

Maryland State Board of Law Examiners  
**FEBRUARY 2020 UNIFORM BAR EXAMINATION (UBE) IN MARYLAND –**  
**REPRESENTATIVE GOOD ANSWERS**

*NOTICE: These Representative Good Answers are provided to illustrate how actual examinees responded to the Multistate Performance Tests (MPT 1 & 2) and the Multistate Essay Examination (MEE 1-6). The Representative Good Answers are not “average” passing answers nor are they necessarily “perfect” answers. Instead, they are responses which, in the Board’s view, illustrate successful answers written by applicants who passed the July 2019 UBE in Maryland. These answers are reproduced without any changes or corrections by the Board, other than to spelling and formatting for ease of reading.*

**MEE 1**

**Representative Good Answer No. 1**

1. The Homeowner is not required to pay the contractor anything under the kitchen contract based on the contractor’s material breach. To begin with, the kitchen contract is a common law contract. Under the common law of contracts, a material breach is an excuse for a party not to perform. [This is typically in the form of a promisee not having to pay the contract price.] However, when there is substantial performance of the contract, even with a few mistakes in performance, the promisee will have to pay the contract price minus any expectancy damages.

In this case, the homeowner will argue that the contractor materially breached the kitchen contract because an essential term and the main purpose of the kitchen contract was the installation of linoleum flooring. The Contractor will argue that the installation of vinyl floor was not a material breach because the market value of the home is the same and the other parts of the kitchen contract, painting of cabinets and installation of appliances, were fully performed. In other words, the contractor will argue that he substantially performed under the contract.

The Court will most likely find that there was a material breach because the bulk of the contract was the installation of the floor. Although the painting of cabinets and installation of appliances were also a part of the contract, those are smaller tasks than installing a floor and probably make up most of the contract price. As a result, given that the contractor did not install the right type of flooring, which although looks similar, the court will most likely find that the contractor engaged materially breached the contract.

It is important to note that the homeowner can strengthen his material breach argument by introducing parol evidence. Although the parol evidence rule bars the admission of evidence to explain additional terms, parol evidence can be introduced to explain existing terms. In this case, the homeowner can argue that parol evidence should be admitted to explain his personal and environmental reasons as to why he wanted linoleum flooring which would further demonstrate the contractor’s material breach.

In conclusion, the homeowner will not be required to pay the contractor anything under the kitchen contract based on the contractor’s material breach of the contract.

2. The homeowner will be required to pay the contractor \$9,500 on the bathroom contract. To begin with, the bathroom contract is a common law contract. Under the common law of contracts, a material breach is an excuse for a party not to perform, typically in the form of not having to pay the contract price. However, if there is substantial performance of the contract, even with a few mistakes, the other contracting party will have to pay the contract price minus any expectancy damages.

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It is difficult for the homeowner to argue that there was a material breach of the bathroom contract because the difference in what was contracted for and what was received is only one inch. It unrealistic for the court to find that one inch constitutes a material breach.

Thus, the contractor will most likely be successful in raising a substantial performance argument because the contractor did in fact execute the bathroom contract perfectly other than the discrepancy of spacing by one inch. As a result, the homeowner will be required to pay the remainder of the contract price minus expectancy damages. The remainder of the contract price is \$10,000 dollars. The reduction in market value of the house based on the one inch is \$500.

$\$10,000 - \$500 = \$9,500$ . Therefore, the homeowner will be required to pay the contractor \$9,500 due to the contractor's substantial performance of the bathroom contract.

**Representative Good Answer No. 2**

Because this is a services contract based on "labor costs" the Common Law of contracts will govern.

(1) Kitchen Contract

A contract requires at a minimum an offer, acceptance and legally bargained for consideration. Here, the parties entered into two services contracts for home repair.

An installment contract occurs when a party agrees to pay or provide their end of the bargain over multiple payment installments. Here, because Homeowner (H) agreed to pay the final installment of \$8000 10 days after the work was completed an installment contract was created.

An express contractual term is a specific term that arises and is required to be satisfied in order for a party to fulfill the obligations of a contract and to be entitled to payment. Here, H and Contractor (C) expressly agreed to the remodel of the kitchen which included replacing the existing kitchen floor with a linoleum floor. Contractor however installed a vinyl floor against the express terms of the contract.

A breach of contract arises when a party fails to fulfill their obligations of the contract agreed upon. Here, C was aware of the express term to include a linoleum floor but "made an executive decision" to install a vinyl floor against homeowners wishes.

A breach can be partial or material. A material breach arises when a party fails to fulfill the bargain and the failure is significant in its nature. Here, C was aware that H wanted a linoleum floor because H wanted to use a "green" material and furthermore H wanted "to be reminded of my youth when I walk in the kitchen." C decided to use a completely different material even though C was aware of these reasons that H wanted to use what C considered an outdated material. Because the reasons for the linoleum usage were made aware to C and C failed to use this material- this would be considered a material breach of k. Under a material breach H would not be required to pay the final installment of the contract price (\$8000) until the breach is cured.

Expectancy damages are the standard for damages for a breach of contract and seek to place the non-breaching party as if they received the benefit of their bargain. Here, C was aware of express requirements in contract and failed to fulfill obligations. For C to replace the vinyl floor with linoleum would be timely and expensive estimated a cost of \$10,000. Some jurisdictions may allow the C to receive some payment of the work as the remedial measures cost more than the final installment contract payment. Other jurisdictions however may find that the

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C had express/actual knowledge of the terms of contract and decided to ignore these obligations. Some jurisdictions may consider the fair market value of the property before and after the breach. Here, the market value of the home remains unchanged.

The non-breaching party can sue for damages to be placed as if they received the benefit of the bargain. Here, the H likely did not suffer damages aside from using a material which opposes her environmental values and her inability to be reminded of her childhood kitchen. The home itself did not lose value. It may be difficult to receive damages if a suit against C.

However, upon a material breach of express contract, the non-breaching party is relieved of its obligation for payment until the breach is corrected. Here, H will not be required to pay the C any additional payments until the breach is cured. (2) The Bathroom Contract

Breach. Discussed above can also be partial. Here, the bathroom contract stated that the space between vanity and bathtub be 30 inches so that a person could freely walk between. After measurements, H discovered that the space between vanity was only 29 inches which is in fact a breach of the contract.

Partial breach arises when the obligations are extremely close to being met. Here, the 1-inch differential is a partial breach of contract as the purpose of having a person freely fit between is likely not impacted.

Payments by party for partial breach of contract may be required by the non-breaching party even if obligations were not fully satisfied.

Material completion of contract arises at 95% of work contract being completed. Here, the contract was materially completed.

Unjust enrichment provides that a party may not benefit if the standards of fairness may be violated. Here, H owes K \$10k for final installment. The cost to repair the 1-inch discrepancy would be \$7500. Additionally, the market value of home is \$500 less with 29-inch gap as opposed to 30-inch gap.

Under unjust enrichment a party may be entitled to payment at the original cost minus any costs which their breach placed upon non-breaching party. Here, the \$500 value decrease would be considered and the fact the contract was very close to being completed would be considered.

Homeowner is likely required to pay C \$9500. The \$10k owed to contractor minus \$500 differential in home value.

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**MEE 2**

**Representative Good Answer No. 1**

Part 1 to MEE Question 2

The husband's execution of the mortgage does sever the joint tenancy as State A is a title theory state. The issue is whether a mortgage interest will sever a joint tenancy.

For a joint tenancy with a right of survivorship to exist, you must have the four unities. State A follows the common law so the four unities must be title, time, interest, and possession. For any tenancy to exist, those four must be met. Further, for a right of survivorship to exist, it must be clearly expressed as modern law favors tenancies in common as a right of survivorship restricts alienation otherwise.

Here, the woman and her husband bought a one-story commercial building. As stated in the facts, the husband and woman bought the commercial building together at the same time, placing title in their names as joint tenants, thus satisfying the first two unities. Further, interest in a joint tenancy, if not clearly expressed, will be assumed to be an equal, undivided interest. Lastly, the couple took possession as soon as they purchased the building, therefore satisfying the four unities. Lastly, they clearly expressed an interest in having rights of survivorship, therefore, a joint tenancy will be upheld.

