# February 2021

# Remote
# New York State
# Bar Examination

# MEE & MPT Questions

**MEE QUESTION 1**

A woman owns and operates a food-truck business. Business has been good. The woman asked a man she knew to work with her. "It would be great if you'd help with my food-truck business. There is just not enough time in the day. I need someone to do the early morning produce shopping for me at the farmers' market. Are you interested?"

The man has a job as a night watchman and had been looking for a way to make extra money. He answered, "Sure, I'm interested. Text me at night what type of produce you want me to buy in the morning when I get off work. The market opens just as I get off my night shift. I could stop by the market with my car and then drop off the purchases at your truck." He then asked, "And how much would I be paid?"

The woman responded, "Texting works for me. I'll go to the market with you the first few times to give you a general idea of what I'm looking for. But then you'd be on your own, making the choices of which vendors to use and which produce to buy. Please use your own credit card to make the purchases, and I'll reimburse you."

Then the woman paused and continued, "As for pay, I can afford to pay you only $20 per daily delivery. I know that's a bit low, but the business doesn't have the cash flow yet. So, my offer to you is that, in addition to $20 per day, I will give you 10% of the food truck's profits."

The man thought for a bit and said, "Okay. It's a deal." They shook hands.

For the first few months, the arrangement worked well. The woman sent texts to the man each night indicating the type of produce to buy, and the man selected and purchased the requested produce in the morning from vendors he selected. He then dropped the produce off at the woman's food truck. The man paid the vendors with his own credit card and later was reimbursed by the woman. Except for the man's purchase and delivery of the produce, the woman did all the work related to the food-truck business.

One morning, while parking at the market, the man negligently ran his car into a farmer's stall, causing extensive damage. The man truthfully told the farmer that, although the accident was the man's fault, he had no money to pay for the farmer's damage and his automobile insurance had lapsed.

The farmer wrote the woman a letter demanding that she pay him for the losses caused by the man's negligence. The woman has asked her attorney what legal relationship she has with the man and what the liability implications would be in each case.

1. (a) Are the woman and the man partners in the food-truck business? Explain.

   (b) Assuming that the woman and the man are partners in the food-truck business, would the woman be liable to the farmer for the damage proximately caused by the man's negligence? Explain.

2. (a) Is the man an employee of the woman? Explain.

   (b) Assuming that the man is an employee of the woman, would the woman be vicariously liable to the farmer for the damage proximately caused by the man's negligence? Explain.

3. (a) Is the man an independent contractor for the woman? Explain.

   (b) Assuming that the man is an independent contractor for the woman, would the woman be vicariously liable to the farmer for the damage proximately caused by the man's negligence? Explain.

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**MEE QUESTION 2**

On July 1, 2015, Testator duly executed a typewritten will that had only the following three dispositive provisions:

1. I give the portrait of my grandparents to my brother, Adam.

2. I give my antique bookcase to my sister, Beth.

3. I give all of my tangible personal property not otherwise effectively disposed of to the person I have named in a letter I signed and dated June 15, 2015. I have

put that letter in the night table drawer in my bedroom in my home along with this will.

Testator died on February 10, 2019, a domiciliary of State A. Both the typewritten will and the letter of June 15 were found in the night table drawer. In clause 2 of the will, the phrase "antique bookcase" had been scratched out by Testator and immediately above it he had typed in the word "motorcycle." And, on the back of the will, the following language appeared wholly in Testator's handwriting: "I don't want Adam to have the portrait of my grandparents. I want it to go to my first cousin, Charles." No signatures appeared on the back of the will beneath this writing.

In the letter referred to in clause 3 of the will, Testator named his niece, Donna, who is Beth's daughter, as the beneficiary.

Testator's only surviving blood relatives are Adam, Beth, Charles, and Donna. In addition to the portrait of his grandparents, the antique bookcase, and the motorcycle, Testator's only other asset was a bank account with a balance of $10,000.

State A permits wills to be completely or partially revoked by the execution of a subsequent will or codicil, or by physical act or by cancellation when accompanied with an intent to revoke the will or codicil. State A law also provides that "unsigned holographic wills or codicils are valid." There are no other relevant statutes.

To whom should the property in Testator's estate be distributed? Explain.

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**MEE QUESTION 3**

A man was driving his truck on a divided highway in State B when the truck collided with a car driven by a woman. As a result of the collision, the man lost control of his truck, which skidded off the road into a deep ravine. The woman's car was knocked into the highway median and rolled over several times before coming to a stop. The truck and its cargo were damaged beyond repair, but the man was not injured. The woman, on the other hand, suffered serious injuries. A passenger in the woman's car was also seriously injured.

Two lawsuits resulted from the collision.

In the first lawsuit, the man, a citizen of State B, sued the woman, a citizen of State A, in the United States District Court for the District of State A. The man alleged that the woman had caused the accident by negligently changing lanes while he was attempting to pass her and that he, the truck driver, had exercised due care and caution at all times. The man's complaint sought damages of $98,000—the value of the truck, trailer, and cargo. The woman answered the complaint, denying that she had driven negligently and asserting that the man had caused the accident by driving well above the speed limit and failing to look out for other vehicles on the road. The woman raised no other claims or defenses in her answer.

Following a bench trial in which both sides offered evidence as to the cause of the accident and the actions of each party, the judge entered judgment for the woman. The judge issued a short opinion finding, as a matter of fact, that "both the woman and the man operated their vehicles negligently" and that "both were at fault in causing the accident." The judge further correctly concluded, as a matter of law, that the contributory negligence law of State B applied. In addition, the judge concluded that the man could not recover because his negligence had contributed to the accident. The judgment was promptly entered denying all relief to the man and awarding costs to the woman. The man did not appeal, and the judgment became final three months ago.

One month ago, the woman and the passenger joined together in a second lawsuit. In this lawsuit they sued the man to recover damages for the personal injuries they had suffered in the accident as a result of his negligence. Like the woman, the passenger is a citizen of State A. This lawsuit was filed in the United States District Court for the District of State B. The woman and the passenger are each seeking damages well in excess of the $75,000 diversity-jurisdiction threshold, and their claimed injuries warrant such damages. The man has filed an answer denying liability and raising several defenses including that the claims by the woman and the passenger are precluded by the earlier suit.

1. Do the Federal Rules of Civil Procedure permit the woman and the passenger to join their individual claims in a single lawsuit against the man? Explain.

2. Is the woman precluded from bringing her claim as a result of the judgment in her favor in the lawsuit brought by the man in federal court in State A? Explain.

3. Is the man precluded from denying that he was negligent with respect to the passenger as a result of the judgment against him in the lawsuit he brought against the woman in federal court in State A? Explain.

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**MEE QUESTION 4**

KeyCo, a company that manufactures keys, has had significant cash flow problems as a result of market trends away from keys and toward electronic locks. Accordingly, last year KeyCo borrowed money on three occasions.

On February 1, KeyCo borrowed $200,000 from Firstbank. Pursuant to an agreement signed by both parties, KeyCo promised to repay the loan within two years and granted Firstbank a security interest in "all of KeyCo's assets" to secure its repayment obligation. On the same day, Firstbank filed a properly completed financing statement in the appropriate filing office, listing KeyCo as the debtor and indicating the collateral as "all of KeyCo's assets."

On April 1, KeyCo borrowed $400,000 from Secondbank. Pursuant to an agreement signed by both parties, KeyCo promised to repay the loan within four years and granted Secondbank a security interest in "all of KeyCo's equipment" to secure its repayment obligation.

On June 1, KeyCo borrowed $600,000 from Thirdbank. Pursuant to an agreement signed by both parties, KeyCo promised to repay the loan within six years and granted Thirdbank a security interest in "all of KeyCo's equipment" to secure its repayment obligation. At the time of this transaction, Thirdbank knew about KeyCo's transactions with Firstbank and Secondbank as described above.

On August 1, Thirdbank filed a properly completed financing statement in the appropriate filing office, listing KeyCo as the debtor and indicating the collateral as "all of KeyCo's equipment."

On October 1, Supplier obtained a judgment against KeyCo for an unpaid debt and, in connection with that judgment, obtained a lien on KeyCo's key-manufacturing machine.

Except as described above, no financing statements have been filed that list KeyCo as the debtor.

KeyCo has defaulted on its obligations to Firstbank, Secondbank, and Thirdbank. Each of those banks, as well as Supplier, is asserting an interest in the key-manufacturing machine.

1. Which banks, if any, have enforceable security interests in the key-manufacturing machine? Explain.

2. Which banks, if any, have perfected security interests in the key-manufacturing machine? Explain.

3. What is the order of priority of the enforceable security interests and Supplier's lien on the key-manufacturing machine? Explain.

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**MEE QUESTION 5**

Thirty years ago, a man purchased a 170-acre tract of farmland. The farmland was bordered on the east by a county road that connected to the main street of a small town where the man worked in the local feed store. On the west, the farmland was bordered by a state highway.

Immediately after acquiring the farmland, the man built and moved into a house on its easterly portion. He constructed a vehicle shed on the westerly portion of the farmland in which he stored farm tractors and some of his cars. He then built a 10-foot-wide east-west gravel road that stretched across the entire farmland connecting the county road to the state highway. This gravel road allowed the man to travel between his house and the vehicle shed and also to drive tractors and cars out of the shed and onto the county road. It additionally gave him two routes from his house to the small town. It took the man 15 minutes to drive to town using the county road; using the state highway, which resulted in a more circuitous trip, took 45 minutes.

After building the gravel road across the farmland, the man usually used the county road to drive to work, although occasionally he used the state highway. On weekends, however,

when he wasn't working, he frequently used the state highway because it allowed him to easily reach other towns where he visited friends.

Two years ago, the man conveyed the westernmost 90 acres of the farmland, including the vehicle shed, to a woman who worked in the same feed store as the man. This 90-acre portion included the western portion of the gravel road that the man had constructed across the property. The deed conveying the westernmost 90 acres to the woman did not mention the gravel road, and the deed was not recorded. The woman built a house on the 90 acres and moved in. She used the gravel road across the man's land to access the county road when driving to work.

One year ago, the woman conveyed her 90 acres to a friend, who moved into the house the woman had built. The friend worked in the same small town as the man and the woman, and the friend also used the gravel road across the man's land to access the county road. The deed conveying the property to the friend stated that the woman was conveying to the friend the 90 acres, together with "the right to use the gravel road" crossing the adjacent 80 acres owned by the man to reach the county road. This woman-to-friend deed was promptly recorded.

Five months ago, the man conveyed his 80 acres to a builder by a deed that made no mention of the gravel road. The builder paid the man fair value for the land and promptly recorded this man- to-builder deed.

Four months ago, the builder erected a barrier across the gravel road. The barrier prevented the friend from using the gravel road across the builder's land to reach the county road.

Three months ago, the friend recorded the man-to-woman deed.

The land is in a state that has a notice-type recording act and uses a grantor-grantee index. In this jurisdiction, the time to acquire an easement by prescription is 20 years.

1. Before the man's conveyance to the builder, did the friend have an implied easement from prior use over the man's 80 acres? Explain.

2. Assuming that the friend had an implied prior use, did the builder take ownership of the 80 acres free and clear of that easement? Explain.

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**MEE QUESTION 6**

A grocer planned to open a supermarket and needed shopping carts for her store. On March 1, she went to the showroom of a shopping-cart supplier to look at a variety of samples of modern shopping carts. After looking around the showroom, the grocer pointed to a shopping cart that bore a price tag of $125 and said to the supplier, "These are the carts I want for my store. When can you get me 100 of them?" The supplier said that he could deliver 100 of those shopping carts to the grocer's supermarket within 30 days. The grocer responded, "That's great. Please ship me 100 of these shopping carts by March 31, and I will wire you payment of $12,500 as soon as they arrive." The supplier said, "You've got a deal!"

On March 2, the grocer sent the supplier an unsigned note, handwritten on plain paper, stating in its entirety: "It's a pleasure doing business with you. This will confirm the deal we made yesterday for 100 shopping carts at $125 each." The supplier received the note on March 4 and read it immediately but never responded to it in any way.

On March 31, the grocer received an envelope delivered by an express delivery service. Inside the envelope was a document printed on the supplier's letterhead. The document stated, in its entirety: "Thanks so much for your business. The 60 shopping carts you ordered from us are on the way. Be on the lookout for our delivery truck—it may even arrive today! Please send us payment of $7,500 (60 carts x $125/cart) as soon as you receive the carts."

