that landlord withholding consent to the assignment of the lease to the lawyer was not reasonable, and that she is therefore not liable for rent from May 2, 2015. This argument has some merit. At issue is whether a consent requirement in a residential lease gives a landlord an unfettered right to block assignment.

Residential leases can contain terms that prohibit transfer or assignment without consent of the landlord. However, a landlord must not unreasonably withhold consent to an assignment without good cause.

Tenant will argue that landlord's withholding consent to the assignment was without good cause and unreasonable. Tenant provided a suitable assignee, a well-to-do and well-respected lawyer in the community, who was willing to take over the balance of the lease term at the same rent. Landlord refused to give consent to this assignment based on his personal views on lawyers.

If tenant is able to persuade the court that consent was unreasonably withheld, she will be successful against landlord with respect to the assignment, resolving the question of unpaid rent in tenant's favor.

Surrender

Tenant will argue that landlord accepted her surrender of the property on July 26, 2015 and that she is therefore not liable for the subsequent 17 months' rent. This is a strong argument. At issue is the question of what constitutes acceptance.

A surrender occurs where a tenant vacates the premises, and also makes a clear indication, in writing, that she does not intend to return. The effect of a surrender is to give the landlord the option to: reject the surrender and hold the tenant over, continuing to charge the tenant for rent; or accept the surrender and treat the lease as ended. The landlord must take steps to mitigate any loss arising from a surrender.

In this case, the tenant vacated the apartment, moving overseas, and provided an unequivocal indication that she would not return: on July 25, 2015, she left the apartment keys in an envelope in the landlord's mail slot. The envelope contained a note in which she wrote "As you know, I am moving overseas and won't be back before my lease ends. So here are the keys. I won't pay you any rent from August 1 on." This is undoubtedly a surrender.

Landlord's response to the surrender was to send tenant an email on July 26, 2015 stating: "Although this is a problem you created, I want to be a nice guy and help you out. I feel pretty confident that I can find a suitable tenant who is not a lawyer to rent your apartment." Tenant will argue that this email, though not unequivocal, constitutes acceptance by landlord of tenant's surrender.

2. Landlord's arguments

Reasonable to withhold consent

Landlord will argue that it was reasonable to withhold consent to the assignment. This argument has some merit.

Tenant's argument is discussed above, and landlord will likely argue that his personal experience of lawyers was a valid basis on which to withhold consent to the assignment of the lease to a lawyer. Although the argument would not work if the objection was based on the race or gender of the proposed tenant, a tenant's training and profession may ground a valid basis for reasonably withholding consent.

Even if the landlord is successful on this argument, he still needs to address the surrender issue.

Surrender

Landlord will argue that he didn't accept surrender, and that despite his efforts to mitigate, he was unable to reduce the loss suffered by tenant breaking the lease. Although the court is not likely to find that the surrender wasn't accepted, if it does, landlord has a strong argument that he made adequate attempts to mitigate his loss.

Landlord's email to tenant did not contain an unequivocal acceptance of her surrender; he simply stated that he felt pretty confident he could find a suitable tenant. In actual fact, he was unable to find such a tenant.

If a surrender is not accepted, a landlord must take steps to mitigate his loss from the tenant's abandoning the premises if he is going to sue for rent. If the court finds that landlord did not accept the surrender, landlord has a strong argument that he took all appropriate steps to attempt to mitigate loss, but that he sustained serious loss nevertheless. Landlord advertised the apartments with a sign in front of the apartment building, placed advertisements in newspapers and a website that lists apartments for rent. He also halved the rent on the relevant apartment, but was totally unable to fill the apartment. Although tenant will argue in response that landlord rented two of four available apartments, and could have rented hers, the court is unlikely to accept this argument because landlord made all apartments available, and tenants likely chose the two they liked best.

Based on this mitigation, if landlord is successful in establishing that he did not unreasonably withhold consent and did not accept surrender, he will likely be entitled to the full 17 months' rent.

ANSWER TO MEE 6

A tenancy for years is created when the lease agreement states a lease period and a specific end date. The agreement continues until that date and may not be terminated earlier by either party. Here, the lease agreement was for a period of 2 years with a specific end date of December 31, 2016. The tenant vacated the lease early on July 25, 2015 in breach of the lease.

If a tenant breaches a lease by vacating the property before the expiration of the lease and leaves a written notice to the landlord to that effect, that would be treated as a 'surrender'. If a landlord accepts a tenant's surrender, the tenant is released from the lease

and may treat it as extinguished with no further obligation to pay. If the landlord does not accept the surrender he will generally have two options: to leave the property vacant and sue for all rent payable under the lease, or to re-let the property and sue the breaching tenant for any reduction in rent for the remainder of the lease term. In a majority of states the landlord is at least required to make a reasonable effort to re-let the premises.

If a lease agreement contains a clause that restricts assignments without the landlord's consent, and the landlord agrees to any assignment, then all subsequent assignments are considered consented to and the landlord waives his right to object.

Tenant's arguments

Here, the tenant may argue that she surrendered the lease by vacating and leaving in the landlord's mail slot on July 25, along with the keys, the note stating that she would no longer pay any rent. The tenant would argue that email response from the landlord on July 26 was an acceptance of that surrender and that she is released from the lease and any obligation to pay rent. A court would look to the words of the email to construe the intent of the landlord and the tenant may try to assert that the landlord was agreeing to let the tenant off the hook by wording such as "I want to help you out".

