

February 2018

New York State  
Bar Examination

MEE & MPT Questions

© 2018

*National Conference of Bar Examiners*

© 2018

*National Conference of Bar Examiners*

*These materials are copyrighted by the NCBE and are reprinted with the permission of NCBE. These materials are for personal use only and may not be reproduced or distributed in any way.*

## **MEE 1**

In 2012, David and Meg had a baby girl, Anna. At the time of Anna's birth, David and Meg were both 21 years old. For the next four years, they lived separately. David and Anna lived with David's mother (Anna's grandmother). The grandmother cared for Anna while David worked. David cared for Anna most evenings and weekends. During this period, Meg attended college in a distant city; she called weekly but visited Anna only during school breaks and for one month each summer.

In 2013, David bought an auto repair business with money he had saved. The grandmother continued to care for Anna while David was working in his auto repair business.

In 2016, David and Meg were married in a small wedding held at the grandmother's house. One week before their wedding, David surprised Meg by asking her to sign a premarital agreement prepared by his attorney. The agreement provided that, in the event of a divorce,

1. all assets owned by each spouse at the time of the marriage would remain the sole property of that spouse;
2. neither spouse would be entitled to alimony; and
3. the spouses would have joint physical custody of Anna.

Attached to the proposed agreement was an accurate list of David's net assets (his personal possessions, the auto repair business, a used car, and a small bank account), a list of his liabilities, and his tax returns for the past three years.

David told Meg that he would not proceed with the marriage unless she signed the agreement. Meg believed that the marriage would be successful, and she did not want to cancel or postpone the wedding. She therefore signed the agreement and appended a list of her own debts (student loans); she correctly indicated that she had no assets other than her personal possessions.

Since the wedding, David, Meg, and Anna have lived together and the grandmother has continued to provide child care while David and Meg are at work. Meg has worked full-

© 2018

*National Conference of Bar Examiners*

*These materials are copyrighted by the NCBE and are reprinted with the permission of NCBE. These materials are for personal use only and may not be reproduced or distributed in any way.*

time as a computer engineer, and David has continued to work full-time in his auto repair business. Their incomes are relatively equal.

They have the following assets: (a) the auto repair business (owned by David); (b) stocks (owned by Meg, which she inherited last year); and (c) the marital home (purchased by David in his name alone shortly after the wedding). The down payment and all mortgage payments for the marital home have come from the couple's employment income.

Last month, David discovered that Meg had been having an affair with a coworker for the past year.

David wants a divorce. He also wants to obtain sole physical custody of Anna; he believes that Meg's adultery should disqualify her as a custodial parent. His plan is to live with the grandmother, who would provide child care when he is unavailable.

This jurisdiction has adopted a statute modeled after the Uniform Premarital Agreement Act.

1. May either spouse successfully enforce the premarital agreement in whole or in part? Explain.
2. Assuming that the premarital agreement is not enforceable, what assets are divisible at divorce? Explain.
3. Assuming that the premarital agreement is not enforceable, may David obtain sole physical custody of Anna based on (a) Meg's adultery or (b) other factors? Explain.

## **MEE 2**

A defendant, age 25, is charged in State A with armed robbery. According to the indictment, on June 1, the defendant went into a store, pulled out a gun, and said to a cashier, "Give me all your money or I'll shoot you!" The cashier gave the defendant

© 2018

*National Conference of Bar Examiners*

*These materials are copyrighted by the NCBE and are reprinted with the permission of NCBE. These materials are for personal use only and may not be reproduced or distributed in any way.*

\$5,000. The police arrived as the defendant was driving away. The police car followed the defendant, who was driving over 80 mph. The defendant crashed his car into a tree and suffered a serious head injury, losing consciousness. He was taken by ambulance to a hospital, where he regained consciousness on June 8. On June 15, he was discharged from the hospital. On July 1, he was arraigned on the armed robbery charge and released on bail. Over the next few months, the defendant recovered full physical mobility, but he continued to show symptoms of cognitive impairment resulting from brain trauma suffered during the car crash.

Police interviews with the defendant's family and friends have revealed that, in the months preceding the robbery, the defendant had experienced financial and emotional difficulties. According to the defendant's best friend, the defendant had recently started a new business, which was struggling. A month before the robbery, the defendant told his best friend, "I cannot attract customers because the United Nations has organized a secret boycott of my new business." On the day before the robbery, the defendant texted his best friend: "I've been a victim for too long. I've decided to start making up for my losses. If you read about me in the papers tomorrow, I'll already be far away, so delete this text and tell the police you never knew me."

In December, as the state began preparing for trial, two court-appointed psychiatrists evaluated the defendant and prepared the following joint report to the court:

Before the robbery, the defendant had a slightly above-average IQ. The defendant had completed a community college program in business administration and had recently opened his own business, which he owned and managed at the time of the robbery. A few months before the robbery, the defendant's business was struggling, and he began experiencing some mental health difficulties. His mental health difficulties apparently did not impair his relationships with his family and friends or his ability to manage his everyday life and operate his business. The defendant never sought mental health treatment.

On the day of the robbery, during the crash, the defendant sustained brain trauma that has impaired his cognitive functioning. The defendant has not returned to work, and there has been no cognitive improvement to date. When questioned about the pending criminal charge, the defendant typically responds, "My mother told me I did something bad, but I can't remember what." He is unable to

© 2018

*National Conference of Bar Examiners*

*These materials are copyrighted by the NCBE and are reprinted with the permission of NCBE. These materials are for personal use only and may not be reproduced or distributed in any way.*

remember anything about the robbery. When asked about his appointed counsel, the defendant usually says, “She’s nice” or “She comes to see me and helps me.” He describes the judge as “the guy in charge,” but when asked to explain what happens in court he responds, “I don’t know what they are talking about.” During repeated interviews, we have seen no evidence that the defendant currently understands abstract language and concepts. We have also seen no evidence that he is feigning or exaggerating his cognitive impairment.

State A uses the *M’Naghten* not guilty by reason of insanity (NGRI) test and requires that the affirmative defense of NGRI be proved by a preponderance of the evidence.

Defense counsel has requested a hearing to determine whether the defendant is competent to stand trial (in some jurisdictions, this is called “fitness to stand trial”) and has informed the court that, if the trial proceeds, the defendant will argue that he is NGRI.

Based on all the information presented above, including the information in the psychiatrists’ report:

1. Should the prosecution be suspended because the defendant is currently incompetent to stand trial? Explain.
2. If the defendant is found competent to stand trial and the prosecution proceeds, will the jury likely find that, with respect to each element of the *M’Naghten* test, the defendant has met his burden of proof? Explain.

### **MEE 3**

A woman whose hobby was making pottery wanted to improve her pottery skills both for her own enjoyment and to enable her to create some pottery items that she could sell. Accordingly, she entered into negotiations with an experienced professional potter about the possibility of an apprenticeship at his pottery studio.

© 2018

*National Conference of Bar Examiners*

*These materials are copyrighted by the NCBE and are reprinted with the permission of NCBE. These materials are for personal use only and may not be reproduced or distributed in any way.*

The negotiations went well, and after some discussion, the woman and the professional potter orally agreed to the following on May 1:

- The woman would be the potter's apprentice for three months beginning May 15. During the apprenticeship, the potter would provide education and guidance about the artistry and business of pottery. The woman would pay the potter \$4,000 for the right to serve as the potter's apprentice, payable on the first day of the apprenticeship.
- The potter would supply the woman with equipment and tools that she would use during the apprenticeship and would be entitled to take with her at the conclusion of the apprenticeship. On or before May 8, the woman would pay the potter \$5,000 for the equipment and tools.
- The woman would be provided with a private room in the potter's studio in which to stay during the apprenticeship.

On May 2, the woman and the potter signed a document titled "Memorandum of Agreement." It contained the terms orally agreed to the day before, except that it did not refer to the woman's living in a private room in the potter's studio. The last sentence of the document stated, "This is our complete agreement."

On May 8, the woman went to the potter's studio and paid him the \$5,000 called for in the agreement for the equipment and tools. While she was there, the potter said that he had decided that the \$4,000 price was too high for the right to serve as his apprentice and proposed lowering it to \$3,500. The woman happily agreed, and they shook hands on this new arrangement.

On May 15, the woman arrived at the potter's studio to begin the apprenticeship and move into the room she would occupy during that time. The potter refused to let her move in, however, and said that their deal did not require him to provide lodging for the woman. When the woman protested that they had agreed to the lodging arrangement, the potter took the signed Memorandum of Agreement out of his pocket and pointed out to her that it contained no reference to the woman's living in his studio. He then said, "If it's not in here, it's not part of the deal."

The woman then said, "At least you were reasonable in agreeing to change the price for the apprenticeship to \$3,500. Saving that extra five hundred dollars means a lot to me."

© 2018

*National Conference of Bar Examiners*

*These materials are copyrighted by the NCBE and are reprinted with the permission of NCBE. These materials are for personal use only and may not be reproduced or distributed in any way.*

In response, the potter pointed to the Memorandum of Agreement again and said to the woman, “That’s not what this says. This says that you’ll pay me \$4,000 today. Even if I agreed to lower the price, I didn’t get anything for that, so why should I be bound by it?”

The woman is quite angry about this turn of events and is considering suing the potter.

1. If the woman sues the potter about the disputes relating to the apprenticeship, will those disputes be governed by the common law of contracts or by Article 2 of the Uniform Commercial Code? Explain.
2. Assuming that the common law of contracts governs, is the oral agreement concerning the woman’s lodging binding on the parties? Explain.
3. Assuming that the common law of contracts governs, is the oral agreement lowering the price for the apprenticeship binding on the parties? Explain.

#### **MEE 4**

A developer acquired a 30-acre tract of land zoned for residential use. The developer thereafter marked out 60 building lots. The developer granted various utility providers appropriate easements to install underground sewer and utility lines. These utility easements were promptly and properly recorded.

Subsequently, the developer contracted with a man to build a home for the man on one of the 60 lots. The contract provided that, at closing, the developer would convey the home and lot to the man by a warranty deed excepting all easements and covenants of record. The home was completed nine months later.

At the closing, the developer conveyed the home and lot to the man by a valid warranty deed containing the six title covenants. Notwithstanding the language in the contract, the deed contained no exceptions to these six covenants. The deed was promptly and properly recorded.

© 2018

*National Conference of Bar Examiners*

*These materials are copyrighted by the NCBE and are reprinted with the permission of NCBE. These materials are for personal use only and may not be reproduced or distributed in any way.*

Two months later, following a heavy storm, the man discovered rainwater in the basement level of his home. Three bedrooms were located on this level, and the influx of rainwater made all of them unusable. An expert determined that the cause of the rainwater influx was a defect in the construction of the home's foundation.

The man contacted the developer, who denied any responsibility for the influx. Rather than argue with the developer, the man contacted a plumber, who concluded that the problem could be solved by installing a sump pump in the basement. The plumber accurately told the man that the usual cost of installing a sump pump was \$750, but that the location of the sewer lines coming into the home created more work, raising the installation cost to \$1,500. The man told the plumber to install the pump.

Thereafter, the man sued the developer for \$5,000 in damages for the cost of the sump pump, its installation, and damage to the floors and carpeting in the basement. He also sought additional damages for breach of one or more title covenants.

1. Which present title covenants, if any, did the developer breach with respect to the utility easements? Explain.
2. Assuming that there was a breach of one or more of the present title covenants, can the man recover damages from the developer for the breach? Explain.
3. May the man force the utility company that installed the underground sewer lines to remove them from the land? Explain.
4. May the man recover the \$5,000 in damages from the developer? Explain.

### **MEE 5**

While speeding down a rural highway in State A, the driver of a moving van lost control of the van and struck a car. A passenger in the car was seriously injured.

The passenger filed suit in the federal district court for the district in State A where the accident had taken place. She sought damages for her injuries from the driver of the van

© 2018

*National Conference of Bar Examiners*

*These materials are copyrighted by the NCBE and are reprinted with the permission of NCBE. These materials are for personal use only and may not be reproduced or distributed in any way.*

and the moving company that employed him. Among other allegations, the complaint alleged that

- the driver and the moving company are citizens of State A;
- the driver resides in the federal judicial district where the suit was brought;
- the accident occurred in the federal judicial district where the suit was brought;
- the passenger is a citizen of State B;
- the amount in controversy exceeds \$75,000;
- venue is proper in the federal judicial district where the suit was brought;
- the driver was employed by the moving company and was acting in the course of his employment at the time of the accident;
- the driver of the moving van was negligent; and
- the passenger suffered serious injuries as a result of that negligence.