Later that day, the supplier's truck arrived at the grocer's supermarket, and the truck driver said to the grocer, "I've got 60 shopping carts for you in the truck." The grocer replied, "I didn't order 60 shopping carts; I ordered 100. You go back to your boss and tell him to send me the right order." The grocer refused to allow the truck driver to unload the 60 shopping carts from the truck and did not pay for them.

The grocer would like to sue the supplier for breach of contract for failing to deliver 100 shopping carts.

Is there an enforceable contract requiring the supplier to sell 100 shopping carts to the grocer for $125 each? Explain.

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**MPT 1 – *In re Mills***

In this performance test, the client, Charlotte Mills, is considering whether to pursue legal action against Ramble Group (Ramble) for breach of contract. The dispute arises from an event planning engagement that Mills undertook for Ramble. After Mills had begun preparations for the event (a spring festival with a 5k run), Ramble decided to use another event coordinator. The task is to draft an objective memorandum analyzing whether there is an enforceable contract between Mills and Ramble and what damages Mills may be able to recover in an action for breach of contract. Examinees must consider the import of Mills's written proposal (which was not signed by either party) and review the email exchanges between Mills and Ramble's owner, Kathryn Burton, to determine whether the elements required for contract formation are present. The File contains the instructional memorandum from the supervising attorney, a summary of the client interview, the written event planning proposal, and email correspondence. The Library contains three Franklin appellate cases.

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**MPT 2 – *State v. Kilross***

This performance test requires the examinee to draft a persuasive argument in support of a motion to exclude the use of certain evidence at trial. The State of Franklin has charged the client, Bryan Kilross, with robbery of a liquor store. Because Kilross has no alibi witnesses, it is likely that he will have to testify in his defense, but defense counsel is concerned that Kilross's prior felony conviction for robbery will prejudice his case. The examinee is asked to draft the argument in support of a motion to preclude admission of the prior conviction as impeachment under Franklin Rule of Evidence 609. The File contains the task memorandum from the supervising attorney, the firm's guidelines for writing persuasive briefs, the transcript of the client interview, a file memorandum from an investigator, a copy of the indictment for the previous robbery charge, and a transcript of the plea hearing for that charge. The Library contains the Franklin statutes defining the crimes of theft and robbery, Franklin Rule of Evidence 609, and two appellate cases.

# February 2021

# Remote
# New York State
# Bar Examination

# Sample Essay Answers

**February 2021 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) Partnership

1. (a) The man and the woman are not partnership the food-truck business. The issue is whether the man and the woman formed a general partnership.

A general partnership is formed where two parties manifest an agreement to carry on as co-owners a business for profit. The principal inquiry is whether they share in the profits of the business. However, where profits are shared in payment of services, a presumption of a general partnership will not arise although there may be profit sharing. Exercise of control over the business is also an element of the test in determining whether a partnership exists.

Here, the woman offered the man $20 per day in exchange for his services. Acknowledging the low pay due to the business's low cash flow, she offered the man 10% of the food truck profits. Therefore, because profits were given in payment for services, no presumption of general partnership arises. Further, the woman maintained control of her food truck business and performed all work related to the business except the man's purchase and delivery of the produce. Therefore, lack of control by the man further supports the conclusion that no partnership was created here.

2. The woman would be liable to the farmer. The issue is whether general partners are vicariously liable for the torts of their copartners.

Partners are generally vicariously liable for the torts of their copartners as long as the partner was acting within the scope of the partnership. However, the claiming party must first exhaust the assets of the partnership. Here, the man was acting within the scope of the partnership as he was engaging in activity in furtherance of the partnership purpose. Therefore, the woman will be vicariously liable for the negligent conduct of the man. However, the farmer will first have to exhaust the assets of the partnership before going after the woman.

2. (a) The man is not an employee of the woman. The issue is whether the woman exhibited enough control over the means to be used by the man in carrying out his tasks.

The principal inquiry is whether the woman exhibited control over the means or only the results of the man's tasks. Also essential to the inquiry is whether a party is able to exercise their own discretion, uses their own tools, is paid per job or with a salary. Here, the woman exhibited some control over the man's actions. She showed him which produce she would like him to purchase on her behalf but

afterward the man was free to make his own choices of which vendors to use and which produce to buy. Further, although the man was paid a salary, he held another position as a watchman. Further, the man used his own credit card and was reimbursed for payments by the woman. Therefore, the man is likely not to be considered an employee of the woman.

(b) The woman would be vicariously liable. The issue is whether the man was acting within the scope of his employment when he committed the tort.

Under the doctrine of respondeat superior, an employer is liable for the torts of an employee if those torts occurred within the scope of employment. Here, the man was clearly working within the scope of employment. He was tasked with buying produce and was on his way to the market parking his car when he committed the tort. Therefore, the woman would be vicariously liable to the farmer.

3. (a) The man is likely an independent contractor of the woman. The issue is the same as in 2(a).

Based on the analysis above, the woman controlled only the results of the man's actions on her behalf. He was able to exercise discretion in choosing vendors and produce. The man paid with his own credit card and was reimbursed by the woman. Therefore, the man is likely an independent contractor of the woman.

(b) The woman would not be vicariously liable to the farmer. Employers are generally not liable for the torts of their independent contractors unless the act is inherently dangerous or a nondelegable duty. Here, the man's job did not involve any inherently dangerous activity or any nondelegable duties. Therefore, the woman would not be liable to the farmer.

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## ANSWER TO MEE 1

1) (a) Are the Woman and the Man Partners in the Food-Truck Business?

The issue with regard to the first question is whether the woman and the man became partners in the food-truck business when the man began delivering produce on a daily basis.

The general rule under partnership law is that no partnership agreement is required to form a general partnership at law. Instead, a partnership is formed when three elements are in place: (1) two parties, (2) carrying on a business together, and (3) with a view to making a profit. Where these three elements are satisfied, the law will find a partnership, despite the subjective intentions of the parties to form one or not.

On the facts of this case, the first element is clearly satisfied. The man and the woman are the two parties and they are linked by the fact that the man is running food deliveries for the truck.

The third element, an intention of running the business for profit is clearly established here as well. The woman is selling food for profit, and the woman expressly mentions the profitability of the business when she was referring to the lack of immediate cash flow in the business. Therefore, the was a view to making profit here.

The second element is the closer question. In assessing whether a partnership has been established, and when looking at this second element of carrying on a business together, the court will look to certain presumptive facts, which, if present, will raise a presumption of a partnership - rather than an employment or other relationship between the parties. These factors include: (1) whether the parties agreed to share profits and losses of the business, and (2) the level of involvement of the parties in the business. Where the parties agree to share only the profits in the business, this does not lead to a presumption of partnership. However, where the parties agree to share losses, this will strongly favor the finding that a partnership was intended.

Applying the law to the facts, here, the woman has the man picking up the ingredients for the food each day. Thus, the man is involved in the business. However, his involvement is quite limited, he does not appear to be involved the cooking of the food, the selection of what will be served, the business or strategic functions of the food-truck, or anything else.

As such, this factor suggests that there is in fact, no partnership here.

Looking to the factor of shared profits and losses. There is a profit-sharing arrangement in place here. The man is sharing in 10% of the food truck's profits in

exchange for his work. However, the two did not agree on loss sharing. As stated above, the stronger presumption of a partnership comes from loss sharing, not profit sharing. As such, this factor is relatively neutral on the finding of a partnership.

Finally, the man was paid $20 per day for his work. This fact is more consistent with employment or independent contractor status than a partnership. While partners can be paid by the partnership, they need not be. Additionally, a fixed claim like this one is more akin to employment due to the lack of risk the man assumes in being paid. In conclusion, the man is likely not a partner with the woman because the two will not be found to be carrying on a business together.

1) (b) <u>If they are partners, would the woman be liable to the farmer for the damage proximately caused by the man's negligence?</u>

The issue here is the liability of a partner for the torts of her co-partner committed during the ordinary course of the partnership's business.

Under partnership law, all partners of a general partnership are jointly and severally liable for the negligence of their fellow partners if the tort is committed in the ordinary course of the partnership business under the partner's actual or apparent authority. Actual authority arises where an agent reasonably believes he has the authority to act in a particular fashion.

Assuming there is a partnership, the first question is whether the actions taken by the man were in the ordinary course of the partnership business. The answer is that they certainly are. The man had actual authority from the partnership to pick up groceries from the market on a daily basis, his partner Woman, told him to do so. Additionally, the partnership is in the food business and the man was picking up ingredients. As such, picking up the food was clearly in the ordinary course of partnership business.

Therefore, the woman will be jointly and severally liable to the Farmer for his broken stall when the man negligently ran into it with his car while picking up groceries, an activity within the scope of the partnership business.

2) (a) <u>Is the man an employee of the woman?</u>

Control over work, hours, paid by hour or job, control of tools

The issue is whether the man is an employee of the woman.

The determination of whether an agent is an employee or independent contractor is determined through a multi-factor analysis used by the court to determine which relationship is more fitting on the facts. It is a highly fact specific inquiry. The court

will look to the following factors to determine whether the agent is a contractor or employee: (1) the control the principal has over the agent's work and how the agent does that work, (2) whether the agent has multiple jobs, or only the one job, (3) whether the agent is paid by the hour or by the job, and (4) whether the agent has control and ownership over the tools and instrumentality required to do the job.

*Control over the Man's work*

Here, the control exercised over the man's work by the woman is mixed. On the one hand, the woman attended the market with the man for the first few visits to tell him what type of produce she likes and a "general idea" of what she was looking for. This looks more like employment control. However, for the entire rest of the arrangement, the man went to the market on his own and purchased based on what the vendors had available and what looked best. This looks much more like a low level of control over the man and more like a contractor arrangement.

Additionally, the man used his own credit card and the woman repaid him for each purchase. This is in contrast to having control over the woman's credit card. This factor suggests less control by the woman, and pushes in favor of finding a contractor arrangement.

On balance, this factor looks more like a contractor arrangement.

*Multiple Jobs*

Here, the man has a night shift job as a watchman. Having this additional job suggests that he is a contractor.

*Paid by Job*

Here, the man was paid by the job, rather than by the hour on a per day basis. This suggests that he was a contractor, rather than an employee.

*Control over the Tools*

Here, the major factor is that the man had control over his own car. He drove the car to the market himself and delivered to the woman himself. This is more consistent with a contractor arrangement.

Therefore, the man is likely not an employee of the woman.

2) (b) Assuming the man is an employee of the woman, would the woman be vicariously liable to the farmer for the damage caused by the man's negligence?

The issue here is whether the woman is responsible through a respondeat superior theory of vicarious liability for the man's negligence.

Under the doctrine of respondeat superior, an employer is vicariously liable for the acts of their employee if the acts are within the scope of employment. A court will find that an employee was acting within the scope of employment when he is not on a "frolic" doing something completely unrelated to the job he is employed to do.

On the facts, the man was parking at the market to pick up the food and ran into a stall. He was found negligent. This was clearly within the scope of his employment because he was tasked to shop on a daily basis, the precise thing he was doing at the time of the negligent conduct.

In conclusion, the woman will be liable for the man's negligence at the market on a theory of respondeat superior.

3) (a) Is the man an independent contractor for the woman?

As discussed above, the man likely is an independent contractor.

Referencing the discussion above, the man drove his own car, exercised discretion in what to buy, used his own credit card and was reimbursed, and the woman exercised very little control over what he did.

Therefore, it is likely that the man was an independent contractor.

3) (b) If the man is an independent contractor for the woman. would the woman be vicariously liable to the farmer for the damage from the man's negligence?

If the man is in fact found to be an independent contractor, the issue is whether the woman can be vicariously liable for his torts.

The general rule is that a principal is not liable for the torts of their independent contractors. However, there are two exceptions to this rule. First, where the contractor is engaged in an inherently dangerous activity, or second, where the principal owes a non-delegable duty that cannot be delegated to the contractor.

Here, the contractor was not engaged in an inherently dangerous activity. An inherently dangerous activity is where the activity is dangerous even done with utmost care and

still remains dangerous. Driving a car to the market is far from this. Thus, this exception will not apply.

With regard to non-delegable duties. There is no duty present here. While retailers generally owe a duty to protect their customers from injuries occurring at their premises, there was no such injury. Here, the injury occurred at the market, via car accident. There was no non-delegable duty, and thus the woman will not be vicariously liable.

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**ANSWER TO MEE 2**

1 - Portrait

The issue is whether a handwritten note in the back of the will is enough to revoke an otherwise valid gift in the will in State A.

A will is valid if (i) the testator (T) is at least 18 years old (ii) T has testamentary capacity (iii) T signs the will in presence of two witnesses and (iv) the witnesses also sign the will. The effect of a valid will is that property duly included in the will will be distributed to the indicated beneficiaries as per T's instructions at T's death.