The tenant may argue that the landlord acted reasonably in refusing consent to assign the lease to the lawyer. The tenant stated that the lawyer was well- respected and well-to-do, establishing that the lawyer was likely to be a good tenant able to pay rent on time and to comply with tenant's duties. The tenant may argue that this was an invalid withholding of consent and that the tenant used their best efforts to assist the landlord.

The tenant may argue that the landlord should have tried to re-let her apartment before the others, as it seems all were similar and the rent payable for each was the same. This may reduce her required payments to \$1000 per month as the difference in value between her rent and the re-let rent amount.

Landlord's arguments

The landlord, however, would argue that by saying he "wanted to be a nice guy and help out" and that he felt "pretty confident he would find a suitable tenant who is not a lawyer to rent your apartment" was not an acceptance of surrender but a commitment to at least try to re-let the premises. He may try to assert that it was a conditional statement and that he may accept the surrender in the future. The landlord did attempt in good faith to re-let the premises and was unable to do so, so he may argue that the tenant is still liable for all unpaid rent for the remainder of the agreement. The court may look favorably on the landlord's efforts to re-let, particularly if required by the applicable state.

The landlord may argue that the lease did not include a requirement that the landlord act reasonably in withholding consent and that the terms of the lease agreement gave him the right to refuse the assignment of the lease to the lawyer. The landlord may also argue that the consent was withheld reasonably because the landlord had personal experience that lawyers can be argumentative tenants that make unreasonable demands. The landlord may argue that he has the right to choose the tenant that he wants to choose.

ANSWER TO MPT 1

MEMORANDUM

To: Lauren Scott, Managing Partner
From: Applicant
Re: Ace Chemical: Potential Conflicts of Interest

Montagne & Parks LLC ("Montagne" or the "Firm") has been approached by Ace Chemical, Inc. ("Ace") to represent the company in a breach of contract case against Roadsprinters Inc., and you have requested that I analyze three potential conflicts of interest that may prohibit Montagne from taking on Ace as a client in this matter consistent with the Franklin Rules of Professional Conduct (the "Rules"). This memorandum analyzes the following three potential conflicts: (1) Montagne's Columbia office's representation of the Columbia Chamber of Commerce, for which Jim Pickens (the president of Roadsprinters) once served as the chair of the Board; (2) Samuel Dawes' prior representation of Roadsprinters in a trademark registration matter; and (3) Montagne's Olympia's office's desire to hire Ashley Kaplan, an attorney who presently works in Adams Bailey's (Roadsprinter's counsel) Franklin office. In addition to assessing the extent of each potential conflict, this memorandum also identifies actions that Montagne can take to eliminate potential conflicts where they may exist.

1. Potential Conflict: Columbia Chamber of Commerce

Even in light of the Firm's representation of the Columbia Chamber of Commerce (the "Chamber"), the Firm is likely to be able to represent Ace in the matter against Roadsprinters without violating the Rules. The Firm's representation of the Chamber raises the issue of whether a firm that represents a trade organization in lobbying activities has, in effect, represented a member of the trade association, such that a later representation of a party adverse to the member would constitute a conflict under the Rules. The Franklin Supreme Court's opinion in Hooper Manufacturing, Inc. v. Carlisle Flooring, Inc. provides the relevant review framework.

As an initial matter, the Franklin Supreme Court has held that courts in the state will be guided by the Rules in assessing conflicts of interest questions of this nature.

The first substantive issue is whether "the trade association member provided confidential information to the lawyer that was necessary for the lawyer's representation of the trade association." [Hooper Mfg. v. Carlisle Flooring] If the member provided such information, then representing the association will be considered tantamount to representing the member itself.

Based on your Memo to File regarding the Firm's representation of the Chamber, it appears that the Firm did not obtain any confidential information from Roadsprinters, the member, in the course of its representation of the Chamber. While the Firm has received some confidential information from the Chamber itself regarding strategies and tactics relating to tax issues, the Firm has not received any confidential information from or regarding any of the Chambers' members, including Roadsprinters. Concluding that the Firm did not obtain any confidential information about Roadsprinters in its representation of Commerce does not end the inquiry; if the Firm advised Roadsprinters that any and all information provided to the Firm would be treated as confidential, that would also create a conflict. [Hooper Mfg. v. Carlisle Flooring] There is also no indication that the Firm provided any such assurances to Roadsprinters, and that conclusion is underscored by the fact that the Firm clarified with the Chamber that the Firm's communications with the Chamber's members were not confidential. Indeed, the Chamber confirmed in writing that our representation was limited to lobbying for the Chamber itself, and not for its individual members. Because the Chamber did not provide any confidential information about its member Roadsprinter to the Firm, and because the Firm did not advise Roadsprinter that any information provided to the Firm would be kept confidential, if the Firm represents Ace, it will not be directly adverse to another client (the Chamber).

The second substantive issue the Firm must consider is whether an employee of Roadsprinter had an important position at the Chamber and whether, in that position, he worked closely with lawyers of the Firm. If there was substantial contact, under Rule 1.7(a)(2), there may be a significant risk that the Firm's representation of Ace might be "materially limited" by its responsibilities to the Chamber, and thus might be barred under the Rules. Under the facts here, this is not likely to be an issue. While Jim Perkins, the longtime president of Roadsprinters, was chairman of the Chamber's Board for a year during the Firm's representation of the Board, the firm did not work primarily with the officers of the Board, and so did not work extensively with Perkins. In contrast to the facts in *Hooper*, in which the trade association's lawyer worked extremely closely with the member of the trade association the firm now was going to be adverse to (i.e., meetings every two weeks, emails every day during legislative sessions), the minimal (if any) contacts between the firm and Perkins are not likely to create a problem.