Whenever one party to a joint tenancy sells their interest, the joint tenancy will be severed and will revert to a tenancy in common. However, if one simply leases, title has not passed and thus, the joint tenancy is maintained. The execution of a mortgage can mean different things depending on whether the state follows a lien theory or a title theory. Under a lien theory, a mortgage interest does not claim the title owned by the joint tenant and even in default, a joint tenancy is not necessarily severed. However, the facts tell us this is a title theory state so when a mortgage interest is executed, the title is held by the mortgagor until the mortgage is paid off. Considering the interest created, the friend has title along with the woman as tenants in common considering that the husband essentially did pass his interest on.

The state does not recognize a tenancy by the entirety. If the state did recognize the former, the joint tenancy would not be severed as the wife would be protected from the mortgage as it was taken out on the husband's name. Since this is not the type of tenancy involved, the friend has a one-half undivided interest with the woman in a tenancy in common. Part 2 to MEE Question 2

a) Under the assumption that the joint tenancy was not severed by the mortgage, the husband's execution of the lease did not sever the joint tenancy. As mentioned previously, a joint tenant is free to lease their interest in the property as they have not sold their interest. So long the joint tenants maintain their ownership and title, there is much they are allowed to do, including leasing their interests. Leasing does not sever title. So long as the tenancy interest is not conveyed or assigned to another party, a joint tenant maintains rights to do with the property as they wish without severing the joint tenancy.

b) the tenant does not have any rights in the building outside the lease interest he currently possesses. When a tenancy in common exists and one of the tenants dies, their interest is passed on through their will or intestacy. Generally, when a spouse survives the other and there are no other descendants, they inherit the estate and any interest that their spouse had. While the state does not recognize tenancies by the entirety thus removing the woman's right of survivorship, interestingly enough, the woman inherits her husband's interest in the tenancy in common shared with his wife but also any obligations placed on the husband's estate and interests. As a result, the tenant does not get a one-half undivided interest in the commercial building, he continues only being a tenant.

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Part 3 of MEE Question 2

a) The woman was entitled to half the rental income payable to the husband under the lease, regardless if they were joint tenants or tenants in common have a right to split certain things, particularly profits. The issue is whether a joint tenancy creates different rights for the joint tenants. Joint tenants and tenants in common generally enjoy the same benefits between their fellow tenants. The only difference between the interests of joint tenants and tenants in common is the right of survivorship. As joint tenants, the wife was entitled to half the rental income. Normally, improvements made to the land are not enjoyed by all parties, however, rent payments are one exception in which both parties are entitled to the amount. Unless the amount is clearly expressed in the joint tenancy, the common law will usually dictate that it be split evenly.

b) Assuming that the joint tenancy was not severed, the woman inherits everything under the husband's name through the right of survivorship, including the mortgage interest. The issue is whether the spouse is protected from the mortgage interest under the husband's name. The tenant, on the other hand, maintains the same position and is not subject to the mortgage although he may lose his interest if the mortgage is foreclosed and later sold for repayment.

A mortgage interest that does not sever a joint tenancy (normally under a lien theory state and since we are assuming that it will not sever the joint tenancy, we must be guided by lien theory rules), will attach the surviving tenant and although the surviving tenant does not assume the mortgage, the mortgagor, the friend, may foreclose in order to pay off the mortgage owed by the husband. As mentioned previously, the state does not recognize a tenancy by the entirety so even though the husband and woman are married and even though the husband took the mortgage in his name only, the woman will still be subject to the mortgage as she is not protected by the rights under a tenancy by the entirety.

**Representative Good Answer No. 2**

I. The issue is whether the husband's execution of the mortgage severed the joint tenancy.

RULE:

A joint tenancy is a form of tenancy where the co-owners have a right to survivorship. Such a right means that when one party dies, the other(s) take over that party's ownership rights. If two people are joint tenants with a right of survivorship and one dies, the other party will be the sole owner. In order to properly form a joint tenancy, there must be unities of time, possession, instrument and interest. The joint tenants must take possession at the same time through the same instrument, be able to possess the whole, and have the same interest in the property.

A joint tenant can make conveyances of their interest, but this will sever the joint tenancy into a tenancy in common. In a title theory jurisdiction, if a joint tenant obtains a mortgage, the mortgagee retains title of the property until the mortgage is paid off. This severs a joint tenancy to a tenancy in common, which does not carry a right of survivorship.

APPLICATION:

Here, as joint tenants, either the husband or wife can convey their interest in the commercial building, which would be one half. Since they purchased the building together, they have taken possession at the same time through the same instrument and were able to possess the whole. Thus, meeting the four unities test. As such,

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the husband was able to take out a mortgage on his portion of the property. However, in doing so, he severed the joint tenancy into a tenancy in common and the mortgagee, his friend, now has title to the husband's interest in the building.

**CONCLUSION:**

The husband's execution of the mortgage severed the joint tenancy

II. The issue is whether the husband's execution of the lease severed the joint tenancy and if it did, what rights, if any does the tenant have in the building upon the husband's death.

**RULE:**

Rules for joint tenancies are as stated above. Leasing property is an action that will not sever a joint tenancy because a tenant does not have interest in the property, there are merely renting it. When a joint tenancy however is severed, it will turn into a tenancy in common and there is no right to survivorship. If a tenant in common dies, then their interest will pass to their heirs.

**APPLICATION:**

Here, the husband did not convey his interest of the building, the leased the building to a commercial tenant for a 10-year period at an annual rent of \$9,000. Such rent was to be paid in equal monthly installments.

**CONCLUSION:**

Since this was a lease and not a conveyance of his interest, the husband's execution of the lease did not sever the joint tenancy. However, assuming that the joint tenancy was severed, then the tenant could continue in his lease after the husband died if the husband's heirs allow him to.

III. The issue is whether the woman was entitled to half of the rental income payable to her husband under the lease and what rights, if any, the woman and tenant have in the building.

**RULE:**

When a joint tenant leases property, then such rents accrued will be distributed evenly among all the joint tenants. When a joint tenant in a joint tenancy dies, then the remaining joint tenant will solely own the property.

**APPLICATION:**

Here, as a co-owner in joint tenancy of the building, the woman was entitled to the rent the husband was paid from leasing the building. At the husband's death, the woman became the sole owner of the building. As such, she has full rights to the building. As for the tenant, the tenant could finish out the remainder of the lease only if the woman allowed the tenant to do so and she would be entitled to the full rental amount.

**CONCLUSION:**

The woman was entitled to half of the rental income during the husband's life time and upon his death became the sole owner of the building. The tenant has no rights in the building unless the woman allows them to remain.

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**MEE 3**

**Representative Good Answer No. 1**

1. Under the Federal Rules of Civil Procedure, the woman did properly join the man, AmCo, and CarCo in a single action. Under the FRCP, a plaintiff can join all the defendants in a single action as long as they arose from the same transaction or occurrence that serves as the foundation of the claim and have at least one common question. If the addition of a party would destroy diversity, the parties cannot be properly added.

In this case, the circumstances of the suit satisfy the requirements for proper joinder. The entire basis of the suit is the single accident -- this being the singular transaction or occurrence -- and the common question is the extent of liability that each party has for her injuries. Although each party is responsible for specific different acts that may have resulted in different injuries, it is all considered one event for which the one question is liability. There is no indication that any addition would ruin diversity, so as the facts currently stand it appears that the joinder of all the defendants is proper.

2. Under the Federal Rules of Civil Procedure, CarCo did properly join LockCo. Under the FRCP, a defendant can implead another party when they believe that the party should be responsible for indemnification or contribution if that defendant is found liable to the plaintiff. Indemnification is an obligation to reimburse a party if they have to pay after a finding of liability. The party can only be impleaded if they should be liable specifically for the same transaction or occurrence that serves as the basis for the suit. Defendants have 14 days after service of their answer to implead a third party. As in the case of joinder of defendants, if the addition of the indemnifying party would destroy diversity, that parties cannot be properly added.

In this case, CarCo did properly join LockCo. They indemnified LockCo seven days after service of their answer, well within the statute of limitations for impleader joinder. CarCo believes that LockCo should indemnify them because LockCo supplied the belt locking mechanism that failed to protect the plaintiff and resulted in her being thrown from the car in the first place following the accident. Because CarCo is being joined for liability rooted in their manufacturing of the seat belt in the car, it is reasonable that CarCo would want to hold them liable for the defective lock. There is no indication joining Lock Co would ruin diversity, so as the facts currently stand it appears that the CarCo's joinder of LockCo is proper.