In State A, a will can be revoked by subsequent will *I* codicil or physical act. Physical acts require some crossing out, burning, destroying of the will with the intention that the will is destroyed. State A provides that unsigned holographic wills *I* codicils are valid.

The will was 'duly executed'. The will left 'the portrait of my grandparents to my brother Adam'. There is no sign crossing the words, nor any other physical act showing an intent to revoke the gift. On the back of the will, however, there is a writing by T saying that he wants the portrait to go to his cousin Charles rather than Adam. Given State A recognizes holographic wills or codicils, even when unsigned, and allows for wills to be partially revoked by codicil when accompanied with an intent to revoke, this is a valid modification of the gift by codicil, as it clearly shows an intent to revoke the gift to Adam.

Adam will not take the portrait. Charles will take the portrait.

2- Antique Bookcase

The issue is whether T's actions as to the antique bookcase amount to a valid modification in State A.

As mentioned above, State A allows for partial revocations of wills by physical act with an intent to revoke a will or codicil.

In light of the above, the scratching out of the gift is a proper revocation by physical act. T's typing of motorcycle above it is however not a valid codicil modifying the will as it does not follow the formalities required to modify *I* revoke a will by codicil. State A has no special rules regarding typed codicil, and only unsigned holographic codicils are valid.

The gift to Beth is a specific gift of T's antique bookcase. Any gift to Beth is deemed to fail unless the court applies the dependent relative revocation doctrine. The doctrine applies when T revokes an otherwise valid gift in the belief that a subsequent different gift is valid. T's intention is for the beneficiary to get a gift but this fails due to a mistake of law in T's mind (i.e. that the subsequent gift will be effective). In this case, the court consider the effect of the mistake of T (i.e. the gift will revert back to the intestate estate of T *I* residuary estate of T) and the effect ignoring the initial revocation (the initial gift will go to the specified beneficiary). The court will decide the fate of the gift based on what result is closer to the intent of T, and may therefore ignore the revocation.

In this case, the effect of the mistake is that the motorcycle will revert back to T's estate and pass under clause 3ofT's will so that Beth will get nothing. It is however clear that T intended for Beth to get something, so the court is likely to apply ORR and ignore the revocation of the bookcase.

Beth should get the antique bookcase.

3- Clause 3

The issue is whether the 15 June 2015 letter is a valid integration, so that Donna can take all T's other tangible personal property not otherwise disposed of by will.

A document referred to in the will will be integrated if (i) the document is in existence at the time the will is executed (ii) the document is clearly identified in the will and (iii) there is a clear intention by T to integrate the document.

The letter was clearly in existence before the will was executed, as the letter is dated 15

June 2015. The letter is clearly identified in the will as the will specify the date of the letter and where it can be found. The letter had actually been dated 15 June 2015 and was

found with the will, in the night table drawer of T as specified by his instructions in the will. The intent of T can be inferred by his clear writing and by the fact that the letter was found together with the will. The letter is therefore validly incorporated in the will.

The letter names Donna as the beneficiary of all T's tangible personal property not effectively disposed of by the will. Donna is entitled to the motorcycle.

4 - Bank Account

The issue is what happens to property not disposed of by will.

Any additional property not disposed of by will will pass in accordance with intestacy rules.

Where T dies with no living spouse or issue, the general rule is that the property will go to T's grandparents or the grandparent's descendants. States are divided as to the rules for the division of property. Some states follow division pro capita at each generational level, but the modern view is pro capita by representation.

No matter which approach is followed by State A, given Adam and Beth are the first ones at first generational level, the $10,000 will be divided equally between them.

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**ANSWER TO MEE 2**

For a will to be valid, it has to satisfy the testamentary formalities as set out in the wills act. Here we are told that Testator's will from 1 July 2015 was duly executed and therefore should give effect.

The portrait of the grandparents

At issue is whether the portrait of the grandparents should be distributed to Adam or Charles. Specifically, the issue is whether the gift of the portrait to Adam was modified by codicil when the Testator hand-wrote on the back of the will "I don't want Adam to have the portrait of my grandparents. I want it to go to my first cousin, Charles". As a general rule, a testator's will can be modified by a codicil which is validly executed. A codicil does not generally revoke a previous will but should be read together with the will and provisions should be interpreted as far possible with the later codicil being

determinative if there is a direct conflict. Therefore, here the testator wrote on the back of the will that he wanted the gift of the portrait to go to Charles, and not Adam. Under State A law, "unsigned holographic wills or codicils are valid". Therefore, the writing on the back of the will was in the Testator's handwriting but was unsigned. However, under State A law this would still make the codicil to be validly executed as a holographic will is a will in the testator's handwriting and therefore accordingly modified the will. Therefore, the gift of the portrait should go to Charles.

The antique bookcase

The antique bookcase should pass to B under the dependent relative revocation but not the motorcycle which will fall into residue. At issue is whether the modification of clause 1 of the will by crossing out the phrase "antique bookcase" and replacing by "motorcycle" validly modified the will and revoked the gift of the antique bookcase to Beth. For a provision in the will to be revoked, there must be a physical act or cancellation when accompanied with an intent to revoke the will or codicil as per state A law. Here, by crossing out the word "antique bookcase", the crossing out of the language of the will is a physical act by the testator and it can be inferred that the testator intended to modify that gift. Therefore, the gift of the bookcase has been revoked to Beth. However, the issue is whether by typing "motorcycle", T modified the will such that Beth should take the motorcycle. The general rule is that modifications to a will must re-executed either by codicil or by a new will with the relevant executory formalities (signature by the testator, in the presence of two witness who sign the will, testamentary intent, writing). Here, the typing of motorcycle is not in the testator's handwriting so it could not be considered to fall within the holographic modification rule of State A. Further, there is no evidence that when he typed in the word "motorcycle", that the T re-executed the will. Therefore, the gift of the motorcycle would fail as well as the bookcase as that gift was revoked.

However, the only way that Beth can argue that she should have the bookcase is based on the dependent relative revocation that some states apply. This would apply to allow the gift if it was based on a mistake of fact. The requirements are that there must be a mistake by the Testator and but for that mistake, the Testator would not have revoked the gift. Here, if it can be proven that the Testator had made a mistake of law (i.e. that he thought he could gift B the motorcycle by simply changing the words) and that but for that mistake he would have kept the gift of the bookcase, B may still be entitled to the bookcase. Here, from the way it was crossed out, it appears that B could rely on the ORR theory to receive the bookcase.

All tangible property not other disposed of

At issue is whether a will can incorporate an extrinsic document by making reference to the document in the will. Generally, a will cannot incorporate an extrinsic document at common law. However, under the UPC, this can be done if there is clear intent in the will to incorporate the document and the other document is sufficiently identified and the document is in existence at the time of execution of the will. Here, the letter was signed and dated 15 June 2015. The will was executed on 1 July 2015 so the letter was in existence when the will was executed. Therefore, the will can refer and incorporate the extrinsic document and all the tangible property not otherwise disposed of would go to the person as named in the letter so Donna. Therefore, Donna would receive the motorcycle.

The residuary estate

At issue is who will receive the balance of $10,000 not specifically devised under the will. When property is not specifically devised under a will, all other assets of the Testator will be the residue and pass under the residuary clause. If there is no such clause, then the rules of intestacy will be applied to determine who will receive. Normally, under the rules of intestacy, if the Tis married, the residuary estate will pass to the wife or if not to the issue. here, T does not have any issue and the only surviving people are his siblings, A and B and his cousin C and B's daughter D. Under the rules of intestacy, most states and the majority rule would be to apply by capita with representation which means that the residue (here $10,000) will be devised amongst the first generation with living takers. As he only has two siblings who are both alive, and no parents, issue or spouse, the residue will be split amongst his siblings A and B in equal proportion so they will each receive $5,000 each. If any other gift were to fail, then these gifts would also be split between A and B.

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**ANSWER TO MEE 3**

1. At issue is whether the woman and the passenger are eligible for permissive joinder of their claims against the man. Under the Federal Rules of Civil Procedure, a plaintiff is entitled to permissive joinder with another party, if the parties can demonstrate that their claims arose (1) out of the same transaction or occurrence and (2) share common questions of law and fact. A claim may be found to arise from the same transaction or occurrence if it arises from the same event or series of events, relies on the same set of evidence, or where the claims bear a logical relationship to one-another.

Here, the woman and the passenger's claims arose out of the same transaction and occurrence. First, the claims both arose from the same car accident, during which the woman and passenger were driving in the same car and injured in substantially similar ways. Both parties will likely rely on substantially similar evidence, since they were in the same car and were part of the same collision. Their claims also bear a logical relationship to one another, because the passenger's claims stem directly from the fact that she was riding in the woman's car at the time of the collision. Therefore, the claims indisputably arise from the same transaction or occurrence.

Additionally, the claims share common questions of law and fact. Both parties are bringing a tort law claim based on negligence, seeking damages for personal injury. Both are relying on the same essential facts, namely, the existence of the collision and the man's conduct during that collision. Therefore, this requirement is easily met. Since both requirements for permissive joinder are met, the woman and her passenger can join claims through permissive joinder.

2. At issue is whether the woman's claim against the man is barred by res judicata or due to her waiver of a compulsory counterclaim.

Res judicata, or claim preclusion, prevents a party from re-litigating a dispute where: 1. the claims in the proceeding are identical to claims previously litigated in prior litigation; 2. the parties to the new litigation are the same or in privity with the parties in the prior litigation; and 3. the original claim resulted in a final judgment on the merits.

Here, the man and the woman were both participants in the original litigation, such that the parties in both the original proceeding and the second proceeding are identical. Additionally, the man's original lawsuit resulted in a final judgment on the merits, because the federal court in State B issued a final judgment, as a matter of law, that the man was unable to recover due to contributory negligence. This judgment was not appealed and therefore is now final.

However, it is not clear that the claims in both proceedings were identical. The man's original claim was against the woman for negligence resulting in property damage to his

truck, trailer, and cargo. The woman's answer was based on the man's contributory negligence. By contrast, while the woman's new claim is also based on negligence, the woman is bringing an affirmative complaint based on personal injuries caused by the man's negligence. This was not part of the original proceeding, and therefore could be considered a separate and distinct claim such that the claim would not be barred by res judicata.

On the other hand, the woman's claim may be barred as a waived compulsory counterclaim. A compulsory counterclaim is any counterclaim which arises from the same transaction or occurrence as the subject of the initial litigation. Typically, if such claims are not raised in the initial litigation, they are deemed waived and cannot be relitigated. While the woman did raise the issue of the man's negligence in the original proceeding, she did not counterclaim for her personal injuries, and therefore a court may find that she waived her right to bring these claims against the man in a separate proceeding. The passenger may, however, continue to bring the proceeding because she is independently eligible to bring a case under diversity jurisdiction in the court in State A.

3. At issue is whether the man is precluded from denying that he was negligent with respect to the passenger under the doctrine of offensive collateral estoppel. Collateral estoppel, or issue preclusion, arises when two lawsuits involve identical issues, at least one party is the same, the court made a final judgment on the merits as to that issue, the issues were essential to the judgment, and the issue was actually, fully and fairly litigated by that party in the prior proceeding. Generally, collateral estoppel may be used defensively by a party attempting to preclude relitigation of an issue that is already determined in a prior proceeding. However, in limited instances, a party may use issue preclusion offensively to estopp a party from denying an issue that it had a full and fair opportunity to litigate in the prior proceeding. Nonmutual collateral estoppel applies to the use of offensive collateral estoppel by a party who was not part of the initial litigation. In determining whether nonmutual collateral estoppel is available, the federal court will look to the law of the court in which the original proceeding was litigated.

Here, if the State B court recognizes nonmutual and offensive collateral estoppel, the passenger could estopp the man from denying his negligence based on the prior proceeding. The issue of negligence in this proceeding is identical to that in the prior proceeding, since both were based on the man's conduct during the same collision. Additionally, the issue was fully and fairly litigated in the prior proceeding, as it was a central issue of the case. It was essential to the judgement because it was the actual basis on which the court denied recovery. Finally, the court reached a final judgment on the issue of the man's negligence on the legal merits of that issue. Therefore, if State B recognizes nonmutual collateral estoppel, the State A court should preclude the man from denying his negligence.