Under both *Hooper* and the Rules, the Firm may take on Ace as a client in *Ace v. Roadsprinters* without running afoul of the Rules in light of its representation of the Chamber.

2. Potential Conflict: Samuel Dawes

While the potential conflict of interest raised by Samuel Dawes' prior representation of Roadsprinters is a fairly fact-based inquiry, it is likely that his prior activities will not bar the Firm from representing Ace in the dispute with Roadsprinters, though there are reasons for caution. At issue here is whether a lawyer who represented a client in a matter totally unrelated to the present dispute may later represent a party adverse to the earlier client without creating a conflict of interest. As an initial matter, the fact that Dawes did not work at the Firm when he represented Roadsprinters is irrelevant; Rule 1.9 provides that lawyers have duties to former clients, and under Rule 1.10, a single lawyer's conflicts of interest are plainly imputed to their entire firm. Thus, any conflicts that apply to Dawes will apply to the Firm as a whole, even though it is a large enterprise with 14 offices and 400 lawyers.

Under the Rules, a lawyer who has formerly represented a client in a matter "shall not thereafter represent another person *in the same or a substantially related matter* in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." [Rule 1.9(a)]. Because we know that Roadsprinters will not provide informed consent, the Firm will only be able to take on the case if Dawes' prior representation of Roadsprinters did not have a "substantial relationship" to the *Ace v. Roadsprinters* matter. A "substantial relationship" exists between the two matters when "the lawyer *could* have obtained confidential information in the first representation that would be relevant in the second representation." [Ethics Opinion 2015-212] Here, it is likely that Dawes' prior matter did not have a "substantial relationship" to the contract dispute at issue now between Ace and Roadsprinters. First, the Ace matter is a contract dispute involving the allegation that Roadsprinters failed to timely deliver Ace's goods to a customer, while the matter Dawes worked on for Roadsprinters was an uncontested trademark registration matter that took place seven years ago. On their face, the two matters have absolutely no relationship, suggesting that it would be highly unlikely that Dawes would have learned confidential information during that case that would be relevant in the present matter. Further, Dawes has been interviewed by the Firm pursuant to Rule 1.6(b)(7) and the Firm has separately concluded that no information that he learned or could have learned in the past matter could possibly be relevant to Ace's case against Roadsprinters. It is also helpful that he has not had any contact with Perkins for the last five years.

While under the Rules it does not appear that Dawes' prior representation of Roadsprinters will be an issue for the Firm should it take on Ace as a client in *Ace v. Roadsprinters*, a word of caution is warranted: the "substantial relationship" test is one that

is concerned with the "appearance of impropriety," that is, the rule is designed to avoid creating "an unsavory appearance" of conflict for the public. [Ethics Opinion 2015-212] On this front, the Franklin Daily News' 2010 write up of Dawes as a rising star should give the Firm some pause, as it features Dawes giving a glowing assessment of his relationship with Jim Pickens, the president of Roadsprinter who Dawes presumably came to know during his representation of Roadsprinter. Dawes' quote, in which he said that Pickens "taught me so much" and was "so generous with his time and advice" suggest a relatively close relationship with Perkins. Of course, the article is several years old, and also discusses matters of general professional relationships rather than confidential business information; however, it is worth considering. While this potential appearance of impropriety is undermined substantially by both the facts of Dawes' representation of Roadsprinter and his interview with the Firm under Rule 1.6 (b)(7), the Firm may wish to act out of an abundance of caution and have a different litigator work on the Ace matter.

Under a reading of the Rules and of the Ethics Opinion and in light of the facts as relayed to the Firm by Dawes, the Firm should be able to take on Ace as a client in the Ace v. Roadsprinters matter without violating the ethics rules. However, in the event the Firm decides that the risk of a *potential* appearance of impropriety is too great, it may still take on Ace as a client as long as it follows the screening procedures outlined in Rule 1.10 for Dawes, discussed more fully in Section 3, below.

3. Potential Conflict: Ashley Kaplan

As described more fully below, Montagne's may make an offer Ashley Kaplan ("Kaplan") to join the Firm's Olympia office; however, if it does so and if she accepts the offer, in order to remain in compliance with the Rules, Montagne must take a series of steps to timely screen her off from the Ace matter. The Firm's Olympia office has already interviewed Kaplan and wishes to hire her, and in the context of that interview process, she provided the Firm with a list of clients for which she has done work at Adams Bailey, and Roadsprinters is on the list. Her inclusion of Roadsprinters on her list did not include any indication of whether she worked for Roadsprinters on the pending contract dispute with Ace.

A. Assessment of Conflict

When a lawyer moves from one law firm to another, a lawyer "shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented the client: (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired [confidential] information protected by Rule 1.6 . . . that is material to the matter." [Rule 1.9] While ethics opinions are not binding on the courts, they are persuasive, and Franklin Ethics Opinion 2015-212 has interpreted this portion of Rule 1.9 and concluded that a new firm may represent a client with materially adverse interests to

the client of the moving lawyer's old firm so long as the lawyer did not *actually* acquire confidential information." (emphasis in original). And even if the lawyer did in fact acquire confidential information, the new law firm may continue representing the client as long as the moving lawyer is properly screened off from the matter.

Based on the limited information the Firm has regarding Kaplan's representation of Roadsprinters, we cannot yet know with certainty whether she in fact acquired confidential information from them; however, based on the Rules' very broad definition of "confidential information" (see discussion above), it is highly likely that Kaplan did acquire confidential information about Roadsprinters in the course of doing work for them at Adams Bailey.