The defendant driver and the defendant moving company were both represented by an attorney who was a partner in a 30-lawyer law firm. The attorney was retained and received a copy of the complaint only four days before an answer was due. The attorney was conducting another trial at the time. Rather than ask another lawyer in the firm to answer the complaint, the attorney personally prepared and filed a timely answer to the complaint on behalf of the defendants.

The answer to the complaint, which was signed by the attorney, read simply: “General Denial: Defendants Hereby Deny Each and Every Allegation in the Complaint.”

Two months later, the plaintiff (the passenger) properly served Requests for Admission on the defendants, requesting admission of each allegation in the complaint. Responding to the Requests for Admission, the defendants (still represented by the attorney) denied the allegations concerning the driver’s negligence and the plaintiff’s injuries, but admitted all other alleged facts.

The plaintiff then served on the defendants’ attorney a motion for sanctions on the ground that the general denial in the answer was inappropriate. The plaintiff requested that the defendants withdraw their original answer and file an amended answer admitting the allegations that the defendants had admitted in their response to the Requests for Admission.

© 2018

*National Conference of Bar Examiners*

*These materials are copyrighted by the NCBE and are reprinted with the permission of NCBE. These materials are for personal use only and may not be reproduced or distributed in any way.*

One month later, after the defendants had failed to withdraw or amend their answer, the plaintiff filed the motion for sanctions in court. The plaintiff's lawyer submitted evidence that his customary billing rate is \$300 per hour and that he had spent seven hours preparing the motion and corresponding with the defendants' attorney about the answer, for a total of \$2,100.

1. May the court properly grant the plaintiff's motion for sanctions? Explain.
2. If the court grants the plaintiff's motion for sanctions, (a) what sanctions are appropriate and (b) against whom should the sanctions be ordered? Explain.

### **MEE 6**

A man and a woman were equal partners in a neighborhood natural-foods store. The store had been at the same location for many years and had developed a loyal following. Under their informal arrangement, the man had managed the business and the woman had supplied capital to the business as needed.

They leased the building in which the store was located and had regularly sought to purchase the building for the partnership, but the landlord had always refused. Six months ago, however, the landlord called the man and said, "I thought you would want to know that I'm planning to sell the building." The next day, the man sent the woman an email: "I am leaving our partnership. I will wind up the business and send you a check for your half share." Without informing the woman, the man then contacted the landlord and offered to buy the building. The landlord accepted, and the two entered into a binding purchase agreement. One month later, the man took title to the building.

Three months ago, the man sent the woman a check for half of the store's inventory and other business assets. Instead of cashing the check, the woman sent the man an email stating that she regarded the partnership as still in existence and demanded that the man convey title to the building to the partnership. The man replied that their partnership was dissolved and that he had moved on. He then began to operate the store as a natural-foods store with a name different from that of the original store, but with the same product offerings and the same employees.

© 2018

*National Conference of Bar Examiners*

*These materials are copyrighted by the NCBE and are reprinted with the permission of NCBE. These materials are for personal use only and may not be reproduced or distributed in any way.*

The woman has sued the man for withdrawing from the partnership and for breaching his duties by buying the building from the landlord.

1. Did the man properly withdraw from the partnership? Explain.
2. Assuming that the man's withdrawal was not wrongful, what was the legal effect of the man's withdrawal from the partnership? Explain.
3. What duties, if any, did the man breach by purchasing the building? Explain.

### **MPT 1 – State of Franklin v. Clegane**

This performance test requires examinees to draft an argument in support of the reading of victim-impact statements and requests for restitution, as authorized under the Franklin Crime Victims' Rights Act (FCVRA), at the sentencing hearing for defendant Greg Clegane. The law firm's client is Sarah Karth, who wishes to make such statements on behalf of her sister, Valerie Karth, and on her own behalf. In the underlying criminal action, Clegane illegally sold dangerous fireworks to a minor who later ignited those fireworks at a party. The fireworks caused serious injuries to Valerie, as well as property damage. Clegane was convicted of a felony but has not yet been sentenced. Clegane has moved to exclude the sisters' victim-impact statements at the sentencing hearing and to deny their requests for restitution. Examinees' task is to draft the argument section of the brief opposing Clegane's motion and persuading the court that under the case law interpreting the FCVRA, Sarah and Valerie are both crime victims entitled to restitution and to make statements at the sentencing hearing. The File contains the instructional memorandum, the firm's guidelines for writing persuasive trial briefs, a newspaper article about the fireworks incident, excerpts from the client interview, and the defendant's motion. The Library contains excerpts from the FCVRA and three Franklin Court of Appeal cases.

© 2018

*National Conference of Bar Examiners*

*These materials are copyrighted by the NCBE and are reprinted with the permission of NCBE. These materials are for personal use only and may not be reproduced or distributed in any way.*

## **MPT 2 – In re Hastings**

In this performance test, examinees' law firm represents Danielle Hastings, who serves on the board of directors for Municipal Utility District No. 12 (MUD 12), a local government entity that provides public water, sewer, drainage, and other services to her neighborhood. Hastings seeks legal advice as to whether she can hold an election-related position in her voting precinct while remaining on the MUD 12 board. The two positions Hastings is considering are county election judge and precinct chair; she doesn't want to pursue either position if doing so would jeopardize her ability to serve on the MUD 12 board. Examinees' task is to prepare an objective memorandum analyzing whether Hastings can apply for and hold the county election judge position or the precinct chair position, while simultaneously serving as a member of the board of directors for MUD 12. The File contains the instructional memorandum, a transcript of the client interview, and descriptions of the two new positions that Hastings is considering. The Library contains Franklin Constitution article XII, section 25; excerpts from the Franklin Election Code; and three Franklin Attorney General opinions.

© 2018

*National Conference of Bar Examiners*

*These materials are copyrighted by the NCBE and are reprinted with the permission of NCBE. These materials are for personal use only and may not be reproduced or distributed in any way.*

February 2018

New York State  
Bar Examination

Sample Essay Answers

## **FEBRUARY 2018 NEW YORK STATE BAR EXAMINATION**

### **SAMPLE ESSAY 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**

### **1) The issue is whether David and Meg entered an enforceable premarital agreement**

Under the traditional approach and under the UPC (which this jurisdiction has adopted), pre-marital agreements are governed by contractual law, with the promise of marriage comprising the consideration. Since a premarital agreement is a contract in consideration of marriage, the Statute of Frauds applies, and requires the marital agreement to be in writing and signed by the parties. A pre-marital agreement may prescribe the division of assets upon divorce and spousal support, but it cannot govern child custody. As for specific rules governing pre-marital agreements under the UPC, the UPC provides that a pre-marital agreement will be enforceable so long as it is made based on full disclosure of each party's assets, fair and reasonable, and voluntary. For a marital contract to be "fair and reasonable," the court will look to both procedural fairness (i.e. whether each party had sufficient time to review the agreement, had the opportunity to be represented by independent counsel), and substantive fairness, including whether the terms of the contract are fair. That being said, the modern trend is to enforce pre-marital agreements even if the terms are unfair, so long as each party entered the agreement voluntarily and with full disclosure.

This pre-marital agreement purports to govern the terms of child custody, which pre-marital agreements cannot validly do, so it is unenforceable in that respect. However, the terms of the agreement governing the division of property and alimony may still be enforceable so long as the factors mentioned above are present. The agreement was based on full disclosure of each spouse's assets, which favors it being enforceable, and Meg signed the agreement voluntarily, since a threat to walk away from a marriage is not considered to constitute duress or undue pressure. On the other hand, Meg could argue that springing the marital agreement on her one week before the wedding was not procedurally fair, and that that fairness was compounded by her having no opportunity to discuss the agreement with independent counsel (since Meg had no assets at the time, it could be argued that fairness required Dan to hire a lawyer for her). All that being said, in light of the modern trend of enforcing premarital agreements even though the terms may be unfair when there is sufficient disclosure of assets, the court would likely enforce this agreement against Meg with respect to the division of property and alimony, but not with respect to child custody.

### **2) The issue is what assets constitute marital property**

The rules governing division of a married couple's assets upon divorce depends on the jurisdiction, with "community property" states requiring equal distribution of marital property, and equitable distribution states requiring an equitable, but not necessarily equal, distribution based on a number of particular factors. Since this jurisdiction follows the UPC, it is likely an equitable distribution state. Only marital property is subject to equitable distribution between the spouses. Marital property includes property acquired during the course of the marriage through the talent and effort of both spouses, but excludes items such as gifts or inheritances that were given to one spouse. Ownership of an item by one spouse does not typically matter

for the purposes of this distribution. The divisibility of the couple's assets on divorce is as follows.

The auto-repair business, and goodwill associated with it, will be considered marital property. Businesses owned and operated by one spouse during the course of the marriage are considered marital property.

Meg's stocks will not be divisible, because she acquired them by inheritance and inherited gifts are not considered marital property.

The marital home will be considered marital property. It was purchased with the funds of both spouses during the course of the marriage, so notwithstanding that it is only in David's name, it is divisible.

In sum, the auto-repair business and the marital home are divisible while Meg's stocks are not. That said, the ultimate distribution of these assets will be determined by the court based on the duration of the marriage, the age, needs, and earning potential of each spouse, et cetera.

### **3) a) The issue is whether David may obtain sole physical custody of Anna based on Meg's adultery**

Adultery is a ground for a fault based divorce. In some jurisdictions, obtaining a fault-based divorced based on adultery would reduce any spousal support payments that David would otherwise owe to Anna. That said, adultery is not a ground for a parent to lose custody of their child. The right to have physical custody of a child is a fundamental right, and courts will not curtail it based on the sexual conduct of one spouse, unless that sexual conduct poses a danger to the child. Here, there are no facts indicating that Meg's adultery constituted or constitutes a threat to the wellbeing of Anna, so a court would not grant sole physical custody to David solely based on Meg's adultery.

### **3) b) The issue is whether David may obtain sole physical custody of Anna based on other factors**

While a court will not consider the sexual conduct of a spouse in determining physical custody, it may weigh other factors such as which parent was the primary caregiver, the age and needs of the child, the home that each parent is able to provide. The paramount consideration is always the best interests of the child.

Here, the court could award sole physical custody to David based on the circumstances and Anna's best interests. Meg has not been the primary caregiver of the child, and that role has been filled instead by David and David's mother, with the grandmother continuing to be the primary care giver for Anna. Based on the role of David's mother as the primary caregiver, the court would likely view the best interest of the child as continuing to reside with the grandmother. For that reason, and Meg's limited involvement in Anna's upbringing, the court

could award sole custody to David. That said, such a sole custody award would likely allow Meg to retain visitation rights, which are fundamental right which will not be removed absent.

## **ANSWER TO MEE 1**

### **Agreement**

The issue is whether David forced Meg to sign the agreement involuntarily.

Spouses may contract regarding the division of property and alimony, but not regarding child custody or child support. The agreement included provisions for the division of property, the entitlement to alimony and the custody of their child. The provisions regarding the division of property as well as alimony are enforceable (if the agreement is valid). However, the court will disregard the custody provisions, and will instead consider the best interests of the child.

A premarital agreement is enforceable if it is in signed writing and if it was entered into voluntarily, with full disclosure of each spouse's assets, and it is fair and equitable. Independent legal advice is not required.

The agreement appears to comply with the requirements set out above, except that it may not have been entered into voluntarily by Meg. The agreement was in signed writing and included a full disclosure of each spouse's pre-marital assets. The agreement appears to be fair and equitable as it divides property that is not community property (i.e. property that was acquired before the marriage). Further, both David and Meg are employed and earn relatively equal income.

However, Meg may argue that she entered into the agreement involuntarily. She may argue that it was sprung upon her shortly before the wedding and that she was threatened by David (i.e. that he would not marry her), and thus was forced to sign it. However, there is no sign of undue influence. Undue influence is influence that would destroy the will of the other, and induce the agreement. There is no evidence that Meg had her will destroyed. Meg appears to have signed the agreement voluntarily after reconsidering the matter. She sought that the marriage would be successful and therefore was ultimately not opposed to signing the agreement. She then provided a list of her own assets. Thus, such an argument will likely fail.

In conclusion, the agreement is enforceable except for the provision re custody of the child.