**Representative Good Answer No. 2**

1. Yes, the woman properly joined the man, AmCo, and CarCo as defendants in a single action. The question is when a plaintiff may bring a tort claim for damages against multiple defendants.

A plaintiff may bring claims against multiple defendants in a single case when: (1) they arise out of the same transaction or occurrence; and (2) they raise at least one same question of fact or law. In particular, a plaintiff may join several defendants in the same suit if they are all jointly and severally liable, wherein allegedly their actions all contributed to the damages.

Here, a woman was hit by a car that a man was driving in the opposite direction. At the moment of head-on collision, the woman's seat belt malfunctioned, and she was thrown from the car and seriously injured. The seat belt was manufactured by CarCo.

The private ambulance driver transporting her to the hospital then lost control of the ambulance. That ambulance company is called AmCo. The ambulance skidded off the highway, causing further injuries and exacerbating the injuries she suffered in the original accident.

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The ambulance company would be vicariously liable for its employee's driving within his scope of work.

She filed a single tort action against the man, AmCo, and CarCo. In this case, all three claims arise from the same occurrence: the car accident and the subsequent ambulance ride. The ambulance ride is an intervening cause that did not cut off liability for the questions arising from the crash and alleged seatbelt malfunction.

They all raise the same questions of causation--both actual and proximate (foreseeability) causation. For the man, there will be a tort question about his negligent driving. For CarCo, there is a question about this particular seatbelt in her car. For AmCo, there will be questions about the driver going too fast.

The jury will have to decide if each defendant was negligent. If this jurisdiction accepts comparative negligence, the jury will then decide the relative contribution of fault of each defendant to apportion damages.

Given that the case against the three defendants arise from the same transaction or occurrence and raise the same questions of fact or law, the woman properly joined the man, AmCo, and CarCo.

2. Yes, CarCo properly impleaded LockCo as a third-party defendant. The issue is when a defendant may implead another defendant for indemnification or contribution.

A defendant may implead another party when it seeks indemnification or contribution from the other defendant. Their cross claim must arise out of the same transaction or occurrence. The original defendant becomes a third-party plaintiff and the new defendant becomes the third-party defendant. Cross claims are not compulsory.

Here CarCo impleaded LockCo to indemnify CarCo if it is held liable in the case with the woman. LockCo manufactured and supplied the seat belt locking mechanism that CarCo then installed in the woman's car. If CarCo is found liable to pay damages to the woman, they can seek indemnification (full reimbursement) from LockCo if the court finds that LockCo was liable for the fault seatbelt.

CarCo impleaded LockCo within the required timeframe, 7 days after serving its answer. In the event that the timeframe was not met, the court will allow a defendant to be brought in if the interests of justice so require. It is at the court's discretion, but liberally granted.

To implead a party, the court must have both personal and subject matter jurisdiction. Supplemental jurisdiction may be available if the cross claim arises from the same nucleus of operative facts. There is nothing in the fact pattern to suggest that personal or subject matter jurisdiction is a problem impleading LockCo.



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**MEE 4**

**Representative Good Answer No. 1**

1. The Bank had a security interest in Construction Company's right to be paid 450k by the developer for the road-building project because of the effective after acquired contract clause.

The UCC governs security interests. Under the UCC a security interest attaches when 1) value is given; 2) the Debtor signs a security interest which reasonably identifies the collateral; and 3) the Debtor has right/interest in the collateral. Attachment has occurred under these facts. In exchange for 500k loan from the Bank, the president of Construction Company (CC) on behalf of the company signed a writing, which reasonably identified the interest in all rights to be paid with respect to any contract for the construction or repair of bridges or roads (accounts, and or proceeds). At the attachment, CC had rights to the accounts, and or proceeds. The security interest contains language "arises in the future." The UCC will uphold such after acquired property rights. Thus, even though the security interest attached in February, the contract that arose in March is still secured by the Bank's security interest.

2. The developer was not discharged from its payment obligation under the road building contract because it received proper notice of the Bank's security interest in the proceeds of the contract. Even though no perfected because no UCC Financing statement was filed, Bank still had a security interest in the proceeds of the road-building contracting. The Bank immediately sent a letter to the developer, which was signed on behalf of the bank by its president, informing the developer of the security interest granted to them by CC and that all payments were to be paid to the Bank. This letter was received by the Bank on September 3. If the developer had any questions regarding the arrangement, this was the time to ask. Developer should have contacted the Bank to question the veracity of the letter and to develop a path moving forward. Additionally, it should have contacted CC to verify the truthfulness. Rather, then any investigation, upon completion of the project and after a demand from CC, the develop blatantly ignored the bank's request and mailed the 450k payment to CC. Because payment was already made to CC, the Bank could do a variety of things to enforce its security agreement. It could make a demand from CC for the proceeds, file a complaint against CC or in the alternative, sue developer for payment who can later sue CC for indemnification.

**Representative Good Answer No. 2**

1. Yes, Bank did have a security interest in Construction Company's right to payment by the developer. The issue here is whether the Bank's security interest attach to the account collateral.

Under Article 9 for secured transactions, a creditor has a right in debtor's collateral if it properly attaches its interest in the collateral. For attachment the creditor must (i) give value to the debtor; (2) there must be an authorization of the security interest; and (3) the debtor must have an interest in the collateral.

Here, Construction company borrowed \$500,000 from Bank on February 1. This meets the value requirement, because Bank as creditor gave Construction money. The company's president signed and delivered a security agreement to Bank, this meets the authorization requirement. Final, Construction company used an account receivable as collateral (rights to be paid for construction contracts). Construction company has an interest in the accounts it makes in its business.

When an after-acquired clause is provided in the security agreement, that gives the creditor a security interest in future collateral (of the same type) of the debtors. Here, the security agreement provided for Bank to have

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rights in existing and future construction contracts (for bridges or roads) that Construction entered into. That would include the contract Construction entered into with developer on March 1, to build roads.

A security interest does not spring into life until the debtor defaults on security agreement. At that time, the creditor does have a right to collect on the collateral. Here, Construction Company defaulted on its loan obligation to Bank. Therefore, Bank's security interest in the account sprung to life. And at that time, Bank had a right to be paid the \$450,000 by the developer.

2. No, the developer was not discharged from its payment obligation under the road- building contract by paying Construction Company. The issue here is the obligation of the obligor in an assignment.

An assignment is when a party to a contract (assignor) transfers his rights in the contract to a third party (assignee). Under contract law, assignments are permissible, and rights under the contracts are alienable. When this is done, the assignee stands in the place of the assignor to accept performance of the contract by the other original contracting party (obligor).

This security agreement was a contract between Construction and Bank that also included an assignment. However, the assignment did not technically arise until Construction entered into the contract with developer. Construction as assignor, assigned its rights to the payment from developer (obligor) to Bank (assignee). Once Construction defaulted and the security interest took effect, the assignment was completed.

Once the obligor is aware of the assignment, he must perform his contractual obligation to the assignee. Obligor's obligation will not be discharged upon paying the assignor.

Here, Bank informed developer that the \$450,000 payment should be paid to it, via the assignment by Construction. Instead, developer paid Construction. This did not satisfy the obligation of payment to the construction contract. Because of the assignment, developer still owes Bank on that contract.

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**MEE 5**

**Representative Good Answer No. 1**

1. Linda is likely liable to the sign shop for the purchase price of the signs because the driver acted with apparent authority based on the representations made to the shop owner via Linda's handwritten note.

**Agency Relationship.** An agency relationship exists when a principle and an agent agree to work for benefit. The relationship is formed upon a manifestation of assent, an agreement to work for the principal's benefit, and the principal retains some control over the agent. The agreement need not be in writing. Here, Linda hired the driver and for her benefit. Whether or not she did so as an independent contractor or an employee (as set forth below) is immaterial to the question of whether an agency relationship existed for the purposes of the sign purchase, although such a relationship is probative of the (easily-satisfied) requirements to form an agency relationship between principal and agent. Then, Linda instructed the driver to purchase the signs, which was an act of control. Therefore, for purposes of the sign purchase, an agency relationship existed.