It is irrelevant to the assessment of this conflict that the Firm is considering hiring Kaplan to work in its Olympia office, while it will potentially be representing Ace out of its Franklin office. Rule 1.10 is clear that while lawyers are associated in a firm "none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so" under the rest of the conflict of interest rules. Franklin Ethics Opinion 2015-212 reads this rule strictly, and concluded that "the imputation of Rule 1.10 applies to all members of the law firm, regardless of the office in which they work." Thus, the fact that Kaplan would not be working in the Montagne office that would handle the Ace representation does not change the conflicts of interest analysis as it applies to her.

Under Rule 1.9 and Franklin Ethics Opinion 2015-212, the Firm may not hire Kaplan and take on Ace as a client *unless* Kaplan is timely and properly screened off of the matter.

B. *Curing the Conflict*

In the event that Kaplan is offered the position with the Firm and accepts, in order to ensure that the Firm is in compliance with the Rules and does not have a conflict of interest on the Ace matter, the Firm must abide by the screening procedures laid out in Rule 1.10(2) in order to make sure that Kaplan, as the "moving lawyer" is "screened from all contact with the [Ace] matter." [Ethics Opinion 2015-212] Rule 1.10 requires that Kaplan be timely screened from any participation in the Ace matter, and that she not be assigned any portion of the fees arising from the matter. [Rule 1.10(2)(i)] Likewise, Montagne will have to give written notice to Roadsprinters, including a description of the screening procedures employed, a statement of Montagne and Kaplan's compliance with the Rules, a statement that review may be available before a tribunal, and an agreement by Montagne that it will respond promptly to any "written objections or inquiries" from Roadsprinters regarding the screening processes." [Rule 1.10(2)(ii)] Finally, both Kaplan and a partner at Montagne will need to provide Roadsprinters with a certificate of compliance with the Rules at reasonable intervals, at Roadsprinters' written request, and on termination of the screening procedures. [Rule 1.10(2)(iii)]. Montagne will also need to

ensure that all digital files relating to the Ace matter are password protected and that Kaplan does not have access to the files, and must also instruct all lawyers at the firm that they are not to communicate with Kaplan in any way about the Ace matter. [Ethics Opinion 2015-212] Crucially, Kaplan must be screened *before* she has any contact with information about the Ace matter from which she is being screened. [Id.]

ANSWER TO MPT 1

Memorandum

To: Lauren Scott, Managing Partner
From: Examinee
Date: February 21, 2017
Re: Ace Chemical: potential conflicts of interest

1) Potential conflict: Columbia Chamber of Commerce

Issue: Does our firm's representation of the Columbia Chamber of Commerce pose a concurrent conflict of interest under Rule 1.7 to our representation of Ace Chemical.

Rule 1.7 of the Franklin Rules of Professional Conduct determine whether there is a concurrent conflict of interest in our representation of the Columbia Chamber of Commerce ("Chamber") and Ace Chemical ("Ace"). While the Rules of Professional Conduct are only intended to govern the regulation of lawyers, and thus not binding on courts when faced with questions other than attorney discipline, the Franklin Supreme Court has found that the courts in the state are guided by the rules in determining motions for disqualifications based on conflicts of interest. *Hooper Manufacturing, Inc., v. Carlisle Flooring, Inc.*, Fr. Sup. Ct. (2002). Therefore, the rules are authoritative on this issue.

The first inquiry under Rule 1.7 is whether representation of both clients poses a concurrent conflict of interest. Such a concurrent conflict of interest exists when 1) the representation of one client will be directly adverse to another client; or 2) there is a significant risk that representation of one or more clients will materially limit the lawyer's responsibilities.

The representation of a trade association presents unique difficulties in this analysis because there is the question of whether the representation of a trade association entails representation of its individual members. Under *Hooper*, the critical question is whether a trade association member provided confidential information to the lawyer that was necessary for the lawyer's representation of the trade association. If yes, then representation of the association as a whole constitutes representation of the member as well. *Id.* If no, then representation may still be barred under Rule 1.7 (a)(2) if the lawyer

advised the member that any and all information provided to the lawyer would be treated as confidential, posing a significant risk that representation will be materially limited. *Id.*

Applying the *Hooper* analysis to our case, our representation of the Chamber does not entail representation of Roadsprinters. Under *Hooper's* first inquiry, we have not received any confidential information from any of the Chamber's members. Indeed, we have made clear in our communications with Chamber members that our representation is of Chambers, and not of the members, and that communications with us are not confidential. Therefore, it is very unlikely that Chamber members would have mistakenly submitted confidential communications with us. The facts of our case on this issue are similar to those in *Hooper*: the Court determined that clear communications between the lawyer and the association's members that communications were not confidential was sufficient to satisfy Rule 1.7 (a)(1).

But we must still conduct *Hooper's* second analysis to ensure that representation of both will not materially limit the representation of either client. The critical factual inquiry as required by *Hooper* is whether an employer of the member worked closely with the lawyers for the trade association. In terms of our case, it is whether an employee for Roadsprinters (Jim Pickens) worked closely with the lawyers of our firm in the course of our representation of Chamber. The facts of *Hooper* are significantly distinguished from ours: there, an employee of a member worked closely with the association's lawyers, meeting them in person and communicating with them every day during the legislative session, and an average of every two weeks during the rest of the year. By contrast, while Jim Pickens was the chair of the Chamber, he was only chair for one year, and our lawyers worked with the executive director and not with the board. Therefore, in our case, there is not the kind of close relationship between our lawyers and an employee of Roadsprinters as to present a material limitation in our ability to represent either the Chamber or Ace.