### **Divisible Assets**

The issue is whether the asset was acquired prior to or after marriage or whether it was received during marriage as a gift or by inheritance.

Most states only divide community property; i.e., assets that were acquired after the marriage excluding assets that were inherited or gifted to one spouse.

The auto repair business started before the marriage with money from prior to the marriage but continued after the marriage. Any increase in value in the business that occurred after the marriage may be considered community property as it occurred after the marriage. Accordingly, the business should be valued at the time of marriage and its current state. Meg's contributions to the marriage may be deemed to have had an effect on the growth of the business.

Meg's stocks, which she inherited after the marriage, will be excluded. This is because the stocks became her property through an inheritance.

The marital home is also likely to be deemed community property. While it is titled in David's name alone, it was acquired after the marriage and both spouses contributed to the down payment as well as the mortgage payments.

## **Custody**

The issue is what the best interest of the child is, and whether the adultery makes Meg unfit as a parent.

Custody is determined based on the best interests of the child. A court may consider other factors, including who the primary caregiver is, the fitness of each parent, the child's comfort in the home, and so forth.

Meg's alleged adultery is unlikely to have an effect on custody, unless a court finds that her new relationship renders her unfit as a parent (e.g. she is in a relationship with a drug dealer). However, that seems farfetched. There is no such evidence or evidence of child abuse that would render Meg unfit.

Instead, the court will focus on the best interest of the child. The child's best interest is to spend time with both parents provided that such an arrangement is feasible (for example, if they live far away from each other, then it will not be possible).

There is also a chance that the court will award sole custody as David and Meg lived apart from 2012 to 2016 and during that period, Anna was in David's custody. Anna has lived with her grandmother for a long time, and she will be able to do that with David but not Meg. David and his mother appear to be the primary care givers of Anna. The Grandmother even cared for Anna during the marriage.

Thus, it is likely that David will have sole custody of Anna, but not due to Meg's adultery.

## ANSWER TO MEE 2

1. The issue here is whether the defendant is competent to stand trial. Competence is determined at the time of trial, not at the time the offence was committed. A defendant is competent if he understands the nature of the crimes with which he is charged; the nature and consequences of the proceedings against him; and if he is able to participate effectively in his own defense. The trial judge has an ongoing obligation to suspend a trial if at any point it is established that the defendant is not competent to stand trial.

Regarding the nature of the crimes, most states require that the defendant understand that the key elements of the offence with which he is charged. Here, it is not clear that the defendant is aware of the nature of the armed robbery charge. He apparently refers to it as "something bad" but does not provide any further detail e.g. what he did or the fact that it involved a weapon. This implies that he does not understand the nature of the crime with which he has been charged.

The defendant should be able to understand the nature and consequences of the proceedings against him. This generally means that he must be able to understand that he is being tried in a court of law and the consequences of a guilty or not guilty verdict. This understanding only needs to be at a relatively high level and the defendant may be assisted by his attorney on specific aspects of procedure. Here, the defendant does not seem to know that he is being tried in a court of law or understand the process or procedure. His description of his attorney is that she is "nice" or "comes to see me and helps me". He also describes the judge as the "guy in charge". This indicates some understanding of the criminal process but probably too little for competence. In particular, his statement that he doesn't know "what they are talking about in court", when combined with the other facts, would tend to show that he does not understand that he is being tried for a crime and the consequences of this.

Finally, the defendant must be able to participate meaningfully in his own defense. In many states, the fact that the defendant has no memory of what happened does not automatically mean he is incompetent. This is the case here as the defendant is unable to remember anything about the robbery. There may be sufficient other facts or witnesses that the defendant can mount an effective defense with his counsel even if he does not remember the crime itself. However, most states would consider this a strong factor in favor of an incompetency finding as the defendant will not be able to use facts or evidence from the time of the crime to prove his innocence. Additionally, the statement that the defendant does not understand "abstract language and concepts" means it is unlikely that the defendant will be able to participate meaningfully in his defense, since this will involve abstract concepts such as whether he intended to commit the crime. It is also more evidence to show that he may not understand the nature and consequences of the proceedings against him.

Therefore, given the factors above, the prosecution should be suspended as the defendant is currently incompetent to stand trial.

2. The issue here is whether the defendant has proved by a preponderance of the evidence that he has established the defense of insanity.

Insanity is assessed at the time of commission of the crime. The M'Naghten test requires the defendant to show that he has a "disease of the mind" which caused a defect in reasoning such that he could not understand the "nature and quality" of his actions, or that what he was doing was wrong.

Regarding the first element of a disease of the mind, states have different requirements on what level of impairment is required for a disease of the mind. Here, the defendant had some "mental health difficulties" but these apparently did not impair his relationships with family or friends or his ability to manage his everyday life and operate his business. This would be insufficient in most states to meet the standard of a disease of the mind. The fact that the defendant did not seek mental health treatment is normally not dispositive. The defendant would probably need to introduce additional evidence to show that he had a disease of the mind as this is not established by the psychiatrists' testimony. The fact that he told his friend that the United Nations was organizing a boycott of his business (assuming this is untrue) may show evidence of paranoia or delusion that might suggest he had a more serious mental disorder than the psychiatrists diagnosed.

The defendant must not have been able to understand the nature and quality of his actions, or that what he was doing was wrong. The first statement to his friend regarding the United Nations boycott is a general suggestion that that the defendant may have been suffering delusions and so did not know the nature and quality of his actions. However, the second text to his friend goes the other way: "I've decided to start making up for my losses" implies that he understood that he was going to rob someone and take their money. In addition, his statement that "If you read about me in the papers tomorrow, I'll already be far away, so delete this text and tell the police you never knew me" clearly indicates that he knew what he was doing was wrong (since he would have to run away and the police would be looking for him). Therefore, he likely knew the nature and quality of his actions and that what he was doing was wrong.

Consequently, the jury is not likely to find that the defendant has met his burden of proof on the M'Naghten test based on the evidence presented.

## **ANSWER TO MEE 2**

### **1. Defendant's Competency to Stand Trial**

The prosecution should indeed be suspended, because the defendant is likely incompetent to stand trial. The issue is whether forcing a defendant who cannot assist his counsel in mounting a defense to stand trial violates the accused's constitutional rights.

Lack of competency is not a defense to a crime; rather, it is a determination that the court makes concerning whether or not the defendant should have to stand trial. Thus, *M'Naghten* is inapplicable here, because insanity and incompetency are distinct concepts. In determining competency, we look only to defendant's mental faculties at the time of trial, not when the crime was committed. If defendant is entirely unable to assist his counsel in mounting a defense to the crime charged, the prosecution should be suspended until such a time, if any, that defendant is competent to mount a defense (and, if strategically necessary, take the stand on his own behalf).

In this case, the defendant lacks substantial competency. When asked about the pending criminal charge, he states that his mother tells him that he did something bad, but that he can't remember what he did (he is altogether unable to remember the events surrounding the armed robbery). Most relevantly, when asked about his appointed counsel, the defendant usually says that his counsel is nice, and comes to see him and helps him. When asked about the judge, he states that the judge is the guy in charge, but he is unable to understand what is happening at the trial proceedings. And, according to the two court-appointed psychiatrists, there is no evidence that the defendant is feigning or exaggerating his cognitive impairment.

On these facts, defendant does not understand the nature of the proceeding being levied against him. He is unable to assist his counsel in any significant way in mounting a defense, which is crucial to his constitutional right to counsel and to a fair trial. Moreover, the defendant could possess crucial clarifying information as to his state mind at the time of the robbery, which will be extremely relevant since his counsel is planning to argue not guilty by reason of insanity.

Therefore, because defendant lacks competency to stand trial, the prosecution should be suspended until a later time when defendant regains competency. Notably, this does not mean that the defendant is not guilty-- a finding of incompetency to stand trial merely stays the proceedings until defendant, if ever, regains competency.

## 2. Has the defendant met his burden of proof under *M'Naghten*?

The defendant will not be able to meet his burden of proof as to the affirmative defenses of not guilty by reason of insanity, under the *M'Naghten* standard. The issue is whether the defendant knew his conduct was wrong and appreciated the nature of his conduct.

In order for a defendant to successfully argue that he is not guilty by reason of insanity, he has the burden of showing that, at the time of the crime, he was suffering from a mental disease or defect. Under the *M'Naghten* standard, he also has the burden of showing that, at the time of the offense, he either: (1) did not know that his conduct was wrong, or (2) did not appreciate the nature of his conduct. If either prong is satisfied, the defendant has met his burden.

Here, the defendant will fail to show that either prong of *M'Naghten* is satisfied. As to the first prong - not knowing that his conduct was wrong - , defendant texted his best friend on the day

of the robbery that, "I've been a victim for too long. I've decided to start making up for my losses. If you read about me in the papers tomorrow, I'll already be far away, so delete this text and tell the police you never knew me." Several aspects of this text reveal that defendant knew his conduct was wrong. First, defendant references that he will be fleeing after he commits the offense, which indicates that he knows he will be pursued by police after committing the crime. Second, he asks his friend to delete the text, which evinces that he knew the text was incriminating to either him, his friend, or both of them. He requested his friend to delete incriminating evidence of his conduct. Third, defendant explicitly tells his friend to tell the police that his friend didn't know him. This shows that he knows or believes the police will question the friend as a result of his actions, from which it may be inferred that he knows he is committing a crime. All of these factors weigh against finding insanity under the first prong of *M'Naghten*.

Under the second prong of *M'Naghten* - not appreciating the nature of his conduct -, defendant will fail here as well. Despite the fact that defendant exhibited signs of paranoia as a result of his business struggling, stating to his friend that he "cannot attract customers because the United Nations has organized a secret boycott of my new business," this does not imply that he did not appreciate the nature of his conduct. Indeed, even if his paranoid worries about the U.N. were true, it would still be a crime to rob a store at gunpoint. And, as noted, defendant knew this action was wrong. Thus, defendant was not unable to appreciate the nature of his conduct, for the reasons stated as to the first prong of *M'Naghten*, and because his act was still knowingly wrong even though he might have believed the surrounding circumstances of the crime were not as they were.

Accordingly, because defendant cannot meet his burden of establishing NGRI under *M'Naghten*, the jury is unlikely to find that the defendant has met his burden of proof under either prong of the applicable test.

### **ANSWER TO MEE 3**

#### **1) The issue is whether the predominant purpose of the contract is for goods or services.**

Two different bodies of law govern different types of contract claims. The predominant purpose test explains which test should be used. If the predominant purpose of a contract is to provide services, then the common law governs. If the predominant purpose is to provide consumer goods, then Article 2 of the Uniform Commercial Code (UCC) applies.

In the present case, the woman wanted "to improve her pottery skills" and "to enable her [self]" to make pottery items she could sell. This language suggests that the woman primarily envisioned the contract as one involving services. Had the woman merely desired to acquire pottery items she could sell, she could have avoided many of the terms in the contract, such as living in a "private room" and receiving "education and guidance" about pottery. The fact that

the woman originally intended to pay the potter more money for the consumer goods (equipment and tools for \$5,000) than for the apprenticeship/training rights (\$4,000) does not mean the predominant purpose was commercial. On the contrary: the fact that the woman specifically negotiated "an apprenticeship" three months in duration suggests a sustained commitment to the potter's services as an educator. The fact that the potter may be a "merchant" under the UCC also does not determine the nature of the underlying contract. Therefore, the predominant purpose was likely for services, meaning that the common law governs.

In conclusion, because the predominant purpose of the contract is for services, the common law governs any disputes relating to the apprenticeship.

## **2) The issue is whether the parole evidence rule precludes admission of extrinsic, verbal terms negotiated prior to the execution of a written contract.**

The parole evidence rule (PER) tends to exclude extrinsic evidence regarding a contract in a dispute. PER states that under most circumstances, when a contract clearly indicates that it is a final, complete agreement, outside evidence of any negotiations prior to the contract in conflict with this document must be excluded. However, a number of exceptions exist. PER does not apply when a party attempts to introduce evidence related to a defense to contract formation, a defense to contract enforcement, a condition precedent to the contract, a condition explaining an ambiguous term, or evidence of a separate agreement not in conflict with the current one. PER also implements a hierarchy for resolving disputes based on extrinsic evidence. The rule states that the express language of the contract must come first; when this express language is not clear, parties must next look to the course of performance in this transaction. Parties must look next to the course of dealing, if there is a history of transactions, and finally to the general trade usage. A contract under the common law requires parties to specify price, quantity, subject matter, and parties. A contract under the UCC, by contrast, requires only quantity, with UCC "gap-filler" provisions accounting for the rest of the contract.