**Agent Authority.** An agent may be liable for contracts entered into when she acts without authority. Authority may be actual or apparent. Actual authority is express or implied. It is express when the principal affirmatively dictates the scope of the authority to the agent; and it is implied when the principal gives the agent reason to believe he has the authority to take certain acts, in light of facts such as prior dealings with the principal, trade usage, and general business custom. In contrast, apparent authority exists when a principal makes representations to a third party than an agent has authority to act on the principle's behalf.

Here, the driver does not have actual express or actual implied authority. There is no actual express authority because he has been charged explicitly with spending no more than \$300 for the van stickers. There is no implied authority because, in addition to the express instructions to the contrary, Linda has given the driver no reason to believe that he may exceed spending limitations she explicitly sets. Indeed, an agent has a limited duty to obey a principal, so a contravention of that duty - such as by spending 50% more than dictated by the principal - would be an example of conduct that by definition does not fall into trade usage or custom.

However, as defined above, there is apparent authority that gave rise to the driver's authority to act. Specifically, Linda's note to the owner was a principal-to-third-party communication that was sufficient to establish apparent authority. The note identified the driver as an agent and authorized the purchased of the signs. Silence as to price does not eliminate Linda's liability for actions taken in contract by an agent acting under apparent authority. Therefore, because the driver acted with apparent authority, Linda is liable for the purchase price of the signs.

A principal has an opportunity to ratify a contract entered by an agent acting under authority. To ratify a contract, the principal must (1) accept all terms of the contract, and (2) must be fully informed as to each material term. Under these facts, Linda has elected not to ratify the purchase of the signs. In any event, ratification would not materially change the scope of Linda's liability for the contract nor the agent's non-liability, as set forth below.

2. The driver is not liable to the shop owner for the purchase price of the signs because the driver acted with apparent authority (as set forth above), and Linda was a revealed principal known to the shop owner because she sent her business card and identified herself as the principal of the agent.

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The driver is not liable to the shop owner for the value of the signs. Linda sent her business card to the shop owner with a note authorizing the sign purchase. Identifying herself as the principal to the driver's agent means that she is not a hidden principal and can therefore be liable for the contracts entered by her agent. Generally, a hidden principal may elude contract liability for contracts entered by an agent without actual authority, but not so when a principal's identity is known to the third party promisee.

While she may seek damages from the driver for his breach of express authority, at her discretion (whether she will succeed is a different question entirely), that potential litigation between agent and principal has no bearing on Linda's liability to the shop owner as the driver's principal, or on the driver's liability directly to the shop owner.

3. Linda's liability for the driver's negligence will be determined by whether the court finds that the driver was actually an employee based on the amount of control Linda retained over his operations.

An employer has a vested interest in limiting liability by classifying employees as independent contractor ("IC"); it reduces their potential avenues of liability because an independent contractor generally cannot pass vicarious liability to a party it does business with, with some exceptions for non-delegable duties and abnormally dangerous activities. In short, whether an IC is merely a misclassified employee turns on the amount of control the principal retains. The more control retained, the more likely a finding of an employer-employee relationship giving rise to vicarious liability for the negligence (but not intentional torts) of the employee.

Here, the test presents a close question. Linda has purchased signs for the van, indicating control. However, Linda can argue that she only retains him as an at-will contractor and found him on a long list of contractors available to control by other business owners at any time. Thus, she can argue that she has no exclusive control. If the court finds more control than freedom, it will likely hold Linda vicariously liable for the driver's negligence that caused the customer's injury.

4. Linda is liable to the customer because she negligently hired a negligent driver to do a driving job.

Negligent hiring is a tort committed by an employer than does not require vicarious liability. When an employer hires an employee (putting aside the control test as set forth above) and does with negligence or recklessness towards that employee's qualifications, and harm results from that employee's known negligent conduct of which the employer had prior knowledge or reason to know of, then the employer may be liable in tort for negligent hiring. Here, Linda has ample knowledge of the driver's negligent driving to give rise to liability for the customer's injuries. The driver has had three prior lawsuits for negligent driving and was found liable in each case. Therefore, a court will likely find a basis for holding Linda liable for negligent hiring.

**Representative Good Answer No. 2**

1. Linda is liable to the sign shop. The issue is whether the driver had authority to make the purchase.

Under the agency theory, a principal is bound by a contract entered into by another whom the principal gives actual (express or implied) authority to act on its behalf, or whom the principal holds out to other that the person is her agent and has the authority to bind her (apparent authority).

Here, Linda hired an independent contractor. In general, a person is not liable for the acts of an independent contractor that acts on his/her behalf. However, here, Linda gave the driver one the store's cards as means of identifying the driver as acting for her store when she sent him to buy signs for her, so as to be stuck to his van while he is delivering her products to customers. Her words "this is my agent to purchase signs for my store" is

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an express authority, that informs that other party to the contract, the owner of the sign shop, that the driver is Linda's agent. because of the express authority, the driver bound Linda to the contract with the store, and she is liable for the entire price of the signs purchased by the driver.

2. The driver is not liable to the sign shop. The issue is whether an agent can be liable to a third party for acts the agent was expressly authorized to pursue.

An agent with actual authority to act cannot be held liable to a third person on a contract the agent entered into on behalf of the principal. Here, Linda authorized driver to purchase signs, and sign shop owner knew of agent's authority. The agent though exceeded his authority by spending more than Linda allowed him to on the signs (he paid 450 instead of 300). However, because the shop owner was not aware of the extent of driver's authority, the shop owner cannot hold driver liable for the 150 the driver exceeded in his purchase. As far as the shop owner, the driver had the apparent authority to make a purchase no matter how much the cost was.

3. Linda is liable to the customer under the theory of vicarious liability.

When a principal holds someone out to the public as his agent, the principal is vicariously liable for the agent's conduct under the apparent authority theory. The principal is liable when the liability arises while the agent was acting within the scope of employment.

When Linda called the customer to tell her that she sent "her driver" to deliver the products, she held him out to the customer as her agent. Also, the driver's van had Linda's store signs on it, and that's another indicia that Linda wanted to let the public know that the driver worked for her. Also, the driver's negligence was done while he was delivering for Linda, so it was during the scope of employment. Thus, Linda is liable under the theory of vicarious liability to the customer.

4. Linda is personally liable for the customer injuries. The issue is whether she negligently hired the driver.

Under the theory of negligent hiring and entrustment, a person is liable for its own negligence in hiring an employee or agent who later commits a tort. Here, Linda knew about the driver's instances of misbehavior, untrustworthiness and bad driving because she found him on a website that listed local delivery drivers, and that included with their names and hourly rates, customer reviews of their work, and driver had a rating of 1.5 out of 5. She was also aware that driver was sued three times for negligent driving and found liable. Thus, Linda can easily be found negligent of hiring the driver and can be personally held liable to customer for her injuries.

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**MEE 6**

**Representative Good Answer No. 1**

1. The Common law defense that would be usable by the woman would be self-defense. This affirmative defense states that the woman would be able to react with force in kind if she believed she was in imminent danger of physical harm. The Force that is used in response must be of the same kind and not excessive. In this case the man began shouting at the woman and started to poke her harder and harder. This man already had begun to escalate the physical altercation and was the primary aggressor. In this case, the woman's response of punching the man would be appropriate as she could have reasonably believed that it would escalate beyond this as it was already increasing. The woman did not react with force that exceeded the man, in that her force was non-deadly. However, it may be arguable that her response was more violent than the man's pokes. She punched him in the nose. She only punched him once though and did not continue. Additionally, the man was the one who started shouting and poking initially which would put the woman in imminent apprehension of harm and thus illicit the response that occurred. The Woman's affirmative defense of self-defense in this situation would be successfully established. A minority of states require a duty to retreat if able to. If this is applied in this jurisdiction, and established that the woman could have retreated safely, then this affirmative defense would fail.