While it is highly unlikely that our relationship with Chamber will present a concurrent conflict of interest under Rule 1.7(a), I want to note that even when a representation poses a concurrent conflict of interest, Rule 1.7(b) may still permit concurrent representation if: 1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; 2) the representation is not prohibited by law; 3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and 4) each affected client gives informed consent, confirmed in writing. However, if our case fails the previous analysis, it will likely also fail the requirement of Rule 1.7(b)(3) since the two parties are directly adverse to one another in the same proceeding. Further, as indicated in the memorandum, (4) cannot be met since consent from Roadsprinters cannot be obtained.

In conclusion, it is highly unlikely that our representation of Ace and the Chamber poses a conflict.

2) Potential conflict: Samuel Dawes

Issue: Does Samuel Dawes's prior representation of Roadsprinters in an uncontested trademark registration breach a duty to former client under Rule 1.9.

As noted above, the Franklin Rules of Professional Conduct are authority that courts follow in determining motions for disqualifications based on conflicts of interest. *See supra* (citing *Hooper*). Since Roadsprinters is not a current client of Samuel Dawes's, the issue does not concern Rule 1.7 for concurrent conflicts of interest, but rather, Rule 1.9 concerning duties to former clients. The Rules provide that a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the *same or substantially related matter* in which that person's interests are materially adverse to the interests of the former client unless the former client consents. Frank. R. Prof. Conduct 1.9(a). Since Roadsprinters will not provide consent, Rule 1.9(a) must be satisfied for Dawes to represent Ace. And clearly, Roadsprinters and Ace Chemicals are directly adverse in this case, so the question that remains is whether Dawes worked on the same or "substantially related" matter for both Roadsprinters and Ace.

The meaning of "substantially related matter" was clarified by Franklin Ethics Opinion 2015-212. While this opinion is not binding on Franklin Courts, it is persuasive authority. According to the Opinion, substantial relationship exists when the lawyer *could* have obtained confidential information in the first representation that would be relevant in the second representation. The inquiry is not whether the lawyer did actually obtain such information, but rather whether it could have. In other words, it is not a factual inquiry, but rather an objective one.

It is unlikely that Dawes's previous representation of Roadsprinters in an uncontested trademark registration will be found to be substantially related to this breach of contract with Ace. As noted in the memorandum of Feb 17, 2017, if no information that Dawes learned, or more critically, *could have learned*, could possibly be relevant to the litigation against Roadsprinters, then the standard in Ethics Opinion 2015-212 has been satisfied in this case.

However, before I end the analysis, I would like to flag a potential concern under Ethics Opinion 2015-212 and Rule 1.7(a). The purpose of the rule is to prevent an "unsavory appearance of conflict of interest . . . in the eyes of the lay public, . . . the bench and bar." The reason for Rule 1.9 is to encourage clients to share confidences with their lawyers, and to ensure that clients do not distrust their lawyers who may switch sides. The 2010 Franklin Daily News article may raise some red flags, because the article discusses the "close and lasting" relationship he built with Mr. Pickens at Roadsprinters. The article also discussed how Mr. Pickens is a mentor to Dawes, and how he did things above and beyond what he would do with an attorney. This close relationship may run afoul of Rule 1.7(a)(2) if there is a risk that Dawes's ability to represent Ace will be "materially limited" by his personal interest of maintaining a close relationship with his mentor Pickens.

However, as noted in the February 17, 2017 memorandum, Dawes has not had contact with Pickens for the last 5 years, and is presumably no longer being introduced to community and business leaders by Pickens as noted in the newspaper article. In that case, it is likely that he can represent Ace without posing a conflict of interest.

In sum, unless Dawes has a close relationship with Pickens such that he cannot represent Ace without posing a significant risk that such a relationship will materially limit his responsibilities to Ace (which is not what the facts seem to indicate); Dawes can represent Ace in this matter.

3) Potential Conflict: Ashley Kaplan

Issue: Does Kaplan's prior representation of Roadsprinters present a conflict of interest under Rule 1.9 (b) and 1.10 for her representation of Ace in this matter.

Rule 1.9 discusses the problem of conflict of interests posed when a lawyer has previously represented a client at a different firm. The lawyer has duties to her former client under Rule 1.9. In that situation, the lawyer shall not represent a new client if: 1) the new client's interests are materially adverse to those of a former client; and 2) the lawyer had acquired information from the former client that is protected by Rule 1.6, unless the former client grants informed consent in writing. Since Roadsprinters will not provide consent, Kaplan can only work for Ace in this matter if the requirements of the rule are satisfied.

Again, Franklin Ethics Opinion 2015-212 helps us interpret the rule (although its authority is merely persuasive, not binding). The firm may represent a client with materially adverse interests to the client of the moving lawyer's old firm so long as the lawyer did not actually acquire confidential information. Unfortunately in this case, Kaplan noted in her client list that she has worked for Roadsprinters when she was at Adams Bailey. Rule 1.6 makes clear that a lawyer shall not reveal information relating to the representation of a client unless there is informed consent. And she has abided by Rule 1.6(b) (7) in revealing only enough confidential information to allow us to resolve conflicts of interests arising from her change in employment. Clearly, Kaplan cannot represent Ace in this matter.