In this case, the parties "orally agreed" to a term on May 1 that included "a private room." While the term includes the subject matter--the private room--and implies quantity--one, single room--this term did not specifically include the price or parties. Under the common law, these elements are normally all required terms for a contract. However, the nature of the negotiations means that the transacting parties should have been clear (the potter and the woman). Although price is not specified, and the common law governs, the parties could reasonably infer a fair market value for the room. While this "private room" term seems to indicate evidence of a prior agreement, the "private room" term also conflicts expressly with the written May 2 Memorandum of Agreement. The May 2 Memorandum includes a merger clause, showing complete integration, i.e., that the contract reflects all terms ("This is our complete agreement.") While PER does not apply to negotiations that take place after a contract has been executed, these negotiations regarding the room took place before the execution of the contract, meaning PER would apply to bar it. It is perhaps possible the woman could argue that the May 2 Memorandum violates the Statute of Frauds, because it

includes a sale for UCC goods of more than \$500 (the \$5,000 for equipment and tools). This theory would support her argument that the oral negotiation should take priority, as the contract might not be enforced. However, given that it is stipulated that the common law governs, and given that the room term itself does not involve a consumer good transaction at all, this argument would not persuade. There would be no Statute of Frauds issue, meaning the contract would be valid, and the PER would exclude the "private room" oral agreement.

In conclusion, the oral agreement concerning the woman's lodging is not binding on the parties.

### **3) The issue is whether parties can enter into a contract modification without consideration.**

A contract modification takes place when, normally due to unforeseeable events, the parties mutually agree to change the terms. Under the common law, a contract modification must be supported by consideration. Under the UCC, by contrast, any good-faith desire for contract modification will be enforceable.

In this case, the common law governs, meaning that consideration is required. The woman did not appear to provide consideration to make the contract modification enforceable. Although she paid the potter the \$5,000 "for the equipment and tools," this payment reflects a preexisting legal duty. As such, it does not constitute consideration. The potter appears to be correct that "I didn't get anything for that," regarding the \$4,000, meaning there is no contract modification. The woman could also not likely argue that an accord and satisfaction took place. The language of the parties does not suggest that the parties anticipated or intended to replace one deal with another.

In conclusion, because the Memorandum of Agreement was an enforceable agreement, and because the common law requirement for consideration applies, the oral agreement lowering the price for the apprenticeship is not binding.

### **ANSWER TO MEE 3**

1. The issue is whether the disputes arising from the disputes in relation to the apprenticeship will be governed by the common law of contracts or by the Article 2 of the Uniform Commercial Code.

The common law of contracts governs service contracts. Such contracts are broken up into two groups, unilateral contracts or bilateral contracts. Unilateral contracts are contracts in which a promise is given in exchange for a performance. The beginning of that performance makes the contract irrevocable. In contrast, bilateral contracts are contracts in which there is an exchange of promise for promise. The Uniform Commercial Code (UCC) governs contracts in which

there is a sale of goods and contracts with goods for over \$500 must be in writing. Contracts that contain both the sale of goods and services will be determined by the predominant purpose of the contract and whatever the predominant purpose is will serve as to what law governs the contract.

Here, the woman formed an agreement with the potter to be his apprentice. The potter would provide education and guidance while the woman served as the apprentice of the potter. Even though there is an agreement in the contract for the woman to pay \$4000.00 for tolls and equipment, such provision is not the predominant purpose of the contract. The predominate purpose of the contract is services that each party is undertaking. Therefore, the common law of contracts will govern.

In conclusion, the common law of contracts will govern because the predominant purpose of the contract is a service contract.

2. Assuming that the common law of contracts governs, the issue is whether the oral agreement concerning the woman's lodging binding on the parties.

In determining what agreement two parties agreed upon the court will look to the contract itself and determine whether that contract is integrated or partially integrated. A writing is integrated if it is proven that the writing is the complete agreement between the parties which is evidenced through language in the contract itself. If a writing is determined to be fully integrated than the parole evidence rule governs and the court is bound to the four corners of the writing. The parole evidence rule states that oral agreements prior to the creation of the contract will not be admitted to show the terms of the contracts. Terms that supplement the contract will be admitted but terms that contradict the contract are prohibited only if the contract is partially integrated. Exceptions to the parole evidence rule are the court will look outside an integrated contract to clear up an ambiguity in the contract and whether the requirements to form a contract were met. If a writing is only partially integrated, the parole evidence rule does not apply and court may look outside the contract to understand the party's intentions.

Here, the writing of the contract states that "This is our complete agreement". Such language in a contract is evidence that the court will use to determine that the writing is fully integrated and the parole evidence rule will apply. The woman is trying to bring into evidence the oral agreement between herself and the potter that the potter agreed to let the woman live in a private room in the potter's studio. Such evidence will not be able to be used because it is prohibited by the parole evidence rule as it does not help clear up an ambiguity in the contract nor establish whether the proper requirements were met to create a contract.

In conclusion, the parole evidence rule will prohibit the evidence of the oral agreement to let the woman live in the private room.

3. Assuming that the common law of contracts govern, is the oral agreement lowering the price for the apprenticeship binding on the parties.

In determining what agreement two parties agreed upon the court will look to the contract itself and determine whether that contract is integrated or partially integrated. A writing is integrated if it is proven that the writing is the complete agreement between the parties which is evidenced through language in the contract itself. If a writing is determined to be fully integrated then the parole evidence rule governs and the court is bound to the four corners of the writing. The parole evidence rule states that oral agreements prior to the creation of the contract will not be admitted to show the terms of the contracts. Terms that supplement the contract will be admitted but terms that contradict the contract are prohibited only if the contract is partially integrated. Exceptions to the parole evidence rule are the court will look outside an integrated contract to clear up an ambiguity in the contract and whether the requirements to form a contract were met. If a writing is only partially integrated, the parole evidence rule does not apply and court may look outside the contract to understand the party's intentions.

In addition, for a modification of a contracts pre-existing duty, there must be consideration unless both parties are merchants. If both parties are merchants then modification of a pre-existing duty just has to be made in good faith. A merchant is one who regularly deals in the deals that are the subject of the contract or through his education hold himself out as having special skills and knowledge of the goods.

Here, the woman wants to bring in the oral agreement for lowering the price for the apprenticeship. Such an agreement is not prohibited by the parole evidence rule because it is an agreement after the contract was drawn up. The parole evidence rule on governs agreements prior to the agreement. In contrast, both parties are not merchants, therefore modification of a pre-existing duty needs consideration. There was no consideration provided for the lowering of \$500 from the agreement. Therefore, the parties will not be bound by the agreement.

In conclusion, the parties will not be bound by the modification of the contract to lower the price of the apprentice.

#### **ANSWER TO MEE 4**

**The developer breached the present title covenant of no encumbrances, as the utility company had various easements on the property.**

The issue is whether the developer breached any present title covenants.

A warranty deed carries with it six covenants of title: 1) ownership of title; 2) right to convey title; 3) no encumbrances of title (unless those which are excepted); 4) covenant to fight against other lawful claims of title; 5) full assurances; and 6) quiet enjoyment. The Doctrine of

Merger in property states that the sales contract merges into the deed, and that the deed will ultimately control.

In the instant matter, a developer contracted with a man to build a home for the man on one of 60 subdivided lots. The contract provided that, at closing, the developer would convey the home and lot to the man by a warranty deed excepting all easements and covenants of record, of which the utility company had several because of the original installation of underground sewer and utility lines in the subdivision. At the eventual closing of the home, the developer conveyed the home and the lot to the man by a valid warrant deed containing the six title covenants, but no exceptions. Although the sales contract carved out these exceptions, the Doctrine of Merger provides that the final deed which omitted them is the controlling document.

As such, the developer breached the present title covenant of no encumbrances, as the utility company had various easements on the property.

**The man can't recover damages because he was on record notice because the utility company's easements were properly recorded.**

A bona fide purchaser is one who purchases land for value, without notice. Notice can be actual, record, or implied.

In the instant matter, the man purchased the land for value. However, the utility easements were properly recorded. Thus, the man was on record notice.

As such, the man can't recover damages because he was on record notice because the utility company's easements were properly recorded.

**The man may not force the utility company that installed the underground sewer lines to remove them from the land because they were properly recorded and the man has no grounds to terminate these easements.**

The issue is whether the man can force the utility company that installed the underground sewer lines to remove them from the land.

An easement is created by: prescription; implied by prior use; necessity; or grant. An easement is enforced if it is properly recorded, and can only be terminated by: estoppel; necessity having ceased; destruction of the servient land; being over burdensome; condemnation by eminent domain; release in writing; abandonment (by overt act, not just time); merger of property; and prescription.

In the instant matter, the utility easements were created by grant and promptly and properly recorded. Further, the facts do not show any of the above termination possibilities being satisfied. Specifically, the burden of the sewer lines' locations, and the resulting inconvenience

to the man by the extra \$750, is not sufficient as compared to the headache and problem in ripping them up and relocating them.

As such, the man may not force the utility company that installed the underground sewer lines to remove them from the land because they were properly recorded and the man has no grounds to terminate these easements.

**The man may recover the \$5,000 in damages from the developer because he failed to deliver 'workmanlike construction.'**

The issue is whether the developer can be held liable for the defect in the home's foundation.

There is no implied warranty of fitness and habitability in land contracts, unless the seller is a new-home builder, in which case he can be held to a 'workmanlike construction' standard.

In the instant matter, the man discovered rainwater in his basement which caused flooding. An expert determined that the cause of the rainwater influx was a defect in the construction of the home's foundation. These facts demonstrate a breach of this limited application of the implied warranty of fitness and habitability.

As such, the man may recover the \$5,000 in damages from the developer.

**ANSWER TO MEE 4**

1. A warranty deed includes six covenants. The most relevant here is the covenant against encumbrances. This requires that the land be delivered without any encumbrances that have not been disclosed to the purchaser. In particular, this includes physical encumbrances such as easements. Given that the warranty deed did not include a carve-out for all easements and covenants of record this means that there has been a breach. While it might be argued that the contract did include such a curve out, the land sale contract is no longer the governing document after closing has occurred. Instead, the deed will govern. Accordingly, the developer has breached the covenant against encumbrances because the developer properly granted the sewer and utility lines easements which crossed across the man's land.

2. The Defendant will be able to recover losses for breach of the warranty deed. In particular, the relevant loss will be an assessment of the lands value without the relevant easements as against the value of the land with the easement. While this is ultimately a question in fact to be determined by the relevant expert, it would appear that the man might have some difficulty recovering because the utilities on the land probably make the land more valuable.

3. The man may not force the utility company that installed the underground sewer lines to remove them from the land. Generally, the burden of easements will run with the land where there has been (1) notice (2) horizontal privity, (3) vertical privity, (4) the easement touches

and concerns the land and (5) an agreement. In this case, there was notice because the easements were properly recorded. While the man had no actual notice of the easements, he will be assumed to have notice if it would be disclosed in a title search. This would be the case here because the easements were recorded. Further, there was horizontal privity between the developer and the utility company and vertical privity between the developer and the man. Further this easement touches and concerns the land because it relates to the use and enjoyment of the land. Accordingly, the man will not be able to force the utility company to remove the sewer lines from the ground because he has a valid easement.

4. The Court may find the developer liable because he was the builder.

Generally, when a person purchases land it does not include any warranties as to the quality of the building. This is the doctrine of caveat emptor, or "buyer beware". However, the Court has found that where a developer is the builder and is selling the land upon which it has built, they will be held liable for any defects. The idea behind this is that the builder had the opportunity to inspect and do a good job of building and therefore should be liable for any known defects which it should have fixed. In this case, an expert has determined that the cause of the rainwater influx was a defect in the construction of the home's foundations. Accordingly, the developer will be held liable for this defect as the builder.