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## ANSWER TO MEE 3

### 1. Joining Claims

Unless the court exercises discretion to have the women bring separate claims, the rules allow the women to bring their claims in a single suit against the man. The issue is whether the woman and passenger are able to join their claims in a single lawsuit against the man. Joinder is permitted where two plaintiffs have claims against a defendant that arise from the same transaction or occurrence and assert common questions or law or fact. Additionally, the court needs to have subject matter jurisdiction, meaning that joining the claims cannot destroy diversity if the claim is in federal court under diversity jurisdiction.

Here, the woman and passenger's claims arise from the same transaction or occurrence: they were both in the same car accident that is giving rise to the claim. Additionally, while they will be asserting claims from personal injuries, which will inevitably vary between the two women, they will base their claims and damages on the common facts of the accident and the common claim that the man was negligent. Furthermore, both women are residents of state A and the man is a resident of state B, so there is a diversity of citizenship. And both women are asserting claims of over $75,000.

Therefore, the court will allow permissive joinder, unless the court decides that, in its discretion, the cases should be brought separately. However, the court will have to deny the woman to join due to the below answer.

### 2. The woman is precluded from bringing her claim in this second action because her claim should have been a compulsory counterclaim in the first action.

Here, the issue is whether the woman is able to bring a claim for damages due to the man's negligence after the man sued her for negligence. There is only one compulsory claim in civil procedure, and it is a counterclaim arising from the same transaction or occurrence. Here, when the man sued the woman in the first suit, she was required to bring any counterclaims she had against the man related to the transaction or occurrence or in defense of any of his claims. Here, because the woman filed to bring her claim for damages against the man in the first suit, and because it was a compulsory counterclaim, the woman is barred from now bringing the claim.

If the court were to find that the woman did not have to bring a compulsory counterclaim in the first suit, they can analyze under claim preclusion. For claim preclusion, or res judiciata, to apply and preclude the woman from bringing a claim against the defendant, these elements must be met: (1) the same plaintiff must be suing the same defendant, (2) there must have been a final judgment on the merits, and (3) the same claim was essential

to the prior judgment. Here, the same plaintiff isn't suing the same defendant- they are switched -while the other two elements of claim preclusion are met (the judgment was final and on the merits and the issue of negligence was essential to determining the previous case). Therefore, if the court were to somehow not find the woman had an obligation to bring her second claim as a compulsory counterclaim in the suit, then she is not barred by claim preclusion now and may join this suit.

**3. Issue preclusion**

Issue preclusion, or collateral estoppel, either prevents a party from having to litigate the same issue or allows a party to bring in prior court's judgment on the issue to not have to prove that issue in the second case. Issue preclusion requires: (1) one of the parties must have been represented in case 1 (either as the plaintiff or defendant), (2) the issue was essential to the judgment, (3) there was a final and valid judgment on the merits of the first case. Here, the issue of the man's negligence was essential to the first case because the judge found his negligence contributed to the accident. The judgment of the first case was final and, on the merits, because it is no longer capable of appeal. However, the passenger was not a party to case 1. She is looking to use non-mutual offensive issue preclusion to allow an issue to which she was not a party come into the case. A party can only use this if the court determines it is fair. Here, a court would likely find it was fair for the court to preclude his denial because the first case was litigated in a different state, the man did not originally sue the passenger in the first suit, so she was not able to raise her own defenses or claims against him. it is in the interests of justice for the passenger to be able to estopp the man from denying he was negligent and forcing the passenger to re-prove his negligence, which the other court had found.

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**ANSWER TO MEE 4**

1. Secondbank and Thirdbank have enforceable security interests in the key-manufacturing machine. Firstbank does not.

The issue is whether each description of the collateral is valid. Article 9 of the Uniform Commercial Code (UCC) governs any transaction which create a security interest in personal property.

Under Article 9, a security interest become valid against the debtor upon attachment. Attachment occurs when: (i) the creditor extends value; (ii) the debtor has interest in the

collateral; and (ii) there is a security agreement evidenced by (a) the debtor's authentication of the security agreement describing the collateral or (b) the creditor's possession or control of the collateral. The security agreement can describe the collateral by its classification (e.g., equipment), but cannot describe the collateral super general way (e.g., "debtor's all assets").

Here, all of the three banks extended value because they loaned money to KeyCo. KeyCo has interest in its assets including equipment. And all of the three banks made a security agreement with KeyCo by a writing signed by both parties. Furthermore, Secondbank and Thirdbank appropriately describe the collateral by the classification ("KeyCo's equipment"). However, Firstbank described the collateral in super general way ("all of KeyCo's assets"). Thus, Firstbank's security agreement is invalid.

The key-manufacturing machine is equipment because it is a good that is not a consumer good, farm product, or inventory.

Therefore, Secondbank and Thirdbank have enforceable security interests in the key-

manufacturing machine. Firstbank does not.

2. The issue is how to perfect a security interest.

A secured party may establish his security interest against other secured parties by perfection. A secured party may perfect his security interest by: filing a financing statement with the secretary of state; or obtaining possession or control of the collateral. A financing statement must describe the names and addresses of the secured party and the debtor; and the collateral.

Here, as stated above, Firstbank filed a financing statement, but its security interest is not enforceable. Thus, its security interest is not perfected.

On August 1, Thirdbank filed a properly completed financing statement in the appropriate filing office, listing KeyCo as the debtor and indicating the collateral as "all of KeyCo's equipment." Therefore, it perfected its security interest in the key-manufacturing machine.

SecondCo did not file a financing statement, nor obtained possession of the key-manufacturing machine. Therefore, it did not perfect its security interest in the machine.

3. Generally, a perfected security interest has priority over an unperfected security interest. Between two perfected security interests, the first to file or perfect prevails. A judgment lien has priority over a conflicting security interest only if the lien was obtained before the conflicting security interest is perfected.

Here, Thirdbank perfected its security interest on August 1. Supplier obtained a judgment lien on October 1. Secondbank did not perfect its security interest. Firstbank's security interest is unenforceable.

Therefore, they have priority in the following order: Thirdbank; Supplier; Secondbank; Firstbank.

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**ANSWER TO MEE 4**

1. The formation of a security interest

The issue is whether the security interests granted to the three banks have been validly created. Under Article 9 UCC, the creation of a security interest has three requirements: 1) there must be a security agreement, 2) there must be an exchange of value, and 3) the debtor must have an interest in the collateral. As to the first requirement, the security agreement needs to be in writing and needs to be authorized by the debtor (by signature or any other appropriate means). Furthermore, the security agreement needs to describe the collateral in reasonably identifiable terms. Article 9 UCC terminology is adequate to describe the collateral (thus, as "consumer goods", "equipment", "inventory", "farm products" or any of the subcategories of intangible property). However, a term such as "all assets" is super generic and not sufficiently identifiable in the security agreement. When there is a valid security agreement, there is an exchange of value and the debtor has an interest in the collateral, the security interest attaches. This means that the security interest on the collateral is valid vis-a-vis the debtor. In order for the security interest to be valid against third parties, it needs to be perfected as well (for an explanation of perfection, please see below).

Here, the debtor KeyCo created three possible security interests.

First, KeyCo entered into a written agreement with Firstbank providing that Firstbank would loan 200,000 USD in exchange for a security interest on "all of KeyCo's assets". There was an exchange of value, because Firstbank loaned KeyCo money and in return, KeyCo promised to pay the loan back and grant a security interest in their assets. Furthermore, KeyCo had an interest in the collateral, because it owned its assets. However, the security agreement is invalid. A description along the lines of "all debtor's assets", as was the case here, is super generic and not sufficiently identifiable. (Side-note: such a description would be sufficiently identifiable for the

financing statement; more on that below). In conclusion, Firstbank's does not have an enforceable security interest in the key-manufacturing machine of KeyCo.

Second and third, KeyCo entered into very similar agreements with Secondbank and Thirdbank. With both banks, KeyCo had a signed writing specifying that KeyCo would borrow a certain amount (400,000 USD and 600,000 USD, respectively) and the banks would get a security interest in "all of KeyCo's equipment" in return. "Equipment" is a collateral category of Article 9 UCC. Thus, this description is reasonably identifiable and valid. Moreover, there was an exchange of value with both banks: Secondbank and Thirdbank promised to loan 400,000 USD and 600,000 USD, respectively, and in return, KeyCo promised to repay the loans within 4 and 6 years, respectively, and grant a security interest on its equipment. KeyCo had an interest in the collateral, because it owned its equipment.

In conclusion, all three requirements have been met both for Secondbank and Thirdbank. Accordingly, a valid security interest was created for both banks.

Under Article 9 UCC, equipment is a catch-all category for any goods used in a business that does not fall within the categories of inventory or farm products (consumer goods are not used in a business setting and fall outside the scope of this essay). Goods are defined as tangible, personal property. Inventory are goods held for sale or goods used in a business with a high turn-over (such as printing paper). Farm products are goods used or produced by farmers in their farming business. A key-manufacturing machine is not inventory, nor a farm product. Thus, it falls under the category of equipment. Because Secondbank and Thirdbank both had valid security interests in KeyCo's equipment, they both have an enforceable security interest in the key-manufacturing machine.

2. Perfection of a security interest

The issue is which of the bank’s security interests have been properly perfected.

Under Article 9 UCC, a security interest that has attached to the collateral is valid against the debtor. A security interest that is perfected, is valid against third parties. There are five ways of perfection: 1) automatic upon attachment (most notably with a purchase-money security interest in consumer goods), 2) by possession, 3) by control, 4) by notation on the certificate of title (where appropriate, most notably with cars outside a dealer-setting), 5) by filing a financing statement.

Here, Firstbank filed a properly completed financing statement in the appropriate filing office, listing KeyCo as the debtor and indicating the collateral as “all of KeyCo’s assets”. While this description is adequate for the financing statement, it is insufficient for the security agreement (see above). This means that while Firstbank has properly

filed a financing statement, its security interest has not yet been attached, and likewise, it is not yet perfected. Once Firstbank amends its security agreement with an appropriate description of the collateral, the security interest attaches and can be perfected with the financing statement. For now, however, Firstbank does not have a perfected security interest in the key-manufacturing machine.

Secondbank did acquire a valid security interest in the key-manufacturing machine, but they undertook no action of possession. This security interest does not perfect automatically upon attachment, and Secondbank does not have possession or control over the key-manufacturing machine. Furthermore, Secondbank never filed a financing statement (notation on the certificate of title is inapplicable). Thus, Secondbank does not have a perfected security interest in the key-manufacturing machine.

Like Secondbank, Thirdbank properly acquired a security interest in the key-manufacturing machine, but unlike Secondbank, Thirdbank did file a financing statement. The financing statement was properly completed and filed in the appropriate filing office, listing KeyCo as the debtor and indicating the collateral as "all of KeyCo's equipment". This is an adequate description both for the security agreement and for the financing statement. Thus, Thirdbank is the only bank with a perfected security interest in the key-manufacturing machine. The security interest of Thirdbank was perfected on August 1, when the financing statement was filed.

3. Priority

The issue is which of KeyCo's creditors has priority on the key-manufacturing machine.

Under Article 9 UCC, if a security interest is perfected before a lien is levied, it has priority over the lien. If a security interest is not perfected, the lien has priority. If a security interest is perfected after the lien is levied, it can still have priority in special cases, e.g., with purchase- money security interests and when future advances are made without knowledge of the lien, or pursuant to an obligation that existed before the lien, or within 45 days after the lien was created.

Here, Secondbank and Thirdbank have enforceable security interests in the key-manufacturing machine. The security interest of Secondbank is unperfected. The security interest of Thirdbank was perfected on August 1. On October 1, Supplier obtained a judgment against KeyCo for an unpaid debt and, in connection with that judgment, obtained a lien on KeyCo's key-manufacturing machine. This means that Thirdbank has the first priority, because it has a perfected security interest, and the security interest was perfected on August 1, before the lien of October 1.

Supplier has the second priority, because he obtained a lien on October 1. Secondbank has the third priority, because they did not perfect its security interest. Firstbank has nothing, because no enforceable security interest was created.

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**ANSWER TO MEE 5**

1. Before the man's conveyance to the builder, did the friend have an implied easement from prior use over the man's 80-acres?

Implied Easement

An easement is a right to use another person's land for a limited benefit. Easements can be created in a number of ways, including express in writing, by adverse possession, by implication, or necessity. An implied easement, which does not require a signed writing, can be formed when a property is (a) previously undivided with a single owner, (b) the easement in use prior to property division, (c) upon division of the property, the parties intended for easement to continue, and (d) the use following division was continuous, apparent, reasonably necessary.