Unfortunately, Kaplan's joining of our firm may impute her conflict of interest to the rest of our firm for the purposes of representing Ace in this matter. As Ethics Opinion 2015-212 indicate, the fact that Kaplan is joining the Olympia office does not matter for the purposes of imputing her conflict on the rest of the firm. The imputation rule applies across the entire firm, and is not constrained to a given office. We can only continue to represent Ace if the requirements of Rule 1.10(a)(1) or (a)(2) are satisfied. Rule 1.10(a)(1) would allow us to represent Ace if the conflict with Kaplan arose based on her personal interest, but that is not the case here. Therefore, we must rely on Rule 1.10(a)(2) and take the necessary precautions therein in order to continue to represent Ace.

First, under 1.10(a)(2)(i), Kaplan must be timely screened from participation in the case and cannot be apportioned any part of the fee in the matter for which she is being screened. Ethics Opinion 2015-212 clarifies what it means for Kaplan to be timely screened. Proper screening requires that Kaplan be denied access to all digital and physical files relating to the client and/or the matter. All digital files must be under lock and the screened lawyer must not have the password. All physical files must be under lock and the screened lawyer must not have a key. In addition, all lawyers in the firm must be admonished that they cannot speak with or communicate in any way with Kaplan about the matter.

Second, under 1.10(a)(2)(ii), written notice must be given to the former client, Roadsprinters, to enable Roadsprinters to ascertain compliance with the provisions of Rule 1.10, which shall include a description of the screening procedures employed, a statement of our firm's and Kaplan's compliance with Rule 1.10, a statement that review may be available before a tribunal, and an agreement by our firm to respond promptly to any written inquiries or objections by Roadsprinters about the screening procedures.

Finally, under 1.10(a)(2)(iii), Kaplan and a partner of our firm must provide certifications of compliance with Rule 1.10 and with the screening procedures to Roadsprinters at reasonable intervals upon Roadsprinters' written request and also upon termination of the screening procedures.

In summary, Kaplan cannot represent Ace in this matter. In addition, in order for the firm to be able to continue to represent Ace, we must comply with and immediately implement the requirements of Rule 1.10(a)(2).

Final Summary:

The firm may represent Chamber and Ace without posing a conflict of interest. Dawes may represent Ace against Roadsprinters, barring revelation of unknown and deep ties between Dawes and Pickens. And Kaplan cannot represent Ace without posing a significant conflict of interest. Indeed, in order to ensure that her conflict is not imputed to the rest of the firm, all measures under Rule 1.10(a)(2) must be undertaken immediately.

ANSWER TO MPT 2

In re Guardianship of Martinez Findings of Fact and Conclusions of Law

FINDINGS OF FACT Background

1. Henry King is 74 years old.
2. In 2013, a year after his wife died, Henry began to have trouble with his memory and lose his attention span. A neurologist and psychiatrist said that Henry was showing early signs of dementia. At that time, Noah lived in Dry Creek, where Henry lived, and Ruth lived in another city.
3. On May 20, 2013, after discussions, Ruth, Noah and Henry agreed it was practical to give Noah necessary authority and Henry subsequently signed an advance directive and power of attorney.
4. In both the advance directive and power of attorney, Noah was nominated as Henry's prospective guardian.
5. Noah's duties include the management of Henry's finances.
6. In about 2015, Henry's condition began to worsen. He did not leave the house and began to make less sense during any conversations with Ruth and Noah. He spends his days in his favorite chair, staring out the window, at a book or the TV. Henry's condition has remained that way until now and the doctors have said it is permanent.

Noah's care of Henry

7. Towards the end of 2015, Ruth returned to Dry Creek to visit her father.
8. During that visit, Henry told Ruth that he had fallen in the shower and the length of the back of his right arm was bruised.
9. On confronting Noah about the incident, he said that he was aware his father had fallen but he didn't think it was a problem because Henry had not complained.
10. Noah subsequently agreed to take Henry to the doctor, who confirmed there were no broken bones, but simply bad bruising.
11. A few days after that doctor's visit, Ruth and Noah argued about her concerns relating to her father's care and Ruth was told by Noah to stay out of it.
12. On June 22, 2016, Henry fell over in his bedroom, breaking his wrist. On that occasion, Noah had visited his father in the evening and Henry complained to being a little stiff, but did not appear to be in too much pain.

13. On June 23, 2016, a neighbor called Noah stating that Henry's wrist was swollen. Noah took his father to the emergency room where they put a cast on his wrist and discharged him the same day.

14. Noah did not tell Ruth about this incident.

15. In August 2016, Ruth transferred her work to an office close to her father. She spent two or three evenings a week with her father.

16. After moving back to Dry Creek and spending time with her father, Ruth noticed that Noah did not buy Henry food and the refrigerator was mostly empty.

17. Ruth began food shopping and cooking for her father, and ultimately hired someone to take over those duties.

Henry's finances

18. On one occasion after moving back to Dry Creek, Ruth noticed an overdue notice from the electric company. Ruth confronted Noah and he said he had missed a few months' payments.

19. The bills and bank statements kept at Henry's house.

20. Ruth looked through the bills and statements and discovered Noah had not been paying a lot of bills.

21. Henry had received a number of threatening letters, some of which were from his doctor.

22. Ruth also discovered a number of online purchases made by her father from Amazon and other sites, which Henry had shipped directly to his friends as gifts to ensure their visits and to repay favors.

23. On that one occasion, Ruth reviewed 2 months' worth of bills and statements, which totaled \$2,200.

24. From the period between 2016 and 2017, Henry made purchases in the amount of \$9,000 on eBay and Amazon.

25. Henry receives \$2,515 each month from his pension and Social Security.

26. Ruth again confronted Noah. Noah said he knew about the online purchases but that it was difficult to stop his father from spending. He also said it was these online purchases that made it difficult to pay the bills.