2. I believe that it is unlikely for the admission of the friend's statement to the woman to occur. This would be hearsay, which is an out of court statement made by an out of court declarant that goes to the truth of the matter asserted. a statement can be verbal, written, or a gesture which is meant to convey a meaning. However, it is possible that this would convey the state of mind of the woman at that time because the woman nodded in agreement and gave a thumbs up. these gestures were meant to convey statements to the friend. The friend is unavailable to testify in court and thus, cannot be subject to cross examination. The statements that she made would then be inadmissible. The woman's nods and thumbs up would be admissible as non-hearsay as they are statements made by a party-opponent. The eyewitness's information regarding the woman would be character evidence which is generally inadmissible in civil cases. However, in this case, it could be evidence of habit as the eyewitness sees the woman twice a week, every week.

This would be an adequate sampling of these behaviors. IF it is not seen as habit evidence then it would be considered opinion and reputation character evidence and therefore not admissible.

3. The cross examination would not be able to ask about the woman's five-year-old shoplifting conviction as this is a crime that is not punishable by min. of 1 year. This would fall within the 10-year time frame of relevancy and shoplifting is a crime of dishonesty, however the duration of time to serve for conviction is only max. of 6 months which does not make it admissible. The letter to the man would only be able to be used for impeachment purposes as it is a MIMIC exception and goes to Motive. The MIMIC impeachments are motive, identity, absences of mistake, interest, common plan or scheme. The eyewitness's credibility is challenged because he has a motive to speak favorably for his great friend of 10 years.

**Representative Good Answer No. 2**

1. The woman (W) cannot establish a common law affirmative defense based on these facts.

W can't argue self-defense b/c that requires showing that one was in danger of bodily injury or death. Further, the force used in self-defense must be proportional to the threat of harm posed. Here, there was no serious threat of harm from the man (M) poking her shoulder harder and harder and shouting at W. The argument was

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about sports and nothing suggested that M was going to strike W, so W's punching of M was not proportional to the threat of harm or poking from M. Thus, self-defense doesn't apply.

Defense of others, necessity, consent are also inapplicable here. Thus, no affirmative defense by W possible.

## 2. Eyewitness testimony

Evidence is relevant if it makes a fact at issue more or less probable. Evidence's probative value must substantially outweigh its prejudicial effect. Hearsay is an out of court statement offered to prove the truth of the matter asserted. The hearsay exceptions available for an unavailable declarant are: dying declaration, former testimony, statement against interest, family history, and forfeiture by wrongdoing.

Here, the eyewitness testimony about the W talking to a Friend (F), who said to the W : "You and I have waited so long...they'll be going to the hospital" is inadmissible b/c the friend is unavailable to testify, and none of the hearsay exceptions apply. That statement is being offered to prove the truth of the matter asserted, so it's inadmissible.

However, the woman nodding her head and giving her friend a thumbs up signal is admissible b/c it's relevant and based on personal knowledge of the eyewitness (Observed through senses and observations).

Eyewitness (E)'s statement about "I recognized the woman. I live in her neighborhood and I probably see her at least twice a week" is admissible b/c it's relevant and based on personal knowledge. But the part about seeing her argue every time he sees her is inadmissible character evidence b/c it shows specific conduct and does not rise to the level of being habit evidence (can't use character evidence generally to show conduct in conformity w/ that trait)>

## 3. Cross examination

The 5 year old conviction is inadmissible b/c it is irrelevant to the crime of battery by W. The conviction is for a misdemeanor too, and only misdemeanor convictions of false statement/dishonesty are permitted. So, this is not allowed under Federal Rules.

The letter saying "thanks for 10 yrs. of friendship" is admissible for impeachment purposes b/c it suggests bias b/w Man and E based on this friendship. Thus, this statement can be used to

impeach E, and it's relevant (makes a fact at issue more or less probable--E's bias). So, it's admissible.

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**MPT 1**

**Representative Good Answer No. 1**

Memorandum

To: Hiram Betts

From: Examinee Date: 2/25/20

Re: Downey v. Achilles Medical Device Company

I.

The first issue pertaining to the interview of AMDC employees by the plaintiffs results in different outcomes for each employee based on their position in the company and state of employment.

The Franklin Rules of Professional conduct prohibit communication with employees under 3 prongs of rule 4.2 Comment 7.

Prong 1: Employees who supervise, direct, consult with counsel. Mainly “Control group” of BOD and high level mgmt but must have actual contact or control.

Prong 2. Employees who can enter into K for organization with actual or apparent authority.

Prong 3. Employees whose acts or omissions can be imputed to the organization in the matter and those who supervised these actions.

Even Employees who fail to fall under these three prongs can be protected by attorney- client privilege for communications they were in privy to.

However, former employees are not protected.

1. Ron Adams

Ron Adams is a former director of quality control. In this position he was responsible for supervising and inspecting. Normally, a person in this position can't be contacted by the plaintiff's unless consent is given by defendant's counsel. This is due to FRPC 4.2 Comment 7 that states communication is prohibited, without consent of counsel, with persons whose acts or omissions would be imputed to the corporation. This rule is clarified in FBPC's 2016 Ethic's opinion as the 3rd Prong of rule 7. This includes those who are in a supervising position. As a supervisor, the plaintiff would be prohibited from contacting Ron due to his position. However, Ron Adams is a former employee of AMDC. This status offers less protection from the plaintiffs questioning. FRPC 4.2 Comment 7 states that “consent of an organization's lawyer is not required for communication with a former constituent”.

2. Gus Bartholomew

Gus is a current employee, which generally allows for greater protections from plaintiff contact but these protections are not unlimited. Gus is the executive assistant to the president of AMDC, which entails listening and transcribing board meetings, proofreading letters sent to AMDC lawyers, and email access.

Gus does not fall into any of the 3 prongs under 4.2 comment 7. He does not supervise, direct, control, or consult with counsel. He also does not have the authority, apparent or actual, to contract for the company as required



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under prong 2. His acts or omissions would not be imputed to the corporation in relation to the current matter as clarified by FBPC's Ethics

Opinion.

However, 4.2 also governs the prohibition of speaking to employees who is privy to communications protected by attorney-client privilege. The plaintiffs is not prohibited from contacting Gus, but the plaintiff is prohibited from asking directly or indirectly about any of the communications protected by the attorney client privilege.

### 3. Agnes Corlew

Agnes is the head of the PR department. She responds to media and the public the official position of the company that is given to her. She plays no role in litigation or meeting with the company's attorneys. She also has no access to the communication the company has with its attorneys. As such the plaintiff is most likely free to interview her.

She is a current Employee, but she fails to fall under the three prongs of 4.2 and does not have access to information protected by attorney client-privilege.

### 4. Elise Dunham

Elise is the plant manager who oversees all the manufacturing at the plant, which includes implementing quality control standards. Due to the prohibition of contacting current employees under prong 3 Elise can't be contacted without authorization. Prong 3 of 4.2 is an employee whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. As a supervisor she can be imputed for those she supervised under 4.2 prong 3. Moreover, she maybe considered top level mgmt. that would activate prong 1. However, top level mgmt is not just title but actual contact with counsel which there are no facts indicating. The plaintiffs are prohibited to contact Elise under because of her presumed imputation to the organization from her acts or omissions.

### 5. Penny Ellis

Penny Elise is the current CFO. Previously, she was in charge of marketing. She can't be contacted by the plaintiffs because she falls under prong 1 of 4.2 FRPC which stats that contact is prohibited with "a constituent of the organization who supervises directs or regular consults the organizations lawyers. Penny is also on the Bod with a vote in matters pertaining the current litigation. It can be inferred from this power that Penny directs the organizations attorneys.

For this reason, she can't be contacted by the plaintiff without authorization.

II.

The second issue is whether AMDC can interview potential class action plaintiffs.

This issue is completely decided in Mahoney et al v. Tomco Manufacturing. F Ct. of App(2010). This case held that unauthorized communications are prohibited only in regards to named plaintiffs in the lawsuit.

The trial court in this case prohibited contact with potential plaintiffs as well as named plaintiffs due to FRPC 4.2 which prohibits a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by another layer in the matter unless the lawyer has the consent of the other lawyer or is authorized to do so. The appellate court held this to be overbroad because 4.2 requires knowledge and is

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a high standard. This means there must be actual knowledge of the representation. In the case of mere potential plaintiffs there doesn't appear to be any actual knowledge.