Here, the initial requirements for an implied easement formation are met. The man originally purchased the 170-acre tract of land thirty years ago. During his ownership of the land, and prior to the division of the property, the man built a 10-foot wide east-west gravel road that stretched across the entire farmland connecting the county road to the state highway. The man used the road for a variety of reasons, including as a way to traverse with vehicles from the west to exit out of the east onto the county road and to frequently access the state highway from his home to visit friends.

Upon division of the property and subsequent sale of 90 westernmost acres to the woman, it is clear that the parties intended for the easement to continue. Although it was not recorded by the woman-buyer, and the deed did not mention the easement, the woman used the gravel road across the man's land to access the county road when driving to work. The use was continuous (assuming driving to work is an almost daily activity), apparent (assuming the man would notice someone crossing his land to go to work), and reasonably necessary (it would have taken the woman 45 minutes to get to town/work without use of the easement, as opposed to 15 minutes).

When the woman's friend purchased the tract from the woman, the man was still on the eastern tract of land. The friend continued her predecessor's use of the gravel road in the same fashion, for the purpose of accessing the town for work. There are no facts suggesting her use was anything but continuous, apparent, and reasonably necessary.

Therefore, prior to the man's conveyance of his tract to the builder, the friend had an implied easement.

2. Assuming that the friend had an implied easement from prior use, did the builder take ownership of the 80 acres free and clear of that easement?

Recording Statutes/Easements

Recording statutes exist to protect good-faith purchases for value. These types of purchasers can be distinguished from those who obtain property by gift, who do not enjoy the protections of recording statutes. Depending on the type of recording statute in place in a jurisdiction (race, notice, race-notice) a good-faith purchaser will be afforded protections from others making claims to the land purchased. In a notice-type jurisdiction, a good-faith purchaser without notice of an encumbrance on the property will take free of that encumbrance. Easements generally are subject to recording statutes and must be recorded upon the transfer of property.

There are three types of notice – actual, inquiry, and constructive. Actual notice is represented by personal knowledge of the encumbrance, which is not at issue here. The deed conveyed to the builder made no mention of the easement. Here, if the builder had inquiry or constructive notice of the easement, he will not take free of the easement.

(a) Inquiry Notice

Inquiry notice is bestowed upon a good-faith purchaser when a reasonable inspection of the property would make the easement apparent.

Here, if the building performed an inspection of the property, he would notice the 10-foot-wide gravel road traversing both properties. Within a month of his purchase the builder had already erected a wall blocking the easement, which suggests that he discovered it quickly after his purchase. These actions will be controverted by the builder's likely argument that the road was merely 10 feet wide, which paled in comparison to the property's overall acreage.

If the court determines that the builder had inquiry notice, which it should give his quick discovery of the road and subsequent erection of a wall, the builder will not take free of the easement.

(b) Constructive/Record Notice – Wild Deed

A party is constructively aware of an encumbrance on a land when the encumbrance is duly recorded. Here, the friend will likely argue that the builder was on record notice because she recorded the easement when she purchased from woman.

A buyer in not sufficiently given record notice, however, when the deed recorded is a wild deed. A wild deed exists outside the chain of title, which means that the new interests recorded must follow previously recorded interests. If a prior encumbrance is not recorded upon its creation, and the property is later sold, upon which it is again not recorded, a future recording pursuant to another sale creates a wild deed.

Here we have a wild deed because the man-to-woman deed was not recorded. The presence of the wild deed did not give the builder constructive notice, forcing the friend to rely on the builder's inquiry notice to continue use of the easement. The friend's later recording of the man- to-woman deed three months ago did not cure the previously failed recording. Although she properly recorded, her efforts fell short.

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**ANSWER TO MEE 5**

1. The issue is whether the friend had an implied easement from prior use over the man's 80 acres.

An easement is a non-possessory right in the land for the use and enjoyment to that land. An easement can be created and destroyed in many ways. An easement implied by prior use arises when there is a continuous use on the servient estate and a use of continued enjoyment on the dominant estate. An easement by prior use will be in favor of the grantee when (1) the use was necessary and convenient, (2) there is apparent use, (3) there is a benefit of the land given to the grantee, (4) the grantor conveyed the land to the grantee, and (5) there was adjoining land owned by the grantor.

Here, the man and the woman used the gravel road for easier access to the county road. The friend also needs to use the gravel road across the man's land to access the county

road. There is apparent use to use the gravel because it is needed to get to town, it is necessary and convenient because it is quicker access to town and by the builder blocking the friend's path this has restricted her convivence. The land was conveyed to the woman and even though there was no mention of the easement the man knew of her use and the woman used it to her benefit also conveying the land to the friend.

Therefore, the friend has an implied easement from prior use.

2. The issue is whether the builder was put on notice of the friends use of the gravel road. Under common law, a landowner can only convey rights he has in the land at the time he owned the land. The conveyances will be given to the priority of the common law principle of first in time, first in right. Here if there is no recording statute and we are under common law the buyer will not have a case against the woman or the friend. However, in this jurisdiction, this is a notice-type jurisdiction with a grantor-grantee index. For the builder to take free of the easement he must be a bonafide purchaser who (1) pays value for the conveyance, (2) none of the prior conveyances were recorded, and (3) he does not have actual, inquiry, or constructive notice.

Here, the builder has paid fair value for the land. It can be argued that the builder does not have constructive notice because if he looked in grantor grantee index he will notice that the deed from the man to woman was unrecorded. Here there is a wild deed, a deed unconnected to the chain of title. While doing a search, the builder will be unable to find the correct chain of title of who owned the land.

However, the builder will probably not take free and clear of the easement because he will be under inquiry notice. Inquiry notice is found when the party does a survey of the land
and there is visible use. Here, the builder will be on inquiry notice because it is visible that the friend used the gravel road across the man's land to access the county road. He will also be put on inquiry notice that the friend is occupying that land and is using the gravel road for her necessity.

Therefore, the builder will not take ownership of the 80 acres free and clear of the easement.

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**ANSWER TO MEE 6**

The issue is whether there is an enforceable contract requiring the supplier to sell 100 shopping carts to the grocer for $125 each.

The first issue is whether UCC Art 2 applies to this transaction or the common law of contracts. UCC Art 2 applies to transactions involving the sale of goods. Goods are moveable objects that are identifiable at the time of contracting. The common law applies to land and service contracts. Here, the sale is for shopping carts and shopping carts are goods because they are moveable objects.

The next issue is whether there is a contract between the supplier and grocer.

Under the UCC, a contract can be formed in any reasonable manner to show manifestation to contract. Here, the grocer offered to purchase 100 shopping carts for $125 each and the supplier accepted because he said "you've got a deal." Therefore, a contract was formed between the supplier and grocer, however if statute of fraud applies the contract must be in writing to be enforceable.

The next issue is whether the Statute of Frauds applies.

The Statute of Frauds applies to contracts for the sale of goods $500 or more. A writing must contain the parties, essential terms, and signed. Under the UCC, the only essential term is quantity.

Here, because the contract is for 100 carts for $125 each for a total of $12,500, the sale of goods is for more than $500. Therefore, unless an exception applies, the contract is unenforceable as it is not in writing.

The next issue is whether the merchant confirmation memo exception to the statute of frauds applies.

The merchant confirmation memo requires both parties to be merchants; some writing; signed by the party that sent the memo; it must contain the quantity; and the other party did not object within 10 days of receiving the memo. A formal signature is not required, a letter sent on letterhead is sufficient. Additionally, quantity is an essential term, thus the contract is enforceable only for the written quantity.

A merchant is someone who deals in goods of the kind; because of their occupation hold themselves to have special knowledge; a business person acting in a commercial matter.

Here, the supplier is a merchant dealing in goods of the kind because the supplier sells shopping carts as a business. The grocer is a merchant because the grocer is a business

person acting in a commercial transaction purchasing goods for their business. Therefore, the supplier and grocer are merchants to satisfy the merchant confirmation memo. Grocer's memo Here, because the grocer sent an unsigned, handwritten on plain paper to the supplier, the grocer did not satisfy the exception. The grocer listed the quantity for 100 shopping carts, however, the quantity is not enforceable because the letter was not signed. Therefore, the grocer's letter does not satisfy the merchant confirmation memo.

Supplier's memo

Here, the supplier sent the grocer a signed letter because the supplier sent the letter on the supplier's letterhead. The supplier's letter contained the quantity as 60 shopping carts. However, the letter arrived on Mar 31 and the shopping carts also arrived on Mar 31, the grocer objected to the shipment and the truck driver, but the grocer did not object to supplier. However, the grocer may not enforce the contract for 100 shopping carts as the satisfying written memo states the quantity as 60 shopping carts.

Therefore, there is not an enforceable contract requiring the supplier to sell 100 shopping carts to the grocer for $125 each because the supplier's letter states the quantity is 60 and that is the enforceable quantity.

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**ANSWER TO MEE 6**

1. Applicable Law

Article II of the UCC applies to contracts for the sale of goods. Goods are moveable objects at the time that the contract is entered into.

Here, the alleged contract is for the sale of shopping carts which are moveable goods. Therefore, the UCC will apply to this transaction.

2. Was a contract formed?

In order for there to be a valid contract, there must an offer, acceptance of the offer, and consideration. An offer is the manifestation of intent that acceptance of the offer will form a binding contract between the parties. Consideration is a bargained for exchange, or a legal detriment. Under the UCC, contracts need to contain the quantity in order to be enforceable.

The statement by the grocer, "Please ship me 100 of these shopping carts by March 31, and I will wire you payment" as soon as they arrive serves as an offer. The grocer is manifesting intent that should the supplier send the 100 shopping carts by that date, the offer will be accepted and the grocer will pay for the goods. Consideration is present, as the grocer agrees to pay the supplier in exchange for the goods. The oral agreement specified price, delivery date, and quantity. The supplier orally accepted the offer. The supplier orally accepted the offer when she said "you've got a deal!" An oral agreement was formed, but the agreement must still
satisfy the statute of frauds to be enforceable.

3. Statute of Frauds

Under the Statute of Frauds, any enforceable contract for the sale of goods greater than $500 must be in writing and signed by the party to be charged. Without an enforceable written contract, the parties are not required to perform. However, if there has been a firm offer under the UCC, the other party cannot revoke their offer. A firm offer, is a memo sent by a merchant, confirming the details of the agreement, acceptance of the offer, and is signed by the merchant. A memo on the merchant's letterhead would be sufficient to serve as a signature, even if the memo is not actually signed by the party to be charged. A confirmatory memo can be sufficient to form a binding contract when the contract is between merchants.

This transaction is for the sale of 100 grocery carts, for the price of $125 per cart, for a total of $12,500. This is certainly more than $500, so the statute of frauds does apply to this agreement.

Here, the grocer sent the supplier a note on plain paper. He did not sign the note. However, it did contain the essential terms of the agreement. However, since the memo was not signed, it would not be enough to create a firm offer under the UCC. Therefore, an enforceable contract was not created.

4. Perfect Tender

Even if an enforceable contract had been formed, the UCC follows the perfect tender rule. This means that if the seller delivers goods that do not exactly meet the terms of the contract, the buyer can reject the goods. The buyer can reject the goods in whole or in part. However, if there is still time to perform under the contract, the buyer must give the seller a reasonable amount of time to cure the error.

Here, the seller delivered the non-conforming goods on March 31, the day by which performance was required to take place. Under the perfect tender rule, the buyer did not have to accept the goods, even if a valid contract had been formed since the goods did not

conform to the exact terms of the agreement. The grocer's offer was for 100 shopping carts, while the supplier only delivered 60. Since delivery occurred on the day that performance was due, there was no more time remaining on the contract, so the buyer did not have to give the seller reasonable time to cure the mistake.

5. Did the letter sent by the supplier on March 31 create an enforceable contract?

A firm offer under the UCC, is a memo sent by a merchant, confirming the details of the agreement, acceptance of the offer, and is signed by the merchant. A memo on the merchant's letterhead would be sufficient to serve as a signature, even if the memo is not actually signed by the party to be charged. A confirmatory memo can be sufficient to form a binding contract when the contract is between merchants.

Here, the memo sent by the supplier on March 31 includes the details of the transaction, including quantity, price, and delivery date and location. It is on the supplier's letterhead, which is sufficient to be authenticated (signed). However, this memo is only for 60 shopping carts not 100. Therefore, while the acceptance of the offer in the memo would create an enforceable contract, it would only be for the 60 carts mentioned by the memo. Therefore, an enforceable contract for the 100 shopping carts was not formed.