27. Noah did not feel comfortable calling Henry's friends to ask them to return the gifts, and did not have the heart to tell his father to stop the purchases.

28. Noah did not think it was his place to stop his father from spending his money and took no further steps to stop the spending.

CONCLUSIONS OF LAW

1. A guardian is appointed by the court to manage the income and assets and provide for essential health, safety and personal need requirements for a person found in competent (s 400 Guardianship Code ("Code"))

2. The court appoints an individual as guardian who will best serve the interest of the adult, and the individuals are given preference according to list set out in s 401 of the Code (s 401(a)).

3. An adult may nominate a person to be future guardian providing certain formalities are met. Where an adult has given an advance nomination for an individual as guardian, they will be given preference. This is a presumption that can be overcome by a showing of good cause (s 401(b)(1); Matter of Selena J; In re Guardianship of Martinez).

4. Henry executed an advance nomination for Noah to be appointed Henry's guardian should that prove necessary and there is thus a presumption that Noah will therefore be appointed in that capacity.

5. A court may refuse to appoint a proposed or nominated guardian where that person's previous actions would have constituted a breach of a fiduciary duty had the person been serving as guardian at the time. Particular consideration is given to this factor where the person has in fact served as a fiduciary under an advance directive or power of attorney (Matter of Selena J).

6. Part of the nominated or appointed or named person's fiduciary duty is the duty to act in the principal's best interest (Matter of Selena J).

7. Noah has served as fiduciary in his preceding capacities. Thus, if the court finds Noah has breached his fiduciary duties, it has the power to refuse to appoint him and may appoint a person with lower preference (s 401(a)). Such a person includes another adult child of the adult (s 401(b)(3)).

8. A showing of good cause to remove a nominated or appointed guardian exists where the person breaches their fiduciary duty (Martinez).

9. Noah appears to have neglected the care of his father's financial affairs and neglected to properly provide the medical care necessary. Henry was not taken to the doctor after falling over and bruising his arm, nor was he taken within an appropriate time after falling and breaking his wrist. Further, Noah has failed to properly provide food for his father. Noah has also neglected to manage his father's affairs and has allowed debt to accumulate and bills to remain unpaid.

10. Where it appears to the court that there is good cause to revoke or suspend the guardian, the court can investigate the allegations and make such orders it deems appropriate (s 402 Code).

11. In this case, the court should find that good cause has been shown that Noah has breached his fiduciary duties owed to his father. He has neglected to provide the necessary care for his father, in both health and financial matters and has demonstrated that he is not capable and fit to be his father's guardian. Good cause is shown by his failure to meet his obligations and by breach of his fiduciary duties. Thus, the court should appoint Ruth as guardian of Henry as permitted by s 401 of the Code.

ANSWER TO MPT 2

Findings of Fact and Conclusions of Law Regarding Guardianship of Henry King

FINDINGS OF FACT

1. Henry King is 74 years old.
2. In 2013, a year after his wife died, Henry started to have trouble with his memory and began to lose his attention span.
3. Around this time a neurologist and a psychiatrist diagnosed him with dementia.
4. Upon receiving this diagnosis, and while still generally doing well, Henry set up arrangements for his health care and finances in the event that he should become incompetent.
5. Henry and his two children, Ruth and Noah, agreed that Noah would become Henry's health-care agent and holder of durable financial power.

6. Henry, Ruth and Noah further agreed that Henry would nominate Noah as his prospective guardian in the event he should become incompetent.
7. Noah was chosen for these fiduciary duties because he lived closer to Henry than Ruth.
8. On May 20, 2013, Henry signed an advance directive and power of attorney and in both documents nominated Noah as his prospective guardian.
9. Ruth has stipulated to the validity of these documents.
10. About two years ago Henry became noticeably worse to the extent that he cannot take care of himself.
11. Henry's doctor has informed Ruth and Noah that his condition is permanent.
12. In the summer of 2015, while acting as Henry's health-care agent and holder of durable financial power, Noah failed to take Henry to the doctor until prodded by Ruth, even though Noah knew that Henry sustained bruises up and down the back of his arm due to a fall in the shower.
13. On June 22, 2016, while acting as Henry's health-care agent and holder of durable financial power, Noah failed to take Henry to the hospital until prodded by a neighbor, even though Noah knew that Henry was in pain, which the doctor determined was due to Henry breaking his wrist tripping over a rug.
14. Noah did not inform Ruth about Henry's broken wrist.
15. Ruth confronted Noah about his neglect of Henry's bruising and his failure to inform her of the broken wrist.
16. In August 2016, when Ruth moved back to Dry Creek, she spent two or three evenings a week with Henry and noticed that Noah wasn't buying any food for him, that the refrigerator was always nearly empty with just skim milk and a little bread, and there was only canned soup in the cupboards.
17. Ruth started buying food and cooking for Henry and also hired someone to shop and cook for him.
18. Ruth went through Henry's bank statements and his bills and discovered that lots of different bills had not been paid, or were months delinquent, including the electricity bill and the doctor bill (which was about to go to collections).

19. Ruth also noticed that Henry had made purchases online, up to \$1200 a month of his \$2515 monthly stipend (totaling \$9000 over the past 12 months), to buy gifts for friends so they would visit him.

20. Noah has stated that he didn't have the heart to tell Henry to stop his online purchases and therefore he just let it go.

21. After Henry spent \$1200 online in one month Noah asked him to stop, but Henry didn't seem to understand; Noah took no further action.

22. Noah has stated that he doesn't think it is his place to keep Henry from his online spending because he has enough money.