AMDC is free to interview and contact potential plaintiffs, but they are prohibited from contacting "named plaintiffs" as well as potential plaintiffs who are otherwise represented by a lawyer in the matter.

**Representative Good Answer No. 2**

To: Hiram Betts

From: Examinee

Re: FRCP and Achilles Medical Device Company Class Action

I. STATEMENT OF FACTS

[omitted]

II. DISCUSSION

The firm's client, Achilles Medical Device Company ("AMDC") is defending a class certification regarding the sale of allegedly defective walkers between 2010-2015. Currently the plaintiffs seek to speak with one former AMDC employee and four current AMDC employees. Those persons have been contacted by an investigator (Ashley Parks) working for plaintiffs' attorneys. They have presented two issues under the Franklin Rules of Professional Conduct ("FRCP"): (1) Whether the plaintiff's attorneys have acted properly in that contact, and (2) whether AMDC or its representatives may contract any named plaintiffs in the class action OR potential members, without consent of opposing counsel. This memorandum considers each issue in turn, first with a brief introduction of the relevant rules, and then a discussion of each client in turn, with respect to each issue.

As a threshold matter, a lawyer cannot communicate directly about the subject of representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer consents or is authorized by court order. FRCP Rule 4.2. This rule applies equally to "agents of the lawyer or persons acting at the lawyer's behest." Mahoney (emphasis added). Further, the rule governs communication with agents of an organization.

The 4.2 Knowledge Requirement. However, the knowledge requirement required under Rule

4.2 is a "high standard." Id. Simply stated, the opposing counsel must have actual knowledge of the party's representation; mere "reason to believe or assumption" is insufficient to constitute a violation of Rule 4.2 Id.

Types of Communication. Rule 4.2 provides several tiers of prohibited organizational communications, as follows. First, the rule forbids unauthorized communication with a person who supervises, directs, or consults with the organization's lawyer about a matter. This extends to individuals who give and receive information directly to the lawyer, and have the power to settle matters on behalf of the organization. In short, this covers an organization's control group. Whether an individual is a member of the control group turns on a functional analysis that contemplates whether the person is "actually" consulted with, or directs, the actions of the organization's counsel about the matter. Ethics Opinion 2016-12.

Second, the rule forbids unauthorized communication with a person in the organization with a person with authority to obligate the organization regarding a matter. This ONLY covers agents with authority to enter binding contractual settlements for the organization. Such authority may be actual or apparent. Id. Only

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employees with such authority are governed under this prong of the Rule. Thus, an employee with such authority may not be contacted by adverse counsel who has actual knowledge of this relationship.

Third, the rule bars unauthorized communication with an agent whose act or omission in the matter may result in organizational liability (civil or criminal). This is a factual inquiry. The test is whether a fair-minded person could foresee liability. *Id.* If the agent/employee's act or omission could reasonably be relevant to a finding of liability, then such communication is prohibited by opposing counsel without the consent of the organization's counsel.

**1. Contact by Plaintiffs' Investigator and Potential Contact by Client**

As a threshold matter, plaintiffs' counsel's use of an investigator does not insulate them from potential discipline under Rule 4.2. A supervising attorney with direct authority over a nonlawyer must make reasonable efforts to ensure compliance with the attorney's own professional obligations. If plaintiffs' counsel has improperly instructed or ratified the acts of the investigator, they may be subject to discipline under the Franklin Rule of Professional Conduct.

**A. Ron Adams (Former Employee, 2003-2017)**

Generally, under Rule 4.2, opposing counsel are free to communicate with former agents without the consent of the attorney's lawyer regardless of the role that employee may have played in giving rise to the matter. Ethics Opinion 2016-12.

Mr. Adams is a former ACMD employee. As such, he is outside of the ambit of Rule 4.2. Even though he directly oversaw quality control during that time, plaintiffs' counsel or agent are free to contact him directly.

**B. Gus Bartholomew (Current Employee, 2003-current)**

Mr. Bartholomew is a current employee. He is an executive assistant to the president and is responsible for administrative tasks. While he attends board meetings, he only takes notes on what the directors say. Accordingly, he may fall under the third prong of FRCP employees with whom adverse counsel cannot communicate.

The third prong prohibits unauthorized contact with an employee whose act or omission may have given rise to liability for the organization. As provided above, the test is whether a fair-minded person (in the position of the employee) could foresee liability from making disclosures to adverse counsel, or an agent of adverse counsel. In other words, when an employee would, but for the cover of the organization, be a central actor for purposes of determining liability, communication is inappropriate. *Mahoney*.

Here, Mr. Bartholomew is an executive assistant. While he may owe a duty of confidentiality pursuant to his work for the president, he is not an actor for purposes of the third prong. He is, rather, a "mere witness." Moreover, he has not retained counsel for himself and the investigator would have no actual knowledge of such. Therefore, there was likely no potential liability created by the unauthorized conduct by plaintiffs' investigator.

**C. Agnes Corlew (Current Employee, 2017-current)**

Ms. Corlew is the director of media relations. She responds to all media requests. She has no role in making company policy and no ability to settle a case. Further, Ms. Corlew responds to questions about ongoing litigation from the media. She has never met with AMCD's counsel regarding the pending class action.

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First, Ms. Corley does not qualify as an off-limits employee under the first prong, which governs communications with employees who supervise or direct the organization's attorney in the matter. Nor does she have the power to determine settlement. Indeed, she is held out to the public as a press agent. Therefore, plaintiffs' investigator was likely not prohibited from making contact with Ms. Corley on this basis.

Second, and similarly, Ms. Corley has no power to direct the organization to enter binding contracts on behalf of the organization. She has neither actual nor apparent authority. Therefore, she is not a covered employee under this prong.

Third, Ms. Corley cannot qualify as a covered employee under the "actor" prong because, in addition to having no control over the organizational activities giving rise to the class action, she was not even employed by defendant at that time. She began work in 2017; the allegedly defective products were manufactured and sold between 2010-2015.

In sum, the plaintiff' investigator (and counsel) likely did not err in contacting Ms. Corley.

**D. Elise Dunham (Current Employee, 2009-current)**

Ms. Dunham is likely an off-limits employee, and plaintiffs' investigator erred in contacting her. Ms. Dunham was the manager of the plant that made the defective products at issue, at the time that the products were allegedly produced by defendant. Therefore, under the third prong, she acted on behalf of the company and could be named as party to the lawsuit but for the company's legal existence. She cannot be contacted by opposing counsel, and defendant should report this to the state bar at the earliest opportunity.

As a further note, Ms. Dunham has retained private counsel. She informed the investigator of such. Should the investigator further attempt to contact Ms. Dunham directly, without permission of counsel, to discuss any substantive matter, plaintiffs' attorney is likely in violation of FRCP

4.2.

**E. Penny Ellis (Current Employee, 2008-current)**

Penny Ellis is also a covered employee who cannot be contacted by plaintiffs' investigator acting on behalf of plaintiffs' counsel. Under the second prong of employees covered by Rule 4.2, as set forth in Ethics Opinion 2016-12 (See Library), Ms. Ellis is covered because she has actual authority to enter binding contractual settlements on behalf of defendant. In addition, she is likely covered under the first prong because she is a voting member of the board of directors of AMDC. Plaintiffs' counsel may argue that Ms. Ellis has no ability to direct the course of the company's litigation and therefore fails to meet the conditions as a covered employee under the first prong. However, the fact that Ms. Ellis has a voting interest on the board is likely the prevailing argument. In sum, plaintiffs' counsel erred in directing (or allowing, or ratifying) her agent to contact Ms. Ellis.,

**2. Defendant's Contact with Class Members**

Where a named class member is known to opposing counsel to be represented by counsel, and each of those named class members has an attorney-client relationship with the lawyers representing the class, and the opposing counsel has actual knowledge of that relationship, then the opposing counsel's direct contact with the named class constitutes a violation of Rule 4.2

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Mahoney, on the other hand, contact initiated by that same opposing counsel is not a violation where the recipient of the contact is merely a potential member of a class and the class opt-out period has not expired. Id. In short, opposing counsel may contact potential (but not named) class members prior to the end of the opt-out period, unless the opposing counsel has some reason to know that that potential member is currently represented by counsel.