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**ANSWER TO MPT 1**

**MEMORANDUM**

To: Isabel Banks

From: Examinee

Date: February 23, 2021

Re: Charlotte Mills Matter

## I. Enforceable Contract

§ 20 of Franklin Code states that an agreement that by its terms is not to be performed within one year from the date of its making is invalid unless it is memorialized in writing and executed by the party to be charged. Here, Mills and Ramble created a potential agreement in June 2020, for an event called "Springfest" in 2021. Due to the name of the event, it can be inferred that the event was to take place in Spring of 2021, and thus performance was to occur within one year from the date of its making.

Further the final agreed upon date was in April. Thus, the contract between Mills and Ramble does not have to be memorialized in writing and executed by the party to be charged in order to be valid.

I. a. Issue is whether all of the essential Elements for Formation of a Contract are present

The essential elements for formation of a contract are (1) offer, (2) acceptance, (3) the intention to create a legal relationship, and (4) consideration. *(Daniels v. Smith).*

1. Offer

An offer was made when Mills sent a proposal to Ramble, after it was request in the initial email after the phone conversation. In *Daniels v. Smith*, the revised bid form was considered the offer. The proposal contained the language "pleased to offer' showing it might be an offer. The issue is whether there was a counteroffer by Ramble when she sent a clarification email about fees to Mills on June 7th. This is likely not a counteroffer as the question was simply an inquiry. In *Daniels* there was a counteroffer when the parties agreed to change the price. Further, Mills revisited the offer, letting Ramble know they must move quickly and hear back in order to get started in her June 8th email. Thus, the proposal sent by Mills was the offer.

2. Acceptance

In Daniels, an acceptance occurred when the party responded saying "I accept your offer and I thank you very much for the job." Here, Ramble proclaimed, after the reup of the offer by Mills, that "I agree that we really need to get going on this." Further in her email to Mills on June 9, in her response to Mills notification that she would begin the work "Fantastic!" and told her to get started on the work as prescribed in the proposal. Further, Ramble also said "I'm looking forward to working with you to make Springfest 2021 a huge success!" Thus, it is likely that this June 9 email was an acceptance.

3. Intention to create a legal relationship

The issue is whether there was sufficient intention by both parties to create a legal relationship. Per *Green v. Colimon,* if the parties intend to reduce their proposed agreement to writing before it can be considered complete, there is no contract until the formal agreement is signed. There must also must be meeting of the minds on all matters. Here, there was no indication that the parties intended to reduce their proposed agreement to writing. Further, there was a meeting of the minds on all matters, evidenced by the back n forth as to the fees between Mills and Ramble between June 7th and June 9th.

Per *Alexander v. Gilligan,* when parties agree, either orally or via email, upon all the terms and conditions of an agreement with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement has yet to be prepared or signed does not alter the binding validity of the agreement. The issue is whether parties intend that an oral or email-based agreement should be binding is to be determined by the trier of fact from the surrounding circumstances, giving effect to the mutual intention of the parties as it existed at the time of contracting. Here, there was an oral and email-based agreement with a formal written agreement that has not been signed. Although the written proposal sent from Mills to Burton was never signed by either party, mutual intention of the parties can be gleaned due to performance on the contract and promises to perform on the contract, specifically as they were designated in the proposal. For example, Ramble paid the initial $2,000 deposit outlined in the proposal and Mills began preparation. Both parties told the other they would perform in this way, in the June 9 email exchange, during the time of contracting. Further, Mills always gave regular updates and Burton did not express concerns about Mills' event preparations as she conducted per their proposal agreement. Thus, mutual intention of the parties as it existed at the time of contract showed that both parties intended to enter into a legal relationship.

The issue is whether this is the kind of contract that by its very nature indicates that the parties intended to be legally bound only if a formal written contract was executed. Per *Haviland v. Magnolia,* the greater the complexity and important of the transaction, the more likely it is that the informal communications are intended to be preliminary only. In that case, the fact that the contract was worth millions of dollars showed that it was one

that required formal written contract. Here, this contract is not that complex. It is *just* a *two-day event. Further it is shown that the contract is not that complex because Mills did it all on her own as this was* a *one-woman show. Thus, this is not* a *complex enough contract that requires formal written execution to be binding.*

Finally, in Daniels, the court showed that the breaching party, by saying "let's get this thing rolling" made it dear that both parties intended to be legally bound by their agreement. Here, Ramble said "I agree that we really need to get going on this and then asked Mills to do specific things in her June 9 email. Further she said that she would give deposit by end of the week and she was looking forward to making it a huge success. Thus, these comments can further show the mutual intention of both parties to enter into this contract.

4. Consideration

In *Daniels,* adequate consideration was found because there was a construction of a warehouse in exchange for payment of $220,000. Here, there is adequate consideration because there is event planning and pre-event logistics from researching and providing guidance to coordinating with city officials in exchange for payment of $15, 000 for up to the first 1, 000 registration as well as a nonrefundable deposit. Thus, there is adequate consideration for the contract.

I a. Issue is whether the contract is sufficiently specific

Per *Jasper Construction* Co. *v. Park-Central Inc.,* case law does not support the notion that specifications are an essential condition of an enforceable contract. Specificity required depends upon the circumstances. In *Stark v. Huntington,* a contract was enforced notwithstanding the defendant's assertion that "neither design specifications, nor price, nor time of performance have been agreed upon." Here, the date and venue were had yet to be determined, but price was determined (as to the proposal). Although true, date was decided in the June 8 email from Ramble, stating that the date was the first weekend in April. Further, the initial email from Ramble says they could decide event date and location later, showing Ramble did not intend that the lack of those specifications should bar their ability to contract. Thus, the contract was sufficiently specific.

Conclusion

The contract between Ramble and Mills is enforceable because there was offer, acceptance, intention by both parties to enter into a legal relationship, adequate consideration and the contract was sufficiently specific.

## II. Damages

Per Fr. Civil Code§ 100, statutory damages for breach of contract include damages for all detriment "proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." But this provision has be liberally construed to prevent defendant from avoiding consequences of their actions. Therefore, although unascertainable damages cannot be recovered for breach of contract, if damages can be calculated with reasonable certainty, they will be upheld. *(Daniels). In Daniels,* receipts for expenses and a cost breakdown showing lost profits were upheld. *In Alexander, although* parties had not identified a specific fee, no uncertainty existed on whether fees would be paid. Here, the contract provides that there must be a minimum payment of $2,5000 for cancellation and reimbursement of any event-related expenses. Mills has receipts for expenses of $3,000 so she is likely entitled to that amount. As the cancellation price is provided for in the contract, she is also likely entitled to the $2,500. Lastly, the issue is whether she will be able to recast profits. In the June 7 email from Mills to Ramble, she explained that in addition to the $15,000 that she would be entitled to 1,500 at $2 per ticket and 500 at $1 per ticket. Thus, she will be entitled to recover up to $15,000 (base fee) + $3,000 (expenses)+ $2,500 (cancellation fee) in addition to ($3,000 and $500) from the tickets over all.

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**ANSWER TO MPT 1**

To: Isabel Banks

From: Examinee

Date: February 23, 2021

Re: Charlotte Mills matter

This memorandum analyzes whether there is an enforceable contract between Charlotte Mills' event planning business Mills Event Management (MEM) and the Ramble Group (Ramble), and to what damages Ms. Mills is entitled.

## I. **Enforceability of** Ms. **Mills' Contract with Ramble**

A valid and enforceable contract was formed between MEM and Ramble.

### A. Formation of the Contract

According to the Franklin Court of Appeal, the formation of a contract requires the following elements: (1) offer, (2), acceptance, (3) the intention to create a legal relationship, and (4) consideration. Daniels v. Smith (Franklin App. 2011).

#### 1. Offer

The formation of a contract first requires an offer. In *Daniels,* the parties engaged in a discussion about the demolition of structures on the defendant's land where she wanted to build a warehouse. The defendant then sent the plaintiff an invitation to bid. The plaintiff delivered a bid and a revised bid, which constituted an offer. The court noted that the defendant's request that the cost be reduced constituted a counteroffer.

Kathryn Burton, the Ramble's owner, emailed Ms. Mills following their telephone conversations on June 4, 2020, requesting that Ms. Mills send her a proposal outlining event the planning, coordination, and oversight services she would provide. In response, Ms. Mills submitted a proposal offering her services for Springfest 2021, and outlining the responsibilities of MEM and the client. This proposal was an offer. On June 7, Ms. Burton responded with a question about fees, and Ms. Mills offered to lower the fee for fun-run registrations, which constituted a new offer.

2. Acceptance

The second requirement for contract formation is acceptance. In *Daniels,* following the defendant's counteroffer, the plaintiff's statement "I accept your offer" constituted acceptance.

After receiving the reduced offer, Ms. Burton responded "That sounds fair" and asked if Ms. Mills was available the first weekend in April. Following Ms. Mills' request to let her know if Ms. Burton wanted to move forward with MEM, Ms. Burton replied on June 9 "I agree that we really need to get going on this." She asked Ms. Mills to also help with website design and, after Ms. Burton agreed, she responded "Please get started on the website design," stating that she would send Ramble's initial deposit by the end of the week. She also said, "I'm looking forward to working with you to make Springfest 2021 a huge success!" Following negotiations by telephone, reception of the offer by email, and an additional discussion about the terms of the offer by email, Ms. Burton accepted Ms. Mills' offer.

3. Intention to create a legal relationship

The third requirement for contract formation is that the parties intended to create a legal relationship. "If the parties intend to reduce their proposed agreement to writing before it can be considered complete, there is no contract until the formal agreement is signed." Green v. Colimon (Fr. Ct. App. 2005). However, the court in *Daniels* concluded that in *Green,* another requirement for this rule to apply was that there was not a meeting of the minds on all material matters. *Daniels.* The court has also found that when parties agree on all terms and conditions of the contact with the intention that the agreement shall become binding, either orally or by email, the fact that a formal written agreement is not prepared and signed yet does not affect the enforceability of the contract. *Daniels* (citing Alexander v. Gilligan (Fr. Sup. Ct. 2008). The court must therefore determine whether the parties intended that the oral or email-based agreement would be binding, based on the surrounding circumstances. ld.

The contract between MEM and Ramble is similar to the contract that was held valid in *Daniels.* Ms. Mills and Ms. Ramble agreed on all the material terms, through the combination of Ms. Mills' proposal and their subsequent email exchange. In *Daniels,* negotiations regarding the contract price following Daniels' bid took place over the phone and were held to constitute a binding contract. In Ms. Mills' case, the court would likely also consider that the email exchange between Ms. Mills and Ms. Burton evidences an intent of both parties to form a legally binding agreement. After they had agreed on an appropriate price for the event, Ms. Mills expressed to Ms. Burton that she needed to know soon whether they were going forward with the agreement, and Ms. Burton agreed they should "get going on this." She also stated she would send a deposit by the end of the week, and Ramble paid the deposit, evidence Ramble's intent to form the contract.

Policy principles of justice and fair dealing are also considered by the court. *Daniels.* In *Daniels,* the defendant's oral statement "Let's get this thing rolling" was evidence that both parties intended to be legally bound. *Daniels.* Similarly, Ms. Burton stated by email "I agree that we really need to get going on this," evidencing that she intended to work with Ms. Mills and to be bound on the contract.

4. Consideration

Finally, contract formation requires consideration. Under their agreement, Ms. Mills agreed to perform the service of planning Springfest 2021, and Ramble agreed to pay Ms. Mills for her services. The consideration requirement is met.

All four requirement for contract formation were met, forming a contract between Ms. Mills and Ramble.

B. Enforceability of the Contract

1. Statute of Frauds

The Franklin Statute of Frauds requires that an agreement that by its terms cannot be performed within one year from the date of its making is invalid unless memorialized in writing and signed by the party against whom enforcement is sought. Daniels v. Smith (Fr. Ct. App. 2011), citing Franklin Civil Code Section 20). If the parties intend for the agreement to be completed within one year, or if it is reasonable that the contract will be completed within one year, a writing is not required. ld.

Ms. Mills' contract with Ramble was formed in June 2020 and was to be performed less than a year later, in April 2021. Therefore, the Statute of Frauds does not affect the validity of the contract, even though Ramble never returned a signed writing.

2. Specificity

There are no particular specifications necessary for a contract to be enforceable, and the specificity required depends on the circumstances. Jasper v. Park-Central (Fr. Ct. App. 2014). For example, a contract can still be enforceable even if the design specification, the price, and the time of performance have yet to be agreed upon, depending on the circumstances. ld. (citing Stark v. Huntington (Fr. Ct. App. 2003).