23. Ruth confronted Noah about the unpaid bills and the online spending and Noah responded by telling her to let it go, even though Noah admitted that the online purchases made it hard to pay the bills.

CONCLUSIONS OF LAW

1. The court shall appoint as guardian that individual who will best serve the interest of the adult in need of guardianship (hereinafter, "adult" or "ward"), considering the order of preferences set forth in the Franklin Guardianship Code ("Code") Section 401(b). Code 401(a).

2. Individuals who are eligible have preference in the following order: (1) The individual last nominated by the adult, according to certain formalities, while the adult was competent, to serve as the adult's guardian should the adult be judicially determined to be in need of a guardian (401 (b) (1)); (2) The spouse of the adult (401(b)(2)); (3) An adult child of the adult (401(b)(3)). Code 401(b), 401(c).

3. However, the court may disregard an individual who has preference pursuant to Code 401(b) and appoint an individual who has a lower preference or no preference, provided that the court may disregard the preference for a guardian nominated by the adult only upon good cause shown. Code 401(a).

3.5. The court has great discretion over guardians since even once a guardian has been appointed, the court may, upon petition of an interested party and after its investigation of allegations and the guardian's accounting, revoke or suspend the guardian for good cause. Code 402.

4. A court may refuse to appoint a proposed guardian when that person's previous actions would have constituted a breach of a fiduciary duty had the person been serving as guardian. Matter of Selena J. Franklin Court of Appeal (2011).

5. A proposed guardian's previous actions are of special concern when the proposed guardian has actually served as a fiduciary for the proposed ward under an advance directive or power of attorney. Selena J.
6. An advance directive in this context includes a person serving as a health-care agent. Selena J.
7. A health-care agent owes his or her principal a fiduciary duty, which is a legal obligation, to act in the principal's best interest and to avoid self-dealing. Selena J.
8. A holder of a durable power of attorney to make financial decisions for the principal owes his or her principal a fiduciary duty, which is a legal obligation, to act in the principal's best interest and to avoid self-dealing. Selena J.
9. Good cause not to appoint as guardian a person who has been acting as the adult's a health-care agent or holder of durable financial power includes (a) neglect of the adult's financial affairs, and (2) neglect to arrange for needed medical care for the adult. Selena J.
10. Although no Franklin case has yet ruled on the "good cause" standard as it relates to overturning a proposed ward's previously stated preference for a guardian, the Franklin Court of Appeal has stated that the "good cause" standard under such circumstances would be the same as that applied in *In re Guardianship of Martinez* (2009).
11. In *Martinez* the Court of Appeal affirmed the trial court's removal and replacement of guardian Evelyn pursuant to the Code, because Evelyn almost completely disregarded her fiduciary duty to preserve and manage the estate to provide for her ward's needs. *Martinez*.
12. In *Martinez* the court noted that a guardian's fiduciary duty includes the responsibility to apply the income and principal of the ward's estate "so far as necessary for the comfort and suitable support of the ward." *Martinez*, quoting *Nonnio v. George* (Fr. Sup. Ct. 1932).
13. The *Martinez* court stated that a guardian can breach his or her fiduciary duty by action or neglect, if the action or neglect harms the ward. *Martinez*.
14. The *Martinez* court stated that a fiduciary can harm the ward through mismanagement of finances, neglect or the ward's physical well-being, or similar actions. *Martinez*.
15. As Henry's health-care agent and holder of durable financial power, Noah had a fiduciary duty to use Henry's funds for Henry's comfort and suitable support, not to harm

Henry by action or neglect such as by mismanaging Henry's finances, neglecting Henry's physical well-being, or similar actions. Martinez.

16. Noah's failure to take Henry to the doctor when he sustained bruises up and down the back of his arm and when he broke his wrist breached Noah's fiduciary duty to Henry by neglecting Henry's physical well-being. Martinez.

17. Noah's failure to buy food for Henry, leaving the refrigerator always nearly empty, with just skim milk and a little bread, and only canned soup in the cupboards, breached Noah's fiduciary duty to Henry by neglecting to use Henry's funds for Henry's comfort and suitable support. Martinez.

18. Noah's failure to pay a lot of different bills on time and even missing several months' payments, including to the electric and doctor bills which were about to go to collections, breached Noah's fiduciary duty to Henry by mismanaging Henry's finances. Martinez.

19. Noah's failure to prevent Henry from spending up to \$1200 a month online of his \$2515 monthly pension and Social Security on gifts for friends breached Noah's fiduciary duty to Henry by mismanaging Henry's finances. Martinez.

20. Ruth prodding Noah to take Henry to the doctor when Henry's arm was bruised demonstrated Ruth's willingness and ability to assume the fiduciary duty of caring for Henry's physical well-being.

21. Ruth spending two or three evenings a week with Henry upon her relocation to Dry Creek, and her purchase of food and cooking for him, and her hiring someone to shop and cook for him, demonstrate Ruth's willingness and ability to assume the fiduciary duty of caring for Henry's comfort and suitable support.

22. Ruth going through Henry's bank statements and his bills and discovering his arrears on bills and online charges and confronting Noah about these matters demonstrate Ruth's willingness and ability to assume the fiduciary duty of properly managing Henry's finances.

23. Noah's fiduciary breaches constitute good cause pursuant to Code 401(a) for the court to disregard Noah as Henry's guardian.

24. Ruth's demonstrated willingness and ability to care for Henry's physical well-being, and his comfort and support, and to properly manage his finances give the court good cause to appoint her as guardian. Martinez; Selena J.