Here, defendant may properly contact UNNAMED members of the prospective class ONLY UNTIL such time as the "opt out" period for the class has closed, unless defendant's counsel has actual knowledge that a prospective class member has already retained counsel, in which case only counsel-to-counsel contract is appropriate under FRCP 4.2, absent permission from that prospective class member's attorney. The prohibition on direct contact with named members remains in effect regardless of whether the class period has closed or remains open. Defendant - our client - must take pains to abide by these rules or counsel may be subject to disciplinary rules.

### III. Conclusion

If plaintiffs' attorney has directed or ratified the investigator to contact Dunham and Ellis, then that attorney has likely done so in violation of Franklin Rules of Procedure 4.2 and 5.3(a)-(c). However, with regard to the former employee, Ron Adams, there was likely no violation. Likewise, as set forth above, there was likely no violation for the contact with Bartholomew and Corlew.

## MPT 2

### **Representative Good Answer No. 1**

I. Because Eli Doran Lacked Capacity to Consent to Marriage on January 15, 2019, His Marriage to Paula Daws Should Be Annulled.

#### Legal Standard

A marriage that complies with the licensing and officiating requirements of the Franklin Uniform Marriage and Dissolution Act (FUMDA) is presumptively valid. In re the Estate of Carla Mason Green. This presumption can only be overcome with clear and convincing evidence, which is a more demanding standard than preponderance of the evidence because the right to marry is constitutionally protected. Evidence is clear and convincing in a case such as this if it establishes that it is substantially more likely than not that a party lacked capacity to consent to marriage. The capacity to consent to marriage is defined as the ability to understand the nature, effect, and consequences of marriage and its duties and responsibilities. Each party to the marriage must freely intend to enter the marital relationship and understand what marriage is. This capacity to consent is measured at the time of marriage.

#### Argument

Although the marriage met some of the legal requirements of marriage, as far as being officiated by a minister with the marriage license and having two witnesses, the evidence is clear and convincing that it is substantially more likely than not that Eli Doran lacked capacity to consent to marriage at the time of marriage and the marriage should be annulled.

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Mr. Doran did not understand the nature, effect, and consequences of marriage and its duties and responsibilities. This is supported by the witnesses who have testified. Many testified that they thought the Mr. Doran was not oriented at the time of marriage. Ms. Richard credibly testified that Mr. Doran had a serious decline in his cognitive abilities and did not know what he was doing. Doctor Anita Bush who specializes in cognitive or mental disorders credibly testified that Mr. Doran was not oriented to time and that when Mr. Doran's physician of 15 years conducted a Mini-Mental State Exam, Mr. Doran's score was low showing cognitive deficiencies. Dr. Bush credibly testified that when she conducted this test on Mr. Doran later, he scored even lower, and that he lacked the ability of ordinary judgment or reasoning. Dr. Bush credibly testified that in January 2019, Mr. Doran did not have the mental capacity to consent to marriage. This is sufficient to show that it is substantially more likely than not that Mr. Doran lacked capacity, as this court has found the testimony of clinical professional to be credible. See *In re the Estate of Carla Mason Green*.

Ms. Daws may argue that Doctor Bush did not see Mr. Doran on the date that he married Ms. Daws, he could not have known of Mr. Doran's capacity to marry on that date. However, Dr. Bush testified that based on Mr. Doran's condition, is it doubtful that he could have a moment of lucidity, and if he did, it would not have the effect to increase his ability to exercise judgment.

Dr. Bush credibly testified that he saw Mr. Doran before the marriage and after the marriage, and his mental condition only declined, so it is substantially more likely that he did not have the capacity to consent on the day of marriage. Furthermore, the only witness that Ms. Daws had to speak on Mr. Doran's capacity on the date they married is the minister who married them, Reverend Joseph Simms, who is not a doctor or clinical professional of any sort. Mr. Simms had only met Mr. Doran twice, once in January of 2019 before the wedding and on the wedding. Although Rev. Simms stated that he would not have married Ms. Daws and Mr. Doran if he questioned Mr. Doran's mental capacity, he himself admitted that he did not conduct any assessments to determine Mr. Doran's cognitive abilities, nor did he have the training to do so. Accordingly, this witness is not credible.

Additionally, Mr. Doran also did not freely intend to enter the marital relationship. In determining this, courts have looked to whether the party's livelihood was in control by the party that they married. In the case of *In re Marriage of Simon*, the court annulled a marriage of two people who were married in a residential facility who had no prior romantic relationship before the party entered into the care of the other. That is just the case here. Ms. Daws and Mr. Doran did not know each other prior to Mr. Doran entering Ms. Daws care. Ms. Daws may argue that they knew each other for a since 2018 and got married in 2019 which is a long time; however,

the entire time they knew each other was when Ms. Daws cared for Mr. Doran and they had no prior romantic relationship. In the case *In re the Estate of Carla Mason Green*, the married couple had been engaged to be married for two years and planned for marriage and a life together, before the wife got sick. Here, Ms. Daws and Mr. Doran did not have a relationship prior to Mr. Doran entering Ms. Daws's home for her care and did not plan for a life together. Ms. Daws testified that Mr. Doran said to her one night that "You take good care of me. We should get married." and a few days later, they were married. This shows no period of time of an engagement, and the marriage was instead something that occurred on a whim. Furthermore, Dr. Bush credibly testified that he

Furthermore, it is clear and convincing from the provided testimony that Mr. Doran did not understand what marriage was and instead equated marriage with being cared for. As credibly testified to by Ms. Richards, Mr. Doran asked Vera Wilson, his cleaning lady and cook, to marry him. Doctor Anita Bush credibly testified that Ms.

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Doran told her that Ms. Wilson took care of him and that he was married to Ms. Wilson, even though he wasn't. Dr. Bush found that Vera equated marriage with being cared for instead of a romantic relationship. Ms. Daws even stated that Mr. Doran asked her to marry him while she was bringing in his laundry.

Thus, it is substantially more likely than not that Eli Doran lacked capacity to consent to marriage at the time of marriage and it is fair and just for the Court to annul the marriage.

#### Request for Relief

Petitioner respectfully requests that the Court annul the January 15, 2019 marriage of Paula Daws and Eli Doran.

II. Because Eli Doran Lacked Testamentary Capacity on October 7, 2019, His Will Should Be Deemed Void.

#### Legal Standard

Law requires that a testator have testamentary capacity, which means that the testator, at the time of executing the will, be capable of knowing the nature of the act he is about to perform, the nature and extent of his property, the natural objects of his bounty, and his relation to them.

In re the Estate of Dade. A will executed by a testator who lacks testamentary capacity is void. The time for measuring testamentary capacity is the time when the instrument, is executed. A party who seeks to prove the lack of testamentary capacity must do so by a preponderance of the evidence.

#### Argument

Mr. Doran did not know the nature of signing the will. This is evidenced by Ms. Daws's testimony when she stated that she asked him Mr. Doran did he want to make a will, it was not Mr. Doran who asked to make a will. He only stated that he wanted Ms. Daws to have what he had. Ms. Daws brought up the will. Although Ms. Daws may argue that she didn't force him, Mr. Doran never stated that he wanted to create a will. In fact, Ms. Daws drafted the will and did not take the will to Mr. Doran's lawyer to look over. Additionally, Dr. Bush testified that Mr. Doran could not make ordinary judgment and had cognitive deficiencies. Thus, Mr. Doran did not know the nature of signing a will.

Mr. Doran did not know the nature and the extent of his property. Dr. Bush testified that Mr. Doran did not know the nature and extent of his property or his estate. In re the Estate of Dade, the court found that the testator knew of the nature and extent of his property because he talked regularly about his finances, which is not the case here. Ms. Richards credibly testified that she handled Mr. Doran's finances, and that Mr. Doran's pension went directly to his checking account and monthly payments from his checking account automatically went to Ms. Daws so Mr. Doran would not have to deal with his finances. Per Ms. Daws's testimony, Mr. Doran only ever stated that he wanted Ms. Daws to have all of what he had, with no knowledge of what exactly he had. Thus, Mr. Doran did not know the nature and the extent of his property.