### **ANSWER TO MEE 5**

1. The court may properly grant the plaintiff's motion for sanctions pursuant to Rule 11. Rule 11 provides that any party or attorney who signs a filing to be submitted to the court holds out that they have a good-faith, nonfrivolous basis for the content of the filing. In the case of an answer, each denial must be backed up by a reasonable investigation into the matter being denied. If a party believes the other side has violated Rule 11, it may serve a motion for sanctions on opposing counsel asking it to withdraw or amend the filing to comply with Rule 11. If the party fails to do so within 21 days, the complaining party may file a motion for sanctions with the court. Here, the defendant's attorney did not have a good-faith basis for its general denial in the answer. The circumstances suggest that the defendant's attorney did very little research into the basis for his answer, and simply submitted a blanket denial to meet the deadline. The attorney could have easily given the assignment to another lawyer or moved the court for an extension of time. By signing his name to the answer, the attorney warranted that the manifestations he made were backed up by good-faith reasonable investigation, which was not the case. The attorney therefore violated Rule 11 in his answer.

Moreover, the defendants' attorney should have amended the answer. Rule 11 imposes a continuing duty on parties or attorneys, in that each time a pleading or filing is referred to, the attorney verifies that the contents of that pleading or filing are still supported. If it should come to light that an assertion in a filing is inaccurate, an attorney has a duty to amend the filing to reflect the truth. Thus, when the defendants' attorney submitted the response to the

Requests for Admission, he manifested that the general denial in the answer was no longer true. This is especially the case since some of the allegations in the complaint were basic allegations involving the citizenship of the parties and the location of the accident. The defendants' attorney thus should have amended the answer to reflect the responses given to the Requests for Admission.

The plaintiff properly followed the procedure for filing a motion for sanctions--she first served the motion on the defendants' attorney, and, after a month had passed, filed the motion with the court. The court may therefore grant the plaintiff's motion for sanctions.

2. a. The purpose of Rule 11 sanctions is only to deter, not to punish. A court may order sanctions that it deems appropriate in its discretion, including attorney's fees, striking of pleadings, establishing disputed facts in favor of one party, and default judgment. An award of Rule 11 sanctions is reviewable for abuse of discretion. Here, the attorney's conduct was likely not egregious enough to warrant a sanction beyond expense-shifting. He was under time pressure in filing (although he could have moved to extend) and did not manifest false statements under oath, in that an answer is not signed under penalty of perjury. As nothing indicates that the defendants' attorney has a pattern of making defective filings, expense-shifting will likely be sufficient to deter future misconduct. The court should therefore award the \$2,100 requested by the plaintiff's attorney if it determines that the plaintiff's attorney's hourly rate and time billed is reasonable. Seven hours may be an excessive length of time, in that the motion was probably relatively simple to draft, and it is unclear what the plaintiff's attorney would have to discuss with the defendants' attorney beyond asking him to amend his answer. Ultimately, such a determination would lie within the discretion of the court.

b. Because sanctions exist for the purpose of deterrence, they should generally be awarded against the party at fault for the misconduct. Here, the fault lies with the defendants' attorney. Although the defendants were arguably dilatory in that they retained the attorney only four days before the answer was due, the attorney was in a position to assign the job to another lawyer or ask the court for an extension of time given his trial commitments. Furthermore, sanctions against a lawyer will generally constitute sanctions against the lawyer's entire firm. Therefore, the lawyer's firm will bear the costs of whatever sanction the court institutes.

## **ANSWER TO MEE 5**

1. The court may properly grant the plaintiff's motion for sanctions. Under Rule 11 of the Federal Rules of Civil Procedure, a party may move for sanctions against a party who has abused the pleadings process. Here, facts suggest that the defendant's attorney abused the pleadings process. First, the attorney's initial answer simply read, "General Denial: Defendants Hereby Deny Each and Every Allegation in the Complaint." A lawyer is under a duty to reasonably investigate facts in order to make a truthful response to a complaint. A lawyer's signature indicates that he has made appropriate investigations and his responses are

truthful and warranted by existing law. Here, it appears that the lawyer made no such inquiry. Although the attorney was pressured for time, he could have filed a motion for an extension due to the unique circumstances, or given the complaint to another lawyer in the firm in order to ensure an accurate response. After two months, when the plaintiff served a request for admission on the defendants, the defendant's attorney denied the allegations concerning the driver's negligence and the plaintiff's injuries, but admitted all other alleged facts. This supports the idea that had the attorney initially made a reasonable investigation when responding to the answer, he would not have submitted a general denial.

The plaintiff then requested that the defendants withdraw their original answer and file an amended answer admitting the allegations that the defendants had admitted in their response to the requests for admission. This was a reasonable request, and would have resolved the parties' problem. However, one month later, the defendants had still failed to withdraw or amend their answer. This unreasonable delay, and general bad faith in failing to investigate and respond properly to the plaintiff's complaint, evidences an abuse of the pleadings process, and warrants the plaintiff's motion for sanctions. District courts have substantial discretion in deciding to award sanctions, and would probably do so here for the reasons discussed above.

2. If the court grants the plaintiff's motion for sanctions, sanctions are appropriate against the attorney, and would likely include the plaintiff's expenses in filing the motion.

(a) Sanctions are not meant to be punitive, but are rather used to deter future, similar conduct. Therefore, appropriate sanctions should not be too harsh, but enough to deter the defendant's attorney from similar behavior in the future. Appropriate sanctions would likely include the plaintiff's expenses in filing the motion, which in this case are \$2,100. It appears that the costs are reasonable, as the plaintiff submitted evidence that his customary billing rate is \$300 per hour and he spent seven hours preparing the motion and corresponding with the defendants' attorney about the answer. With regard to other sanctions, the court might require that the defendant's answers in the Requests for Admission be established as conclusive. In conclusion, attorney's costs and fees, and a requirement that the defendant's answers in the requests for admissions would be appropriate sanctions.

(b) The sanctions should be ordered against the attorney. Here, the misconduct was entirely on the part of the attorney: he failed to make a reasonable investigation into the truthfulness of his statements in his answer and failed to withdraw the original answer and file an amended answer after talking with the plaintiff's attorney. It would not be appropriate to impose sanctions on the actual defendants, since there are no facts suggesting any wrongdoing on their part. In conclusion, sanctions should only be ordered against the attorney.

## **ANSWER TO MEE 6**

1. The question is whether the man properly withdrew from the partnership.

A partnership is an agreement among two or more persons to carry on a for-profit business as co-owners. It need not be formally created and often is not; the agreement itself is enough. Here, the man and woman created just such an informal partnership.

Many partnerships are created by a partnership agreement. (Indeed, it is often said that "the partnership agreement is the law of partnerships.") Partnership agreements cannot eliminate the power of a partner to withdraw, but they *can* impose limitations on that power. (Frequently, they provide that notice is required in advance of withdrawal.) In the absence of such limitations, however, when the partnership is a partnership at will -- as opposed to a partnership for a definite term or undertaking -- the partners are free to withdraw at any time, for any reason or no reason.

Here, there was evidently no partnership agreement limiting the man's ability to withdraw. Accordingly, if the question is strictly one of his *rights* to withdraw, withdrawal was proper. That result seems at odds with the rule that partners owe each other strict fiduciary duties; it does not seem right that a partner could "properly" withdraw in order to usurp a partnership opportunity. But partnership law deals with the man's conduct in other ways. These are discussed below. As for withdrawal, taken by itself, the man's action was appropriate.

2. In a partnership at will, the withdrawal of a partner precipitates dissolution, unless all the partners -- including the properly dissociating partner -- agree within ninety days that the partnership should continue. Following dissolution, the partnership exists only to wind up its business. All partners participate in winding up. (The properly dissociating partner may participate, but is not obliged to. If he or she does not, his duties and obligations to the partnership cease.) During this stage, the partnership will square its debts with creditors, pay out partnership shares to partners, and eventually cease to exist as a distinct legal entity. Here, assuming proper withdrawal, the partnership dissolved. (It could have continued had all the partners, including the man, agreed to continue it within 90 days, but obviously the man did not do that.) Accordingly, it existed after that point only to wind up the business.

3. A partner owes fiduciary duties to the partnership and to all partners. They include the duty of care and the duty of loyalty. The duty of loyalty requires, as a general matter, that the partner put the interests of the other partners and the partnership ahead of his own. Specifically, his duty of loyalty requires that a partner not usurp a partnership opportunity. That is, if a business opportunity comes before the partnership that the partnership might be expected to embrace in the ordinary course of its business, the partner may not take the opportunity for himself.

Here, the man breached that duty. The man was aware that the partnership was interested in the purchase of the store, but, when the opportunity to purchase the store arose, he seized that opportunity for himself. The law of partnerships requires that such an opportunity be placed before the partnership, rather than taken for the partner's own gain.

## **ANSWER TO MEE 6**

### **1. The man has lawfully dissociated from the partnership**

A partnership is an agreement between two or more persons to run a for-profit business as co-owners. There is no need for any specific formalities or any writing to form a partnership, provided the parties have the intent to run a for-profit business as co-owners. The key element is the sharing of profits and control. A mere passive co-ownership is insufficient. There are two broad types of partnerships - a partnership at will (with no specific duration or purpose) and a partnership for a certain duration or purpose

A partner may generally withdraw from the partnership at any time. Such withdrawal, however, will be deemed wrongful under certain circumstances which carries with it specific legal consequences. Whether withdrawal was proper or wrongful will depend on the type of partnership in question. Withdrawal from a partnership at will will only be wrongful if contrary to the express terms of the partnership agreement. Withdrawal from a partnership for a certain duration or purpose, on the other hand, will be wrongful if i) the partner withdraws prior to the fulfilment of the specific purpose or the expiration of the specific duration, ii) the partner goes bankrupt, or iii) is expelled by court.

The man and the woman in the present scenario entered into a partnership to run a neighborhood natural-food store. They did so for a number of years, with the man managing the business and the woman supplying capital to the business as needed. They did not enter into any writing agreements, but merely followed an informal understanding. Presuming that the woman's role was not limited to a mere passive ownership, this is sufficient to form a valid partnership, even if the parties did not have the specific intent to do so.

The partnership between the man and the woman is an at will partnership as it not limited to a specific purpose or duration. As there is no partnership agreement nor any indication as to any particular terms, the man's withdrawal was lawful. He was allowed to withdraw at any time provided it did not violate any express terms in the partnership agreement. As the man and woman's agreement did not provide for any restrictions on the right to withdraw, such as requiring notice or writing, the man properly withdrew from the partnership.

### **2. Legal effect of withdrawal**

The issue is whether the partnership was dissolved when the man withdrew.

Generally, withdrawal of a partner does not automatically terminate the partnership. However, in an at-will partnership, the partnership will be automatically dissolved upon the withdrawal of any partner, unless within 90 days from withdrawal all partners, including the partner who withdrew, agree to continue the partnership. Furthermore, a lawful withdrawal terminates most of the partner's fiduciary

duties to the partnership (except if he participates in the winding-up of the partnership) as well as his or her right to participate in the management of the partnership. The partner, however, retains the right to participate and share in the winding-up of the partnership.

The man validly withdrew from a partnership at will. This terminated most of his fiduciary duties and his management rights. He continues to be allowed to participate in the winding-up of the partnership. Further, there was no valid agreement to continue the partnership business. While the woman clearly stated that she considered the partnership as still in existence, such an invocation of the possibility to continue the partnership business requires all partners (including the dissociated partner) to so agree. The man, after he dissociated, clearly did not want to continue the partnership. As such, the partnership was terminated.

Additionally, the man continued to be entitled to participate in the winding-up of the partnership as he did.

### **3. The man has breached his duty of loyalty to the partnership**

The issue is whether the man can still incur liability after dissolution of the partnership but before winding-up.

A partner owes the partnership two main duties, namely a duty of care and a duty of loyalty. The duty of loyalty requires that a partner put the partnership's interests before his own and act solely for the benefit of the partnership. This includes a duty not to advance interests adverse to the partnership, not to engage in self-dealing transactions and not to usurp any relevant corporate opportunities. The latter requires that the partner offer any relevant opportunity to the partnership first and only after the partnership declines may pursue the opportunity himself. An opportunity will be relevant if it falls within the partnership's line of business or interest and expectancy.

A partnership is only terminated once fully wound-up. Thus, dissolution of the partnership is only the first step in the termination process. The winding-up can be conducted by any partner, unless he wrongfully withdrew, and requires the partner to satisfy all partnership debts as well as distribute all other partnership assets. In the course of winding-up, a partner continues to owe the partnership fiduciaries duties and may be held liable for any breach thereof.