Ms. Burton might argue that the contract was not specific enough, because Ms. Mills' proposal did not include a date or venue. Further, while they later agreed by email on the date, they had not yet chosen a venue. However, a court would likely hold that the determination of the venue was not necessary for an enforceable contract, especially given the fact that part of the contract was for Ms. Mills to help find a venue. Further,

Ms. Mills did recommend several venues and one in particular. The proposal included the price and the details of which services were to be provided and the responsibilities of each party, and the subsequent emails determined the final price and the date, as well as the additional help with the website.

The contract was likely specific enough to be enforceable.

3. Parole Evidence Rule

Under Franklin case law, when the parties entered into a valid written agreement intending for it to be the final expression of their agreement by each signing it, "the written contract supersedes all negotiations concerning its matter that preceded or accompanied the execution of the contract." Thompson v. Alamo Paper Products (Fr. Ct. App. 2017). The parole evidence rule provides that a court cannot consider prior or contemporaneous agreements that are inconsistent with the terms of the written agreement. ld. (citing Bradley v. Ortiz (Fr. Sup. Ct. 1998). When parties intended to reduce the entire agreement to writing, extrinsic evidence is admissible only to interpret contract terms that are ambiguous or uncertain. ld. When parties did not intend to reduce the entire agreement to writing, written and oral communication may be used to prove the terms of the contract. ld. In *Thompson,* the court prevented the plaintiff from enforcing an oral agreement regarding a bonus that directly contradicted a specific provision in her employment contract about her salary, stating that the oral agreement would add a material term that was not reduced to writing and that the writing did not contain ambiguous or uncertain terms. ld.

Ramble might argue that it did not intend to be bound before signing a written agreement and that the email exchange should not be admitted as evidence of the terms of the contract. However, unlike in *Thompson,* there is no evidence that the parties intended not be bound until the signing of a final agreement reduced to writing. To the contrary, as discussed above, the email exchange evidences an intent to be bound without a signed writing.

Therefore, the parole evidence rule does not bar enforceability of the contract.

**II. Analysis of Damages**

Finally, Ms. Mills will have to show damages in order to recover.

Following a breach of contract, the plaintiff is entitled to "damages for all detriment 'proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom,' and unascertainable damages cannot be recovered. *Daniels* (citing Fr. Civil Code Section 100). This rule only requires certainty as to the fact of damage, not as to the amount. *Daniels.* Damages that can be calculated with reasonable certainty will

be estimated. ld. For example, in *Daniels,* the plaintiff, who had made a contract to construct a warehouse for the defendant but was then replaced by another builder, was able to recover the expenses incurred prior to the breach and the profit he would have made had the defendant not breached.

Ms. Mills has spent $3,000 in preparation for the event, before the breach. Therefore, like in *Daniels,* she will be able to recover this easily ascertainable amount that was expended before the breach.

Under *Daniel,* Ms. Mills can likely also recover the estimated amount of profit that she would have made but for the breach. Ms. Mills outlined her fees in the proposal to Ms. Burton. They then determined by email that she would receive $15,000 for the first 1,000 registrations, $2 for each additional ticket to Springfest, and $1 for each fun run ticket. Therefore, once Springfest is held, it will be possible to calculate how much profit Ms. Mills would have made based on the number of tickets that Ramble sells. If the court has to calculate damages before this time, it can make an estimate based on previous ticket sales (2,500 according to Ms. Burton), and it can consider the fact that they were preparing to sell more tickets than in previous years.

Finally, the court will consider the fact that Ms. Mills' only organizes 20 events per year, that her events are increasingly in demand, and that she was unable to find a replacement event planning engagement following Ramble's breach. Ms. Mills alerted Ms. Burton by email that she would be able to take on a different engagement if Ms. Burton did not agree to hire her. Because she was unable to get a new engagement after the breach, Ms. Mills can likely show that the breach proximately caused her loss of profits from the contract.

Because Ramble already paid a $2,000 deposit, the amount of damages will be reduced by that amount that is already in Ms. Mills' possession.

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## ANSWER TO MPT 2

### I. Captions

[omitted]

### II. Statement of Facts

[omitted]

### Ill. Legal Argument

Rule 609 of the Franklin Rules of Evidence ("FRE") only permits impeachment of a witness's character for truthfulness by evidence of a prior criminal conviction in two narrow circumstances. First, evidence of a prior conviction where the crime was punishable by death or imprisonment for more than one year (Rule 609(a)(1)) must be admitted against the defendant in a subsequent criminal cause only if the probative value of that evidence outweighs its prejudicial effect to the defendant (Rule 609(a)(1)(B)). Second, evidence of prior criminal convictions for any other crime, regardless of punishment, must be admitted only if the court can readily determine that establishing the elements of the crime required proving a dishonest act or false statement. In this case, neither requirement of Rule 609 can be established by the prosecution (Rule 609(a)(2)).

**A) The court should refuse to admit evidence of the defendant's past robbery conviction under Rule 609(a)(1) because the prejudicial effect of admission far outweighs the probative value**

Mr. Kilross acknowledges that the threshold element of Rule 609(a)(1) is met because a conviction for robbery is not punishable by less than one year (Franklin Criminal Code ("FCC"), s. 29). However, the prior conviction should nonetheless be excluded because the probative value of admitting such evidence against Mr. Kilross is far overshadowed by the enormous prejudicial effect that admission would have on him.

In *State v. Hartwell ("Hartwell"),* the Franklin Court of Appeal held that the trial court abused its discretion by permitting the State to use a six-year-old conviction for possession of a firearm to impeach the credibility of the defendant in his trial for the same offense. The Court of Appeal set out the test for evaluating whether the Prosecution has met its burden under Rule 609(a)(1)(B) in attempting to admit evidence of a prior conviction for impeachment purposes. The Court considers four factors when weighing the probative value of admission of a prior conviction against the prejudicial effect: (1) the nature of the prior crime involved; (2) when the conviction occurred; (3) the importance of the defendant's testimony to the case, and; (4) the importance of the credibility of the defendant. The Court of Appeal noted that this was a heightened

balancing test which creates a preference for exclusion. Here, the application of the heightened balancing test overwhelmingly weighs in favor of exclusion.

1. The nature of the prior crime weighs against admission because the two crimes are highly similar and robbery is a crime of low probative value for impeachment purposes

Under the first factor, courts consider the impeachment value of the prior conviction and its similarity to the charged crime. "Impeachment value" refers to the probative value of a prior conviction with respect to the witness's character for truthfulness. Crimes of violence have lower probative value for this purpose, whereas crimes involving some dishonesty have higher impeachment value. In *Hartwell,* a prior conviction for possession of a firearm was found not to imply dishonesty and to have low probative value *(Hartwell).* A conviction for robbery is more akin to a conviction for possession of a firearm, in that there is no inherent deception in the commission of the offense. The fact that the defendant's friend pretended to have a gun in his jacket does not change the inherent nature of the offence of robbery into one that necessarily involves an element of deception.

The more similar the prior conviction to the present crime charged, the stronger the preference for exclusion. Admission of evidence of a similar offense can lead to prohibited propensity reasoning by a jury and is therefore highly prejudicial *(Hartwell).* Like in *Hartwell,* the crime with which Mr. Kilross is charged is virtually identical to his prior conviction for robbery. The prosecution might argue there is a difference between robbery and armed robbery, but armed robbery requires proof of all of the elements of robbery and simply requires proof of an additional element with respect to a firearm. There is a high potential for prejudice in the form of propensity reasoning by the jury that Mr. Kilross is more likely to have committed this armed robbery because he committed another robbery in the past. Indeed, when he was arrested for the present robbery, the police continually raised the issues of Mr. Kilross's prior conviction for robbery in accusing him of committing this one. This factor weighs in favor of exclusion.

2. The age of the prior conviction weighs against admission because the crime is eight years old and Mr. Kilross has had a spotless record since that conviction

While the FRE expressly exclude convictions older than 10 years, the passage of time can reduce a conviction's probative value, even where the conviction is less than 10 years old. Mr. Kilross' prior conviction was eight years ago. He has served out his sentence, is gainfully employed, and has not been convicted of any further crimes since. While he has received two speeding tickets, he pled guilty to both and paid the fines. In *Hartwell,* the defendant's prior conviction was six years old and he had incurred no further convictions since that time. Regulatory offenses were not considered in determining he had a "spotless" record since the prior conviction, nor should they be here. The age and circumstances of Hartwell's prior conviction reduced its probative value and weighed

against admission. Similarly, the age and circumstances of Mr. Kilross's prior conviction reduce its probative value and weigh against admission for impeachment purposes.

3. The importance of the defendant's testimony weighs against admission because Mr. Kilross is likely to testify and admission of the prior conviction could thwart his ability to mount an effective defense

If the defendant's only rebuttal in his trial comes from his own testimony, the court should consider whether impeachment with a prior conviction would prevent the defendant from taking the stand in his own defense and undercutting his ability to mount an effective defense *(Hartwell).* In *Hartwell,* the defendant's co-party refused to testify and Hartwell only had his own testimony to support his theory that the co-party was the one who possessed the gun at trial. Similarly, here, Mr. Kilross only has his own statement to confirm his version of events for the crime with which he has been charged. Mr. Kilross admits that he was present at the liquor store that night, but merely denies taking part in the robbery. He allowed police in to his home to question him and admitted his presence at the liquor store to police when asked, only denying that he committed the crime that he was accused of. The prosecution's case also relies on the testimony of a single witness who identified Mr. Kilross. However, the clerk never saw the perpetrator's face, nor was it depicted on the security camera footage, and this identification was based on the clothes the perpetrator was wearing.

While the prosecution may argue that Ms. Malone is available to testify in Mr. Kilross's defense as well, her evidence is not exculpatory. She was supposed to meet Mr. Kilross that night but she cancelled the meeting before the robbery is alleged to have taken place and therefore cannot account for his whereabouts. It is very likely that Mr. Kilross will have to testify in his own defense to present his side of the story. Mr. Kilross will lose his job if he is convicted again, which was difficult to obtain in the first place as a result of his prior conviction. He is therefore motivated to testify. However, admission of the highly prejudicial evidence of his eight-year-old conviction for robbery would potentially cause him to choose not to testify and have a significant impact on his defense.

4. The importance of the defendant's credibility weighs in favor of admission but is overwhelmed by the weight of the prior three factors

If the defendant's credibility is the central focus of the trial (he does not testify to unimportant matters or uncontested facts), the significance (probative value) of admitting a prior conviction is heightened *(Hartwell).* Because Mr. Kilross will be testifying in his own defense and the prosecution's case is thin, his credibility will similarly be important to the outcome of the case. In addition, Mr. Kilross's testimony will be important because the identification made of him by the clerk relies on clothing only; the clerk never saw his face, nor is it depicted on the security camera footage.

However, where all other factors weigh against use of prior conviction, the conviction will still be excluded under Rule 609. In *Hartwell,* the defendant's credibility was central to the case; nonetheless, because all other factors weighed against use of his prior conviction, it was excluded. Here, all other three factors weigh heavily in favor of exclusion and the prior conviction should not be admitted.

B) The court should refuse to admit evidence of the defendant's past robbery conviction under Rule 609(a)(2) because a conviction for robbery does not require proof of a dishonest act or fraudulent statement

Nothing about the crime with which the defendant is charged requires proof of a dishonest act or fraudulent statement. According to s. 29 of the FCC, robbery is established where a person takes property from the person or in the immediate presence of another, with the intent to commit theft: (1) by use of force; (2) by intimidation, the use of threat or coercion, or by placing the person in fear of immediate serious bodily injury; and (3) the taking occurs by sudden snatching. Intent to commit theft requires an intent to unlawfully take or appropriate the property of another with the intent of depriving him of the property (FCC, s. 25). In *State v. Thorpe ("Thorpe"),* the Franklin Supreme Court held that neither the crime of robbery nor the crime of theft required proof of dishonesty or false statement. The Court interpreted the term "dishonesty or false statement" in the FRE narrowly, in line with federal legislative history, as only pertaining to crimes that require proof of an element of misrepresentation or deceit, such as perjury, false statement or criminal fraud. In other words, crimes that bear on a witness's ability to testify truthfully. Neither robbery nor theft bear on a witness's ability to testify truthfully.

Nor is there anything in the record of Mr. Kilross's prior conviction that suggests an act of dishonesty or false statement. In *Thorpe,* the Supreme Court also considered a 2007 amendment to Rule 609(a)(2) of the FRE, which permits a court to evaluate the factual record and determine whether it supports a finding of an act of dishonesty or false statement. If it does, use of the prior conviction for impeachment evidence would be permitted. Such information could be found by looking to a statement of admitted facts or jury instructions to show that the fact-finder had to find or the defendant had to admit an act of dishonesty or a false statement in order to have been convicted (Federal Advisory Committee Note, *Thorpe).* However, this is not a "mini-trial" in which the court plumbs the record of the previous proceeding.