Mr. Doran did not know the natural objects of his bounty and his relation to them. In re the Estate of Dade, the court did not find that testator did not know the natural objects of his bounty because while he added to his bequests in codicil, he did not disturb the existing provisions. Also in that case, he was informed about his family who may have a claim in his estate and aware of the value of his estate. In this case, Ms. Richards credibly testified that Mr. Doran intended to leave his entire estate to his church before he became incompetent. In the new will, all of his estate goes to Ms. Daws. Dr. Bush credibly testified that Mr. Doran did not know who his niece, Ms. Richards, was and thought that he still lived with Janet, his deceased wife.

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Ms. Daws may argue that because Doctor Bush did not see Mr. Doran on the date that he signed the will, he could not have known of his testamentary capacity on that date. However, as previously stated, Dr. Bush testified that based on Mr. Doran's condition, is it doubtful that he could have a moment of lucidity, and if he did, it would not have the effect to increase his ability to exercise judgment. Dr. Bush credibly testified that he saw Mr. Doran before the will was executed, and after the will was executed, and his mental condition only declined, so it is substantially more likely that he did not have testamentary capacity on the date he signed the will.

Assessments of credibility are critical to determinations of testamentary capacity and witnesses testimony won't be credible if they have an interest in the estate. In re the Estate of Dade. Ms. Daws may argue that Ms. Richards is disputing the validity of the will because she wanted an interest and shouldn't be found credible. However, Ms. Richards is credible because she stated that she knew that Mr. Doran had wanted to leave his entire estate to a local church, not to Ms. Richards. Furthermore, Ms. Daws herself has an interest in wanting all of Mr. Doran's estate to go to her, as Ms. Daws admitted that she has about \$15,000 in credit card debt. This is also why Ms. Daws daughter, Mary Daws Johnson's testimony is not credible, because she would benefit from the will has a descendant of Ms. Daws. Furthermore, Dr. Bush, a cognitive specialist, testified that on the date that Mr. Doran signed his will, he did have the capacity to execute a will.

Thus, there is a preponderance of the evidence that Mr. Doran lacked testamentary capacity at the time he executed the will and it is fair and just that the Court should deem the will as void.

Request for Relief

Petitioner respectfully requests that the Court set aside the will signed by Eli Doran on October 7, 2019.

**Representative Good Answer No. 2**

Closing Argument

I. Mr. Doran did not have the capacity to consent to marriage when he married Paula Daws in January 2019, the January 2019 marriage of Paula and Eli should be annulled.

A marriage that complies with the licensing and officiating requirement of the Franklin Uniform Marriage and Dissolution Act (FUMDA) is presumptively valid. In re the Estate of Carla Mason Green. It can be overcome only with clear and convincing evidence. Id. Evidence is clear and convincing in a case if it establishes that it is substantially more likely than not that a party lacked capacity to consent to marriage. Id. The capacity to consent to marriage, a requirement of a valid marriage, is defined as the ability to understand the nature, effect, and consequences of marriage and its duties and responsibilities. Id. Each party to the marriage must freely intend to enter the marital relationship and understand what marriage is. Id.

Here, Eli Doran was placed in an assisted living home, run by Paula Daws, when his niece Carol Richards noticed that he was becoming forgetful and with the recommendation of his family doctor. After Eli moved in with Paula he was becoming more forgetful. Dr. Anita Bush ran several assessments for testing intellectual capacity when she met with him May 3, 2018. Of those tests was a MMSE which was conducted years ago by his family physician and yielded a result of 21 compared to the average 23 of someone in the same age, and health as Eli. Dr. Bush's result was 19 which was a significant decline. After the marriage of Eli and Paula Dr. Bush saw him a second time in which his memory got worse and when asked where he lived he stated that he lived with his wife Janet



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who died years ago. Dr. Bush also testified that she doubts Eli has moments of lucidity and if he does it is not the same as having the ability to exercise judgement. She further stated that Eli did not possess the mental capacity to consent to marriage. This could be contrasted with the Carla Mason case. In this case, Mason who had terminal cancer married Michael Green at the hospital. However, Mason was alert despite taking medications and it was said that patients can and do have periods of lucidity and alertness. Mason executed a POA two days after the wedding where it was said that she was "alert and oriented" and that her sister, the petitioner, believed that Mason had the capacity to make decisions when Mason signed the POA.

Opposing counsel could argue that if Dr. Bush believed Eli was being abused or exploited she would have called Franklin Elder Protective Services in which she did not. They could also argue that Paula Daws believed Eli had the mental capacity to consent to marriage because he stated over that "You take good care of me. We should get married" and that he stated "You are nice. I love you". However, Eli had said the same thing to Vera Wilson, the hired help, and had even asked her to marry him. Paula Daws has a lot to gain from the marriage and if she did not she would have invited his niece or went to Eli's minister to marry them. Instead Paula went to her own minister in which she is a long-time member of his congregation. Paula did not tell anyone about the marriage until recently as well.

Further, Paula Daws first met Eli when he and his niece came to her home in hopes to put him in assisted living. They did not know each other for long before they got married. Contrast to the Mason case, Mason and Green were engaged to be married for two years. They had planned for marriage and a life together. The case here aligns more with *In re Marriage of Simon*, in which the court annulled the marriage of Henry and Nancy Simon after Henry married Nancy while she lived in a residential facility. Nancy suffered a stroke which her doctors determined were disabling and that she was incapable of receiving or evaluating information. Nancy and Henry only knew each other for a few weeks prior to her stroke and they had no prior romantic or other relationship. The court found not only that Nancy was incapable of consenting to marriage but at the time of marriage she had no understanding of what marriage is. Eli and Paula had no prior romantic relationships or any other relationship more importantly Eli's cognitive assessments prove that he was not in the correct mental capacity to consent to marriage. He did not understand the nature, effect, and consequences of marriage and its duties and responsibilities. Eli did not have the required intent to be married and therefore the January 2019 marriage of Eli and Paula should be annulled.

II. Mr. Doran lacked testamentary capacity when he executed the October 7, 2019 will, the October 7, 2019 will should be set aside.

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

In this case, Eli, at the time of executing the will, did not have testamentary capacity to execute because he was not capable of knowing the nature of the act he was about to perform, the nature and extent of his property, the natural objects of his bounty, and his relation to them. According to Dr. Bush, Eli did not have the capacity to execute the October 7, 2019 will. Dr. Bush testified that in October Eli did not know who his relatives were or who might have a claim on his estate. He did not know who his niece was and thought that he lived with Janet,

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his deceased wife. Eli also did not know the nature and extent of his property or his estate. Opposing counsel could argue that Dr. Bush did not see on October 7, 2019 so she could not possibly know his mental capacity at that time. However, Eli did not have long periods in which he regained mental capacity as Matthew Dade had long periods of sobriety in the In re the Estate of Dade case. In In re the Estate of Dade case, Matthew Dades adult children appealed to set aside their fathers' codicil due to his alcoholism. However, Dade was able to discuss his finances and correctly state his worth. He was also able to identify the extent and value of his investments and regularly provided updates to his niece and nephew and expressed his need to reward his house keeper. He also had long periods of sobriety between 1999 and 2000.

The court also assessed credibility which is critical to determinations of testamentary capacity. The court in Dades found that Dades adult children were interested in protecting the original gift to them and that their testimony about their father's ability when he drafted the codicil was colored by their interest. In the case at hand, both Paula and her daughter Mary have something to gain. Paula did not take Eli to his lawyer to have the new will drafted but instead drafted it for him using an online kit. It was also brought to our attention that Paula has quite a bit of credit card debt of about \$15,000 or so. The money and assets left to her in the will would be more than enough to pay off her debt. As for her daughter Mary, who was present when Eli signed the will, gains her mother's inheritance if something was to happen to her mother after Eli's death. Here, Eli's niece has nothing to gain, in fact his 2016 will leaves his estates to his church that he loves so much.

In closing, Mr. Doran lacked testamentary capacity when he executed the October 2019 will. He did not know who his relatives were or who might have a claim on his estate. He did not know who his niece was and thought that he lived with Janet, his deceased wife, as evidenced by the testimonies of the witnesses. Paula Daws and her daughter both have interests worth protecting if the will is found to be valid. His niece had seen Eli's will from 2016 in which Eli saw his attorney and executed a will leaving his estate to his church, that he loved so much. Therefore, the October 7, 2019 will should be set aside. The reliefs requested are fair and just.