The man informed the woman about his withdrawal from the partnership before he purchased the building in question. However, the winding-up was only completed three months later when the man sent the woman a check for half of the store's inventory and other business assets. As such, in the period between the dissolution of the partnership and the completion of the winding-up process, the man remained bound by his fiduciary duties as he proceeded through the winding-up.

The purchase of the building was clearly an opportunity that should have been offered to the partnership first. The store held by the partnership has been located in the building in question

for many years and the partnership "had regularly sought to purchase the building" before. As such, the man's failure to inform the partnership about the landlord's willingness to sell and the man's subsequent purchase of the building is in clear violation of the man's duty of loyalty to the partnership. The man clearly put his own interests before those of the partnership and usurped a corporate opportunity that was of particular interest to the partnership, and should have been offered to the partnership first.

Therefore, the man breached the duty of loyalty, in particular not to usurp a corporate opportunity and advancing an interest adverse to the partnership, by purchasing the building.

## **ANSWER TO MPT 1**

### **ARGUMENT**

#### **I. Because Both Sarah Karth and Valerie Karth are Crime Victims Under the Franklin Crime Victims' Rights Act, Sarah Karth Can Read A Victim-Statement on Her Own Behalf, And on Behalf of Valerie Karth as Valerie's Legal Representative at Defendant's Sentencing Proceeding.**

The Franklin Crime Victims' Rights Act (FCVRA) defines "crime victim" as a "person directly and proximately harmed as a result of the commission of a Franklin criminal offense." FCVRA 55(b)(1). Under the plain reading of the statute, the purported victim must demonstrate that (1) the defendant's conduct was a cause in fact of the victim's injuries and (2) that the purported victim was proximately harmed by the conduct. *State v. Jones* (Fr. Ct. App. 2006). Franklin legislative history indicates that the term "crime victim" should be read broadly (*State v. Berg* (Fr. App. Ct. 2012)), and the harm embraces physical, financial, and psychological damage. *State v. Humphrey* (Fr. Ct. App. 2008 (citing FCVRA 56(b)(2))).

#### **A. Valerie is a crime victim because Defendant's conduct directly and proximately caused her injuries.**

As stated above, in order to be a crime victim under the FCVRA, the defendant must have both directly and proximately caused the purported victim's harm. This case is analogous to *State v. Berg*, wherein the court found that the defendant both directly and proximately caused the victim's harm. There, the defendant provided alcohol to his girlfriend that was driving a car containing both the defendant and the victim. The driver was underage and also had a history of driving under the influence that the defendant was aware of. Because there was a direct causal connection between the defendant's conduct and the victim's death, the court found that the defendant's action was a cause in fact of the victim's injury. The court reasoned that but for the defendant buying alcohol and providing it to the driver, the victim would not have died. *State v. Berg* (citing *State v. Jones* (Fr. Ct. App. 2006)). Similarly, Valerie would not have

been harmed but for Defendant, Greg Clegane, selling fireworks to a minor. In other words, if Defendant had not sold the fireworks to the teenager, the teenager never would have never set off the fireworks and injured Valerie. Therefore, Defendant's conduct was the direct cause of Valerie's injuries.

Proximate cause is a means used by the court to limit a defendant's liability. As foreseeability is a core factor in determining proximate causation, the court looks to whether the resulting harm was "within the zone of risks" that resulted from the defendant's conduct. *State v. Berg*. In *State v. Berg*, the court found that it was foreseeable that if the defendant bought alcohol and provided it to his underage girlfriend who was driving the car, and who he was aware had a history of drunk driving, that his girlfriend might drunk drive and cause an accident. The court noted that this was a natural and continuous sequence of events, which resulted in an "intuitive relationship," concluding in the victim's death. The court further noted that the defendant could have reasonably foreseen that anyone in the car driven by a drunk driver could have been killed or injured. Because there was both direct and proximate causation, the court found that the victim was a crime victim under FCVRA. *State v. Berg*. Similarly here, it is reasonably foreseeable that if you sell illegal, professional grade fireworks to a 17 year old minor, that the minor, or those in the minor's surroundings, could be injured. That is exactly what happened here, as both the minor and Valerie were injured. There is obviously proximate causation. Because the offense of which Defendant stands convicted, the sale of fireworks to a minor under Fr. Crim. Code 305, was the direct and proximate cause of Valerie's injuries, Valerie is a crime victim under the FCVRA.

**1. Because Valerie is a crime victim, and because she is currently incapacitated, Sarah can read a victim-statement on Valerie's behalf at Defendant's Sentencing Proceeding.**

When someone falls within the "crime victim" definition, he or she has the right to be reasonably heard at any public proceeding in the district court involving sentencing. FCVRA 55(a)(4). Because Valerie is a crime victim, she is entitled to be reasonably heard at Defendant's sentencing proceeding by reading a victim-statement.

The FCVRA provides that if a crime victim is incapacitated, "the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court may assume the crime victim's rights under this Act." FCVRA 55(b)(2). Valerie is currently incapacitated. Due to Defendant's conduct, Valerie was severely injured and was in a coma for several months. Although she is out of the coma now, she is still considered incapacitated. Valerie is unable to leave the hospital to come to court. As such, a representative can assume her rights under the FCVRA. Sarah is the only appropriate representative, as her father died five years ago and her mother is so traumatized by Valerie's injuries that she is too frail to participate in court proceeding. For that reason, Sarah can step into Valerie's shoes to read a victim statement to ensure that Valerie is reasonably heard at the proceeding.

**B. Sarah can read because she is a crime victim because Defendant's conduct directly and proximately caused her injuries.**

As discussed above, in order to be a crime victim under the FCVRA, the defendant must have both directly and proximately caused the purported victim's harm. There is direct causation because but for Defendant's conduct, Sarah would not have been harmed. In other words, had Defendant not sold the fireworks to a teenager, the teenager would not have set off the fireworks, and Valerie would not have been injured. Had Valerie not been injured, Sarah, Valerie's little sister, would not have suffered psychological damage, which is covered under the FCVRA. Sarah also would not have suffered financial damage, which is covered under the FCVRA.

Sarah's psychological damage is foreseeable, and thus, was also proximately caused by Defendant's conduct. It is entirely foreseeable that when someone's sister, with whom she is very close, is severely injured, that person will suffer psychological or psychiatric damage. Because of their close relationship, Sarah became depressed and distraught due to Valerie's injuries. Defendant could have foreseen this due to their close relationship. Further, Defendant could have foreseen that a depressed person would require medical attention, and thus have to bear a financial burden to receive such attention. As such, Defendant's conduct proximately caused Sarah's injuries. Because both direct and proximate causation exist, Sarah is a crime victim under the FCVRA. As a crime victim, Sarah is entitled to be heard in court, and can thus read a victim-statement on her own behalf at Defendant's sentencing proceeding.

## **II. The Restitution Requests For Both Valerie and Sarah Should Be Granted Because They Are Victims of Defendant's Illegal Offense And He Has Not Rebutted The Presumption That He Is Financially Able to Pay Restitution.**

One of the purposes of the FCVRA is to "force offenders to pay full restitution to the identifiable victims of their crimes." *State v. Humphrey* (Fr. Ct. App. 2008). The statute identifies three factors that the court must take into account in determining the amount of restitution paid: "(1) public policy that favors requiring criminals to compensate for damage and injury to their victims; (2) the financial burden placed on the victim and those who provide services to the victim as a result of the criminal conduct of the defendant' and (3) the financial resources of the defendant." *Id.* The court must make a serious inquiry into all factors. *Id.* The FCVRA creates a rebuttable presumption that the defendant is financially able to pay restitution. The burden of rebutting the presumption is placed on the defendant. *Id.*

The FCVRA provides that the court can order that a defendant make restitution to any victim of such offense. Defendant stands convicted of the sale of fireworks to a minor under Fr. Crim. Code 305. His victims are identifiable for the reasons discussed above. Defendant is presumed to have the ability to pay restitution under the FCVRA. Defendant has not provided any evidence to show that he is unable to pay. Instead, Defendant simply states that he cannot pay and that restitution is excessive and not supported by the evidence. This is not sufficient to rebut the presumption that Defendant is able to pay. Further, public policy favors requiring Defendants to compensate their victims for their injuries and victims. Additionally, both Sarah

and Valerie will be financially burdened if they are not compensated. As such, Defendant should be required to pay restitution.

**A. Valerie is entitled to restitution for her physical injuries.**

The FCVRA provides that when an offense results in physical injury to a victim, the defendant must pay the cost of necessary medical services, the cost of necessary physical and occupational therapy and rehabilitation, and must reimburse the victim for any lost income. FCVRA 56(b)(2). Here, Valerie has already paid \$22,000 out of pocket for medical expenses. It is estimated that she will have to pay an additional \$40,000 for medical expenses out of pocket. Valerie is entitled to be compensated for these amounts in full under the statute. Further, by the time she is able to return to work, Valerie will have lost \$120,000 in salary. She is also entitled to this amount in full under the statute since Defendant has not rebutted the presumption that he is able to pay, and all factors weigh in favor of paying Valerie restitution damages in full for her physical injuries and lost income.

In *State v. Hackett* (Fr. Ct. App. 2003).

**B. Valerie is entitled to restitution for her property damage.**

The FCVRA provides that when an offense results in property damage of a victim of the offense, if the property is destroyed completely, the defendant must pay an amount equal to the repair or replacement cost of the property. FCVRA 56(b)(1). Here, Valerie's garage was completely destroyed by the fireworks sold to the minor by Defendant. The cost to rebuild it is \$17,000. Valerie is entitled to this amount in full under the statute since Defendant has not rebutted the presumption that he is able to pay, and all factors weigh in favor of paying Valerie restitution damages in full for her damaged property.

This is similar to *State v. Hackett* (Fr. Ct. App. 2003), wherein the court required a defendant to pay restitution for property damage after he procured supplies to manufacture methamphetamine and he had knowledge and understanding of the scope and structure of the activities of those he sold the supplies to, causing the property damage. The court reasoned that even though there were "multiple links in the causal chain," the defendant remained liable to pay restitution. Similarly here, Defendant had knowledge of the dangers of selling illegal fireworks to a minor. Because the conduct resulted in Valerie's property damage, she is entitled to restitution.

**C. Sarah is entitled to restitution for her physical injuries.**

The FCVRA provides that when an offense results in physical injury to a victim, the defendant must pay the cost of necessary medical services, the cost of necessary physical and occupational therapy and rehabilitation, and must reimburse the victim for any lost income. FCVRA 56(b)(2). Here, Sarah has incurred \$1,500 in medical expenses due to the fact that she must see a therapist twice a month due to her being so depressed and distraught about Valerie's injuries and future conditions. Because she has gone for the past six months, and because her

insurance deductible is so high, the \$1,500 is entirely out of pocket. For that reason, Sarah is entitled to this amount in full under the statute since Defendant has not rebutted the presumption that he is able to pay, and all factors weigh in favor of paying Sarah restitution damages in full for her physical injuries that resulted from Defendant's offense.

This is distinguishable from *State v. Jones*, because Defendant's conduct did in fact proximately cause Sarah's injuries. There, the court found that the purported victim's harm was not foreseeable because there was no evidence that the drug conspiracy led to her injuries or that the defendant knew that the purported victim's boyfriend became violent and abused her when he took the drugs supplied by the defendant. Here, however, Sarah's injuries are entirely foreseeable. There is plenty of evidence, and experts will be able to testify to, the fact that a person can suffer psychological or psychiatric harm when a close family member is severely injured. As such, Sarah is entitled to restitution.

## **ANSWER TO MPT 1**

### **III. Legal Argument**

**The court should allow Ms. Valerie Karth (Ms. Valerie Karth) to make a victim-impact statement, because Ms. Valerie Karth was a direct and foreseeable victim of Defendant's actions under FCVRA.**

Pursuant to Section 55 of the Franklin Crime Victims' Rights Act (FCVRA), a crime victim has the "right to be reasonably heard at any public proceeding in the district court...involving...sentencing." The Act defines a "crime victim" as a person directly and proximately harmed as a result of the commission of a Franklin criminal offense. Ms. Valerie Karth is the type of victim the legislators had in mind when drafting the FCVRA. The court in *State v. Berg* uses a "but for" test to see whether there is a direct causal connection between the defendant's conduct and the victim's death. In that case, the defendant did not drive. Therefore, he did not perform the exact act that killed her. He did however supply the driver with alcohol, illegally, and that act was found to be the direct cause of the death. Additionally, the court in *Berg* defined "proximate harm", the second prong of the crime victim test, as a limitation on the consequences of a defendant's conduct. The court stressed that the "heart" in determining whether it was a proximate cause was "foreseeability" and found that it was reasonably foreseeable that the defendant would know a result of his actions was likely to occur, especially because he had been aware of the driver's history of drunk driving.