In *Thorpe,* the Court held that the prosecution had pointed to nothing in either its indictment or in facts admitted by witnesses in the prior proceedings which established Thorpe engaged in any act of deception or false statement in committing the prior robberies. Accordingly, the evidence was not permitted to be used for impeachment purposes. By contrast in *State v. Frederick ("Frederic/<'),* the defendant had admitted in her plea hearing in an earlier shoplifting vase that she had placed unpurchased items in a

backpack and lied about its contents to a state officer. That was found to be sufficient to use her prior conviction to impeach her under Rule 609.

When Mr. Kilross was arrested for robbery eight years ago, he confessed as soon as he was caught. Nothing in the indictment from his prior charge suggests that he used deception or a false statement to commit the robbery. The prosecution might contend that the use of a "toy gun" in the course of the robbery, as admitted by Mr. Kilross in the hearing on his plea agreement, is a sufficient showing of deception or false statement. However, it was not the defendant who used a toy gun, but rather his accomplice. It was also his accomplice who represented to the clerk that he had a real gun. The defendant merely held the bag to collect the money.

Moreover, the record on the whole showcases the defendant's honesty above all. As mentioned, the defendant confessed to the crime as soon as he was arrested. He also returned the stolen money to the store. The defendant has been similarly forthcoming and open with police in the investigation of this crime, by allowing them into his home and admitting to being at the liquor store on the evening of the crime. Unlike in *Frederick,* Mr. Kilross has never lied to police and, like in *Thorpe,* this court should find the prosecution cannot point to anything in the record to show he engaged in deception in committing the prior offense.

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**ANSWER TO MPT 2**

To: Marie Smith

From: Examinee

Date: February 23, 2021

Re: State v. Kilross

I. Captions

[omitted]

II. Statement of Facts

[omitted]

Ill. The Prosecution Cannot Satisfy the Requirements of Franklin Rule of Evidence 609 Concerning the Use of Prior Convictions for Impeachment.

The prosecution seeks to admit evidence of the defendant's-Bryan Kilross'-prior conviction under Franklin Rule of Evidence 609. The defense seeks to exclude evidence of this prior conviction for impeachment purposes, as the prosecution cannot satisfy the requirements of Rule 609 governing its admissibility. First, Kilross' prior conviction for robbery is not a crime for which at least one element required proof of dishonesty or false statement. State v. Thorpe (Fr. Sup. Ct. 2012). Because robbery does not require such proof, the prosecution has no absolute right to use this prior conviction for impeachment purposes. Second, the admission of Kilross' prior conviction for robbery for impeachment purposes would be more prejudicial than probative, and the prior conviction should therefore be excluded from admission. These two reasons for exclusion will be treated in turn.

A. Kilross' prior conviction for robbery is not a crime for which at least one element required proof of dishonesty or false statement. and the prosecution therefore has no absolute right to use this prior conviction for impeachment purposes.

The prosecution will first likely argue that Kilross' prior conviction is admissible under Rule 609(a)(2). Rule 609(a)(2) states that "for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving- or the witness's admitting -a dishonest act or false statement." Fr. R. Ev. 609(a)(2). If, therefore, the prior conviction falls into this

category, the proponent of such impeachment evidence has the "absolute right" to use it for such purpose, regardless of the severity of the offense. State v. Thorpe.

1. On its face. a prior conviction for robbery, like Kilross'. is not a crime with an element requiring proof of dishonesty or false statement that could automatically be used to impeach a witness under Rule 609(a)(2).

The Franklin Supreme Court has ruled that "dishonesty" for purposes of Rule 609(a)(2) is defined as "deceitful behavior, or a disposition to lie, cheat, or defraud," a narrower definition also supported by the drafters of the Federal Rules of Evidence. Thorpe. The Franklin Rules of Evidence follow the Federal Rules of Evidence, in which Rule 609(a)(2) was intended "to apply only to crimes that require proof of an element or misrepresentation or deceit, such as perjury, false statement, or criminal fraud." Thorpe.

Furthermore, the Franklin Supreme Court has clearly stated that robbery does not fit into the definition of dishonesty for Rule 609(a)(2) purposes because "it is a crime of violent and not deceitful taking." Thorpe. Under Franklin Criminal Code §29, proof of robbery does not include an element or dishonestly, false statement, or deceit, and refers to theft, defined under §25, as its predicate offense. Thorpe, Fr. Crim. Code §29. While the Court notes that theft "may involve dishonesty or false statement ... deception is not an essential element of theft." Thorpe. Thus, "robbery is not a crime with an element requiring proof of dishonesty or false statement that could automatically be used to impeach a witness under Rule 609(a)(2)." Thorpe.

For this analysis, Thorpe is highly analogous to Kilross' case. In Thorpe, the court reviewed whether the admission of the defendant's two prior convictions for robbery for impeachment use was an abuse of discretion. Thorpe. Likewise, the prosecution in Kilross' case will seek admission of his prior conviction for robbery for impeachment purposes in the current trial for armed robbery. Notably, the robberies in Thorpe occurred on three consecutive days; the defendant sought to exclude evidence of the first two robberies during his trial for the third. Thorpe. The first two robberies, to which Thorpe plead guilty, were unarmed, while during the third his accomplice had a gun. Thorpe. Kilross's case is somewhat analogous, though distinguished: his prior conviction was from eight years rather than several days prior to his alleged second robbery, and in the first robbery, to which he pled guilty, his accomplice alleged, although did not have, a gun.

In Thorpe, the court decided that "robbery is not a crime ... that could automatically be used to impeach a witness under Rule 609(a)(2)."

2. Furthermore. facts in the record for Kilross' prior conviction do not establish an act of dishonesty or false statement that would sufficiently prove an act of deception by the defendant to allow the prior conviction to be admitted under Rule 609(a)(2). The

prosecution will likely argue that, although Kilross' prior conviction for robbery is not, on its face, the type of crime requiring an element of dishonestly that is automatically admissible for impeachment purposes under Rule 609(a)(2), the factual circumstances of the offense allow its use. In Thorpe, the Franklin Supreme Court did note that the court is permitted "to look beyond statutory definitions to the factual circumstances underlying the prior offens[e] ... but only up to a point." Thorpe. The court, therefore, will admit a prior conviction for impeachment "if facts in the record establish an act of dishonesty or false statement," even if that is not a requisite element of the underlying offense. Thorpe.

Even considering this extension of the Rule to reach facts in the record rather than elements of the underlying offense, Kilross' prior conviction for robbery is still not admissible for impeachment purposes under Rule 609(a)(2). The Thorpe court offers an example of when facts in the record suffice: in a case against the defendant for theft, the prosecution was allowed to use a prior shoplifting conviction for impeachment purposes, as the record in the prior case showed that the defendant "lied to a security officer" during the commission of her shoplifting offense. Thorpe, *citing* State v. Frederick (Fr. Ct. App. 2008). While this act of deception was sufficient to allow the prior conviction in under Rule 609(a)(2), the court still ruled that there was not similar act of deception or dishonesty by the defendant in Thorpe, and that his prior convictions were not admissible for impeachment under Rule 609(a)(2).

As in the previous analysis, Kilross' case is highly analogous to Thorpe's, such that his prior conviction for robbery should not be admitted for impeachment purposes. Kilross pled guilty to and was convicted of robbery, the underlying offense for which is theft. As noted above, neither offense requires a proof of dishonesty or deception. Thorpe, Fr. Crim. Code §25, §29. Furthermore, the record of Kilross' prior conviction does not establish that Kilross "engaged in any act of deception or false statement." Thorpe. The prosecution will likely argue that Kilross' partner, Dave, made a false statement when he claimed that he had a gun, given that he only had a toy gun. *Excerpt from Hearing on Plea Agreement of Bryan Kilross.* Kilross himself, however, made no such false statement, and therefore committed no act of deception or dishonesty.

Because Kilross' prior conviction neither required a proof of dishonesty or deception, nor does the record of that conviction show an act of dishonesty or deception, his prior conviction for robbery is not admissible under Rule 609(a)(2).

B. The admission of Kilross' prior conviction for robbery for impeachment purposes would be more prejudicial than probative, and the prior conviction should therefore be excluded from admission.

The prosecution may argue in the alternative that Kilross' prior conviction is admissible for impeachment purposes under Rule 609(a)(1)(B). Rule 609(a)(1)(B) states that "for a crime that was punishable by death or by imprisonment for more than one year, the

evidence ... must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant." Fr. R. Ev. 609(a)(1)(B).

In State v. Hartwell, the court noted that the test for admission under Rule 609(a)(1)(B) is a heightened balancing test that admits a prior conviction only "if the probative value of the evidence outweighs its prejudicial effect to that defendant." State v. Hartwell, (Fr. Ct. App. 2014), *citing* Fr. Rule of Evid. 609(a)(1)(B). The balancing test for probative value versus prejudicial effect has four factors: "(1) the nature of the prior crime involved, (2) when the conviction occurred, (3) the importance of the defendant's testimony to the case, and (4) the importance of the credibility of the defendant." Hartwell.

1. The nature of the crime. both in its similarity to the charged crime and in its lack of inclusion of deception. favors exclusion.

For the first factor, the court "should consider the impeachment value of the prior conviction and its similarity to the charged crime." Hartwell. Impeachment value here refers to how probative the prior conviction is in determining the witness's character for truthfulness, and the court notes that crimes of violence have lower probative value than crimes that, by their nature, include dishonesty or deception. Hartwell.

Like Hartwell's prior conviction for possession of a firearm, Kilross' prior conviction for robbery "does not imply dishonesty and thus has relatively low probative value as impeachment."

Furthermore, the Hartwell court found that "the more similar the prior crime is to the present charge, the stronger the grounds for exclusion," because the admission of such evidence may lead the jury to the impermissible inference that the past conviction makes the present charge more likely. Hartwell. Here, Kilross is charged with armed robbery, a charge that is almost identical to his prior conviction for robbery. Admission of the prior conviction for impeachment purposes would obviously be highly prejudicial. This factor favors exclusion of the prior conviction for impeachment purposes.
2. The fact that the prior conviction is eight years old favors exclusion.

The second factor is the age of the prior conviction. Under the Franklin Rules, convictions older than 10 years are presumptively excluded; for crimes less than 10 years old, "the passage of time can reduce the conviction's probative value." Hartwell. In Hartwell, the prior conviction was six years old, and the defendant had no convictions afterward. Similarly, Kilross' conviction is eight years old, and he has incurred no further criminal charges. This factor also favors exclusion of the prior conviction for impeachment purposes.

3. It is important that Kilross be able to testify in this case. which favors exclusion.

The third factor considers the importance of the defendant's own testimony to his defense. Admission of prior convictions for impeachment is particularly disfavored when "the defendant's only rebuttal comes from his own testimony," such that the presentation of impeachment evidence would "severely undercu[t] his ability to present a defense." Hartwell. In Kilross' case, the only other testimony comes from the store clerk who claims Kilross committed the robbery; thus, Kilross' ability to defend himself on the stand is highly necessary to his defense. Just as in Hartwell, in which "Hartwell had only his own testimony to support his theory at trial," Kilross must be able to testify in his own defense, and this factor favors exclusion of the prior conviction for impeachment purposes.

4. Although Hartwell's credibility is a central issue. all other factors weigh against the use of the prior conviction.

The fourth factor is the importance of the defendant's credibility to the trial. Where credibility is a heightened issue, the factor favors admission of the prior conviction. In this case, as Kilross' testimony will be the only in his own favor, his credibility is an important factor, just as the defendant's was in Hartwell. However, as the court in Hartwell noted, "all other factors weigh against use of the prior conviction," and the fact that the fourth factor weighs toward inclusion cannot overcome the potential prejudicial effect of the other three factors. Hartwell.

Just as in Hartwell, the Rule 609(a)(1)(B) balancing test weighs in favor of excluding Kilross' prior conviction for robbery for impeachment purposes, given that the prior and current charges are highly similar; the prior conviction is eight years old and Kilross has no other criminal charges since that time; and Kilross needs to be able to take the stand to testify without fear of being highly prejudiced by this impeachment evidence.

The prosecution should not be able to introduce Kilross' prior conviction for robbery for impeachment purposes under Rule 609(a)(1)(B) because its probative value would not outweigh its prejudicial effect. Hartwell, Fr. R. Ev. 609(a)(1)(B).