In the present case against Defendant, Defendant's actions directly caused Ms. Valerie Karth's injuries and it was the proximate cause of her injuries. Defendant's actions directly caused Ms. Valerie Karth's injuries because but for the defendant supplying the fireworks illegally to the

teenager, Ms. Valerie Karth would not have gotten injured. Thus, because of this supplying, like the supplying of alcohol in Berg, there is a direct causal connection between Defendant and Ms. Valerie Karth's injuries. Next, Defendant was aware of the consequences of his actions, and it was foreseeable that selling fireworks to a minor would likely injure not only the minor, but also any bystanders. Defendant has three similar retail operations spread through the eastern part of the state, so he is very experienced in selling fireworks and knowledgeable about the types of fireworks he is selling. If Defendant tried to argue that he also sells party supplies and is not an expert on fireworks, he would still be put on notice. Even if that was true, the fireworks in the instant case were called "Little Devil Shards." Thus, it was foreseeable for the Defendant to know that "shards" would be a result of a firework so named. In addition, Defendant was also on notice of the teenager's intentions, like in Berg where the defendant was on notice that she had a history of drunk driving, as an arresting officer testified that the boy had told him, "I can't wait to show these to my friends --- I'm going to give everyone a big surprise." Thus, Defendant knew that the teenager was going to use the fireworks; he knew that the fireworks were called "Little Devil Shards" and as a result it was foreseeable that the teenager would harm himself. Additionally, it is foreseeable that if such a teenager were to show the firework to "his friends", bystanders would also be injured.

Further, the victim in State v. Berg was able to make a victim statement despite the defendant only receiving six months in prison. Although not an element of the offense, public policy indicates that if a victim of a defendant who is only incarcerated for six months is allowed to speak, then a victim of a defendant who is potentially going to be incarcerated for up to five years should also be allowed to speak.

Finally, Ms. Valerie Karth did not assume any risk by going to a party. There is no evidence that anyone knew the teenager was going to set off fireworks. In fact, an arresting officer testified that the teenager was going to "surprise" everyone.

Thus, the court should consider Ms. Valerie Karth a crime victim and allow her to make a statement.

**The court should allow Ms. Sarah Karth (Ms. Sarah Karth or Ms. Karth) to make a victim-impact statement on behalf of her sister, Ms. Valerie Karth, because Ms. Valerie Karth was a "crime victim" under FCVRA and Ms. Valerie Karth is incapacitated.**

Section 55(b) of the FCVRA states that "in the case of a crime victim who is...incapacitated...the family members...may assume the crime victim's rights under this Act. Ms. Valerie Karth is incapacitated and remains in the hospital. She is therefore not able to present her own statement. However, pursuant to Section 55(b) of the FCVRA, Ms. Sarah Karth, being her sister, may assume her rights to make a victim-impact statement under the FCVRA. Further, Ms. Valerie Karth's father has passed away, and her mother is too frail to participate in any court proceedings, making Ms. Sarah Karth the only viable representative.

The court should therefore allow Ms. Sarah Karth to make a victim-impact statement on behalf of her sister, Ms. Valerie Karth.

**The court should allow Ms. Sarah Karth to make a victim-impact statement on behalf of herself, because Ms. Sarah Karth was a "crime victim" under FCVRA and suffered direct and foreseeable trauma from Defendant's actions.**

Pursuant to the tests discussed above, Ms. Sarah Karth had a personal and very "life-altering" experience because of Ms. Valerie Karth's injuries. The Defendant will try to persuade you that a victim's sister is not a foreseeable result of his actions. However, given the closeness in the relationship and the extent of the victim's injuries, Ms. Sarah Karth's injuries were definitely foreseeable. The two are only two years apart in age, and Ms. Sarah Karth had to spend days upon days waiting in the hospital to see if Ms. Valerie Karth would even come out of a coma, which lasted for several months, and she is still incapacitated. Ms. Sarah Karth has had to endure ongoing trauma, which will continue long after Ms. Valerie Karth is finally released from the hospital. Thus, her trauma is the direct result from Defendant's actions. In contrast, the court in *State v. Jones* did not allow the girlfriend of the defendant's customer to make a statement because *State V. Jones* had an issue that raised "complex questions relating to the causes of domestic violence." However, the court even stated that the girlfriend who alleged she was a victim offered no expert testimony to support her assertion regarding causation. Ms. Sarah Karth does not have the same issue here. A criminal statute like the one presented in this case likely was put in place to prevent injury from a minor handling an abnormally dangerous activity. Additionally, there are actual manifestations of her distress, as she has needed to see a therapist. The defendant in *Jones* did not have the same issue, and could not prove that the sole reason that defendant was abusing her was because of the cocaine. Here, the only reason Ms. Sarah Karth needs therapy is because of Defendant's actions. As to foreseeably, although not herself present at the scene, it is foreseeable that family members of victims would suffer emotional distress, especially one witnessing Ms. Valerie Karth's condition in a coma for months. The court in *Jones* stated that the closer the relationship between the actions of the defendant and the harm sustained, the more likely that proximate harm exists. Here, unlike *Nocona in Jones*, Sarah can provide the court with evidence that the supplying of fireworks illegally led to her injuries and that the defendant knew about what his actions would result in. Since Defendant is a supplier of fireworks, an abnormally dangerous activity, and knew that the Defendant was going to use it, he could foresee bystanders getting hurt, and also could foresee family members of victims suffering because they need to witness their loved ones in pain.

**The court should grant full restitution requested to Ms. Sarah Karth and Ms. Valerie Karth because public policy dictates punishing such defendants for their actions, the victims have encountered great financial burdens as a result of the defendant's actions, and Defendant has not presented evidence to establish he is incapable of paying restitution.**

Pursuant to Section 56 of the FCVRA, when sentencing a defendant convicted of an offense, a court may order that such defendant make restitution to any victim of such offense. The court

in Humphrey defined this as any identifiable victims of the crime who is "directly and proximately harmed as a result of the commission of a Franklin criminal offense." Additionally, the court in State v. Jones cited State v. Hackett, which stated that the defendant was ordered to pay restitution because he had "knowledge and understanding of the scope and structure of the enterprise and of the activities of his codefendants." Defendant in this case, owning several stores, has knowledge and understanding of the scope and structure of fireworks and how they work and that the teenager planned to use them. Additionally, as stated above, Ms. Sara Karth should be able to recover for Ms. Valerie Karth on her behalf since she is the family member assuming her claim. Ms. Valerie Karth has receipts showing how much she already paid (22,000) and the hospital estimated further damages of \$40,000. Additionally FCVRA allows recovery for lost income, so she should recover the \$120,000. Further, the garage catching on fire and destroyed was foreseeable because fireworks foreseeably cause fire to anything in its vicinity. Since Section 56 allows recovery for damage to property, restitution should be ordered for the full rebuilding cost of \$17,000. Thus, Ms. Valerie Karth should get full restitution for the requested amount. Additionally, for Ms. Sarah Karth's own claims, as stated above, Ms. Sara Karth is also a direct and proximate victim of Defendant's actions. The case in Humphrey was a driver who texted while driving and the restitution was granted for loss of child-support income. Although Ms. Sarah Karth does not rely on Ms. Valerie Karth for income, she will inevitably have to take care of Ms. Valerie Karth as Ms. Valerie Karth recovers, seeing as how the father is no longer alive and the mother is too frail. Since Defendant's actions resulted in Ms. Sarah Karth's necessary professional care for therapy, Defendant should be liable for that too. Finally, Section 56 doesn't actually limit the FCVRA to just "crime victims." Section 55 defines crime victims as applying to the FCVRA, but Section 56 doesn't ever use the words "crime victims," instead just saying "victims". Thus, even if Ms. Sarah Karth is not a "crime victim" under the FCVRA, she should be able to recover as a victim of Defendant's actions because she suffered foreseeable losses as a result. Defendant may try to argue that Ms. Sarah Karth's medical expenses were not necessary since she only went to therapy. However, she is now responsible for taking care of her incapacitated adult sister, and this type of pressure is likely to cause someone to need therapy and she wouldn't have needed therapy but for the Defendant's actions. Thus, the court should find that Sarah's full medical expenses at least thus far are recoverable in restitution.

The Section also provides three factors for the court to consider in considering the amount of restitution: (1) public policy that favors requiring criminals to compensate for damage and injury to their victims; (2) the financial burden placed on the victim and those who provide services to the victim as a result of the criminal conduct of the defendant, and (3) the financial resources of the defendant.

Public policy requires that defendants be punished for their actions. Defendant's actions led to what one resident described in a Franklin City Post article as "a war zone." Additionally, it will show the severity of selling illegal fireworks, as restitution will put other potential defendant's on notice that their reckless sales of fireworks to minors could really devastate a family. Additionally, there is evidence that there is great financial burden placed as stated in the two paragraphs above. Finally, the court in State v. Humphrey noted that the statute places the

burden of proof on the defendant to show that he is unable to pay. Defendant did not present any evidence to establish that he is incapable of paying, merely saying that he does not have the resources to pay the amounts requested. In spite of the lack of evidence Defendant presented, it is known that Defendant has three similar retail operations spread throughout the eastern part of the state. Therefore, one can reasonably assume that he has successfully managed and owned these operations and has a steady source of income. Thus, the court should find that Defendant has the ability to pay.

Thus, the court should grant full restitution to Ms. Sarah Karth on behalf of herself and Ms. Valerie Karth.

## **ANSWER TO MPT 2**

### **MEMORANDUM**

**To:** Emily Swan

**From:** Examinee

**Date:** February 27, 2018

**Re:** Danielle Hastings inquiry

Whether Danielle can apply for and hold the county election judge position or the precinct chair position while simultaneously serving as a member of the board of directors for Municipal Utility District No. 12 ("MUD 12") depends on whether such service is barred under the Franklin Constitution and also whether the common law doctrine of incompatibility prevents such dual service.

As explained below, the Franklin Constitution does not bar a person from serving as a county election judge and holding another office and also does not bar a person from serving as a precinct chair and holding another office, because neither are civil offices of emolument. Also,

the common law doctrine of incompatibility will not bar Danielle from holding the simultaneous office in either case.

### **Civil office of emolument**

Whether Danielle can hold both positions depends on whether the each position is considered a civil office of emolument. Under article XII, section 25(a) of the Franklin Constitution, "[n]o person shall hold or exercise, at the same time, more than one civil office of emolument." A civil office of emolument is one in which compensation is received. Opinion No. 2008-12. MUD directors are entitled to receive a per diem as payment for attending board meetings or engaging in other MUD-related activities. *Id.* This qualifies MUD board of directors are therefore a civil office of emolument. *Id.* However, based on the Marin County Board of Elections position Descriptions, because both election judges and precinct chairs are volunteers and not compensated for services, they are not considered civil officers of emolument. Even though election judges are reimbursed for the cost of training, supplies, and other expenses, this does not rise to the level of compensation. Opinion No. 2003-9.

Because the election judge and precinct chair positions are not civil offices of emolument, article XII, section 25(a) of the Franklin Constitution does not bar a person from serving as a county election judge and holding another office or from serving as a precinct chair and holding another office.

### **Common law doctrine of incompatibility**

The common law doctrine of incompatibility bars one person from holding two civil offices if the offices' duties conflict. Opinion No. 2008-12. The doctrine contemplates self-appointment, self-employment, and conflicting loyalties. *Id.*

Self-appointment and self-employment are only applicable if the responsibilities of one position include employing or appointing the second position. *Id.* Here, MUD 12 does not appoint or employ county election judges or precinct chairs, or vice versa; therefore, self-appointment and self-employment are not implicated.

### **Conflicting Loyalties**

Conflicting loyalties bars holding simultaneous civil offices that prevent a person from exercising judgment which is independent and disinterested in either or both positions. Opinion No. 2010-7. In order for this prong to apply, each position must constitute a "civil office." Opinion No. 2008-12. Whether an individual holds a civil office is determined based on the test in *Morris Indep. School Dist. v. Lehigh*, which explained that a civil officer is one who exercises any sovereign function of the government largely independent of the control of others for the benefit of the general public. *Id.*

As explained in the Attorney General of Franklin's Opinion No. 2008-12, a MUD director is a civil officer within the Franklin Supreme Court test articulated in *Morris* because they are responsible for "the management of all the affairs of the district [Franklin Water Code § 27] and may levy and collect a tax for operation and maintenance purposes, charge fees for provision of district services, issue bonds or other financial obligations to borrow money for its purposes, and exercise various powers set out in the Franklin water code (*id.* § 29)."

The responsibilities of a county election judge, as set forth in the Franklin Election Code § 471, include: management and conduct of the election at the polling place, appointing election clerks to assist in conducting an election, designating the working hours of and assigning the duties to be performed by the clerks, preserve order and prevent breaches of the peace of violations of the code, and administer any oath required to be made the polling place. These tasks will likely to be found to be an exercise of a sovereign function of the government for the benefit of the general public largely independent of control of others, as defined by the *Morris* test.

Therefore a county election judge is a civil officer.

The precinct chair is responsible for guiding, contacting, and organizing voters for their respective political parties in their precincts and also represent their home precinct on their party's Executive Committee ("EC"). An EC conducts the local business of that political party. This does not seem to implicate a sovereign function of the government under the *Morris* test, since it is mostly acting for and on behalf of a political party to encourage people to vote. As such, the precinct chair is likely not a civil officer and therefore there is no conflicting loyalty in serving as a precinct chair and being a director of MUD.

### Incompatibility

Also considered is whether any of the powers and duties of one position are incompatible with the powers and duties of another position. It is unlikely that Danielle's powers and duties of a MUD director, in providing public water, sewer, drainage, and other basic services would be incompatible with those powers and duties of the election judge, who mostly organizes and manages polling places for elections. While there may be some overlap if, for example, the polling place was held in one of the parks owned by MUD 12, that overlap would simply be whether to allow the polling place to be there or if/how much to charge, which is limited and not exclusive. Therefore, this would likely not rise to the level of incompatibility contemplated by this doctrine. Opinion No. 2010-

7. As such, Danielle would not be barred from serving as a county election judge and remaining a director of MUD.

Because there is no self-employment, self-appointment, or conflicting loyalties in being a director of MUD and a county election judge or in being a direct of MUD and a precinct chair, the common law doctrine of incompatibility will not bar Danielle from holding either office while still remaining a director of MUD.

## **Conclusion**

In conclusion, Danielle should be able to hold the county election judge position or precinct judge position while simultaneously serving as a member of the board of directors of MUD 12 under both the Franklin Constitution and the common law doctrine of incompatibility.

## **ANSWER TO MPT 2**

### **MEMORANDUM**

**To:** Emily Swan

**From:** Examinee

**Date:** February 27, 2018

**Re:** Danielle Hastings inquiry

IN order to determine whether Danielle Hastings may serve concurrently on the board of MUD 12, and at the same time as either a county election judge or a precinct chair, there are three issues that must be determined. First, do any of these positions qualify as "civil officers of emoluments" under Franklin Constitution Article XII, which bars holding two or more such positions? Second, is a person barred from serving on the board of a MUD and concurrently as either a county election judge or a precinct chair on the basis of the common law doctrine of incompatibility? Third, is a person barred from serving as a MUD director and an election judge or precinct chair based in Franklin Election Code Sec. 480? My conclusions are as follows: (1) A MUD director position is a civil office of emolument, but neither of the other positions is; (2) a person is not barred on the basis of the doctrine of incompatibility from serving simultaneously as a MUD board member and as either of the other two positions. Third, a person is not barred from serving as a MUD director and an election judge based on Franklin Election Code Sec.480. Therefore, Danielle Hastings could simultaneously serve as a MUD director and as either a precinct chair or a county election judge (but not as all three positions).

### **I. Simultaneous service as both a MUD Director and either a county election judge or a precinct chair does not violate Article XII of the Franklin Constitution.**

Simultaneous service as a MUD director and either a precinct chair or an election judge would not violate Article XII of the Franklin Constitution. Article XII of the Franklin Constitution bars people from holding or exercising, at the same time, more than one "civil office of emolument," unless specifically accepted. MUD directors, county election judges, and precinct

chairs are not specifically accepted by Article XII of the Constitution. [State of Franklin Constitution, Article XII]. The controlling test for determining whether a position is a civil office under the Franklin Constitution, known as the *Morris* test, looks to "whether any sovereign function of the government is conferred upon the individual to be exercised by the individual for the benefit of the general public largely independent of the control of others." [Opinion No. 2003-9, March 17, 2003]. If a civil officer is entitled to compensation, the office is an "emolument" under the Franklin Constitution, even if the person refuses to accept any compensation. [*Id.*]. Per diem compensation qualifies as an emolument.

**A. MUD Directors are civil officers of emolument because they meet the *Morris* test and receive a per diem compensation.**

MUD directors are civil officers of emolument. A MUD director position qualifies as a "civil office" under the Franklin Constitution because it meets the *Morris* test, based on the number of independent functions that are delegated to MUD boards under the Water Code. [Opinion No. 2008-12]. Specifically, MUD engage in providing public water, sewage, drainage, and other basic services to suburban residents who are not served by a city. [Interview with Danielle Hastings]. Furthermore, MUD director positions are given "emoluments." As stated above, the payment of a per diem constitutes an emolument. [Opinion No. 2003-9]. MUD directors are entitled to receive compensation for serving on the board of a MUD, specifically, a \$150 per diem payment as compensation for attending MUD board meetings or other MUD-related activities. [Opinion No. 2008-12]. Therefore, a MUD director position constitutes a civil office of emolument under the Franklin Constitution.

**B. County election judges are not civil offices of emolument because they are not paid positions.**

County election judges are "civil offices" under the Franklin Constitution. A county election judge's duties include conducting elections in the precinct during the year, and making sure that elections are "secure, accurate, fair, and accessible to all voters." Furthermore, Danielle Hastings would be the chief judge of the precinct, since her party got the most votes at the election. [Interview with Danielle Hastings]. The chief judge is in charge of managing and conducting elections at the polling place of the election precinct that the judge serves. These duties appear to be duties within the *Morris* test, since the precinct judge is charged with supervising public elections. [Opinion No. 2008-12] However, they are not emoluments because they are not paid positions. These positions are volunteer positions, and the only payment is reimbursement of actual expenses such as the cost of training and supplies purchased. [Marin County Board of Elections Position Descriptions]. Reimbursement of actual expenses does not constitute an emolument. [Opinion No. 2003-9]. Therefore, the Franklin Constitution does not bar serving as both a MUD Director and a county election judge.

**C. Precinct Chairs are not civil offices of emolument because they do not meet the *Morris* test, and thus are not civil offices.**

Precinct chairs are not "civil offices" under the Franklin Constitution because they are not positions that devolve power upon individuals to "exercise for the benefit of the general public" per the *Morris* test. [Opinion No. 2003-9]. A precinct chair is a political position created by political parties and not by statute. [Marin County Board of Elections Position Descriptions]. Since they are not offices of the state which involve devolving sovereign functions of the government to people, but rather are political positions tied to the political parties, they are not "civil offices" under the *Morris* test. [Opinion No. 2003-9]. Furthermore, even if was a civil office, precinct chairs are not paid, so there is no "emolument." [[Marin County Board of Elections positions]. Therefore, they are not "civil offices of emolument" under the Franklin Constitution. A person would not be barred by the Franklin Constitution from serving as a precinct chair and a MUD director.

**2. Simultaneous service as both a MUD director and either a county election judge or a precinct chair will not violate the common-law doctrine of incompatibility.**

The common-law doctrine of incompatibility bars a person from holding two civil offices if the offices' duties conflict. [Opinion No. 2008-12]. The doctrine has three aspects: self-appointment, self-employment, and conflicting loyalties. [Id.] Self appointment and self-employment are only implicated if the responsibilities of one position involve appointing or employing the second position. [Id.] Conflicting loyalties are implicated if the holding of two or more civil offices would "prevent a person from exercising independent and disinterested judgment in either or both positions." [Opinion No. 2010-7]. This most often arises when a person seeks to be a member of two governing boards with overlapping jurisdictions. [Id.] A threshold matter for applying the conflicting loyalties point is that each position constitutes a "civil office." [Opinion No. 2008-12]. Importantly, the doctrine can apply whether or not one or both of the positions are uncompensated. [Id.]

**A. Simultaneous service as a MUD director and a precinct chair does not violate the common-law doctrine of incompatibility since a precinct chair is not a civil office.**

Simultaneous service as a MUD director and a precinct chair does not violate the common-law doctrine of incompatibility. The first two aspects, the self-appointment and self-employment aspects, are not present here because a MUD director is not responsible for appointing or employing a precinct officer. [Opinion No. 2008-12]. Indeed, MUD directors are nonpartisan positions. [Transcript of interview with Danielle Hastings]. The conflicting loyalties prong does not apply here since the position of a precinct chair, as noted above, is not a civil office under the *Morris* test, but instead is a political party position. Therefore, simultaneous service as a MUD director and a precinct chair does not violate the common-law doctrine of incompatibility.

**B. Simultaneous service as a MUD director and a county election judge likely does not violate the common-law doctrine of incompatibility.**

Simultaneous service as a MUD director and a county election judge likely does not violate the common-law doctrine of incompatibility. As a preliminary matter, the self-appointment and self-employment prongs do not apply to this case because a MUD director is not responsible for employing or appointing an election judge. [Opinion No. 2008-12]. This only leaves the conflicting loyalties prong of the test. As described above, both a county election judge and a MUD director are civil offices under the *Morris* test. Therefore, the threshold matter for applying the conflicting loyalties prong is met. [Id.].

The next part of the inquiry is determining whether the holding of both of these positions would "prevent a person from exercising independent and disinterested judgment in either or both positions." [Opinion No. 2010-7]. In Opinion No. 2008-12, the Attorney General's office stated that a person was barred from both serving as a MUD director and a member of the Planning and Zoning Commission (PZC) by the common-law doctrine of incompatibility. The opinion focused in particular on the fact that MUDs provide "water, sewage, drainage, and other services to suburban communities," while the PZC has authority to provide final approval for plats for residential development in a city. On the basis of this, the opinion concluded that it was possible that a PZC member who was also a MUD member might have conflicting loyalties when a proposed development is located within the MUD on whose board the PZC member serves, and could result in the PZC imposing its policies on the MUD. [Id.] By contrast, in Opinion No. 2010-7, the opinion concluded that service as a school district board of trustees and county treasurer did not lead to conflicting loyalties, and thus there was no violation of the doctrine of incompatibility. IN particular, the opinion noted that the school district and the county were separate positions, with "separate authority to hold and control real estate, sue and be sued, and maintain its own funds." [Opinion No. 2010-7]. Although it was conceivable that a county treasurer could sue to recover funds from the school district, this authority was nonexclusive. [Id.].

Applying these opinions to our issue, it seems reasonably clear that a MUD director and county election judge do not have conflicting loyalties. As noted above, the MUD is responsible for providing public water, sewage, drainage, and other basic services to suburban residents who are not served by a city. [Interview with Danielle Hastings]. By contrast, an election judge is responsible for setting up election materials, making sure that elections are conducted fairly, and making sure that any voting- related challenges are resolved. [Marin County Board of Elections position descriptions]. Based on these descriptions, it does not seem possible that a MUD member might have conflicting loyalties as an election judge. Unlike in Opinion No. 2008-12, where the MUD and PZC had some overlap of duties, there is no overlap of duties between a MUD and an election judge. Therefore, it seems likely that the common law doctrine of incompatibility does not bar simultaneously serving as a MUD board member and an election judge.

**3. A person is not barred from serving as a MUD director and an election judge based on Franklin Election Code Sec. 480, but is barred from serving in all three positions.**

Franklin Election Code Sec. 480 bars serving as an election judge if a person is also running in an election for a contested public or party office in an election to be held on the same day. This does not bar service as MUD director and an election judge. Election judges serve for the elections in November, while MUD elections are held in May. [Transcript of interview with Danielle Hastings] Furthermore, MUDs also appoint their own election judges. [Id.] Therefore, since MUD elections are not held on the same day as the November elections, a person is not barred from serving as a MUD director and an election judge based on Franklin Election Code Sec. 480.

Importantly, since precinct chairs are elected on the same day that election judges serve, and a precinct chair is a "contested party office," Danielle could not both serve as an election judge and run as a precinct chair.