

February 2020 Bar Examination

ESSAY I

Marcus Moneybags was a fiercely loyal alumnus of Fulton University, a private college located in Atlanta, Georgia. In 2010, as part of the university's capital campaign, Marcus signed a written \$10 million pledge to the university, promising to pay \$1 million per year over the next ten years to fulfill the pledge. In anticipation of his fulfilling the pledge, the university named a classroom building after Marcus and created a "Marcus Moneybags Course in Business Ethics" in its graduate business school.

Marcus fulfilled six pledge payments from 2010 through 2015 but then became dissatisfied with the manner in which the university was disciplining students who were disrupting the campus. Marcus ceased his annual contributions and wrote a letter to the president of the university complaining that the university was coddling its students and should instead be punishing them for their behavior.

Marcus died in 2019 without ever having made the final four annual payments on his original \$10 million pledge. The general counsel of the university has recommended to the president that the university file suit against Marcus' estate to collect the remaining \$4 million, which Marcus had promised to contribute as part of his original pledge. The general counsel has also recommended that the Moneybags name be removed from the classroom building and the university cease offering business ethics as a course of study in the business school.

The president agreed with the general counsel's recommendations and asked her to send a letter to the executor of Marcus' estate stating that unless the original pledge is fulfilled in total, the Moneybags name will be removed from the classroom building and the business ethics course will be terminated.

After receiving this letter from the university's general counsel, Marcus' executor, Marcus, Jr., has employed you as counsel to Marcus' estate and seeks your advice. Applying Georgia law, answer the following questions:

1. Is the written pledge signed by Marcus a legally enforceable contract? If so, is his estate also contractually obligated to fulfill the pledge? Please explain your answers.
2. Will the university be in breach of any legal obligation to Marcus or his estate if, following Marcus' refusal to pay the last \$4 million of his pledge, it removes the Moneybags name from the classroom building and terminates the business ethics course also bearing his name? Please explain your answer.
3. Does your client, Marcus, Jr., as executor of Marcus' estate, have legal standing to seek reimbursement of the money Marcus paid on his pledge prior to his death? If not, who has standing to make a claim for a return of the money Marcus paid on his pledge to the university?

4. Assuming (a) Marcus, Jr., as executor, has legal standing to seek a return of the funds Marcus paid on his pledge to the university, and (b) the university carries out its threatened intention to remove the Moneybags name from the classroom building and terminates the business ethics course, what is the likelihood that Marcus, Jr. will be successful in securing these funds? Please explain your answer.

ESSAY II

Mark, an attorney in Athens, Georgia, primarily handles criminal defense matters and small business disputes. One day after work, he visited a bar in downtown Athens and ran into an old fraternity brother. During their conversation, Mark learned that another fraternity brother and old roommate, Jim, had been in a car wreck and was still hospitalized for his injuries.

The next day at the office, Mark decided to give Jim a call. Jim answered and the two talked for a few minutes. Mark asked if he could visit Jim at the hospital and Jim agreed. Mark visited Jim the next day and learned that Jim had been the driver of a car that was struck in an intersection. Jim believed that the other driver ran a red light, but the investigating police officer did not assess fault to either driver. Jim had two passengers in his car, Wendy and Martha. They were also injured.

Because Mark and Jim had not kept in touch over the years, Jim asked Mark what he had been up to lately. Mark replied that he was now a lawyer and although he hadn't handled personal injury cases in the past, he was looking to branch out. Mark pulled out a contingency fee contract and after reviewing the document, Jim agreed to allow Mark to represent him in an action for personal injuries sustained in the wreck. After signing the contract, Jim encouraged Mark to contact Martha and Wendy. Mark had never met Martha or Wendy, but he called them the next day and they agreed to him representing them as well.

Mark filed suit on behalf of Jim, Martha, and Wendy. During the discovery period, Mark learned that the other driver was on the job when the wreck occurred. The name of the company sounded vaguely familiar to Mark and he checked his old files. He discovered he had previously represented the other driver's employer, Harry's Heating and Air, in a dispute with its insurance carrier, whose policy still covered the company's work vehicles.

As the statute of limitations had not yet expired, Mark moved the court to add Harry's Heating and Air as a defendant to the lawsuit. The court signed an order allowing the company to be added. Mark never informed Jim, Martha, or Wendy that he had previously represented Harry's Heating and Air and did not disclose the information to opposing counsel.

A month later, Mark asked to take the deposition of Harry Henderson, the owner of Harry's Heating and Air. At the end of the deposition, Harry Henderson told his lawyer, "Man, I can't believe that guy would sue my company. He represented us years ago and I considered him a friend."

Mark has asked you, his new associate, to prepare a memorandum addressing the following questions. Note that in answering these questions, you should apply the Georgia Rules of Professional Conduct, but you do not need to cite specific rule numbers. Please explain your answers fully.

1. Evaluate the conflict of interest, if any, Mark may have in representing Jim, Martha, and Wendy for personal injuries they sustained in the same collision. Assuming a conflict exists, is that conflict capable of resolution? If so, how?
2. Evaluate the conflict of interest, if any, Mark may have as it relates to his former representation of Harry's Heating and Air and his current representation of Jim, Martha, and Wendy. Assuming a conflict exists, is that conflict capable of resolution? If so, how?
3. Did Mark violate the Georgia Rules of Professional Conduct by soliciting Jim's personal injury case?
4. Did Mark violate the Georgia Rules of Professional Conduct by soliciting Martha and Wendy's personal injury cases?

ESSAY III

Jeb Harris and Susie Morris began living together in 1996, during their freshman year of college, when both were 18 years of age. They opened a joint bank account, rented an apartment in both of their names, and shared monthly living expenses. Each named the other as the beneficiary on their life insurance policies. They told friends that, at times, they even considered themselves married, although they never obtained a marriage license or participated in any marriage ceremony. For tax reasons, they each filed separate state and federal income tax returns as if they were unmarried.

Upon graduation from college in June of 2000, Jeb and Susie decided to call it quits. They moved out of the apartment, established separate residences, divided the money in their bank account, and removed each other as a beneficiary of any life insurance. Neither filed for or obtained a divorce.

In 2005, Jeb and Susie decided to get back together and were willing to try to make a go of it. They moved into Susie's residence and told everyone they considered themselves married. A child, Jake Morris, was born to Susie in December of 2006. No one was listed on the child's birth certificate as the child's father. As before, Jeb and Susie did not obtain a marriage license and they did not participate in any marriage ceremony.

In December of 2019, Jeb and Susie again physically separated and have remained separated. Susie took the child with her, but refused to let Jeb have any contact with him. Jeb refused to pay any financial support in response to Susie cutting off his contact with

the child. Jeb is a client of one of your senior partners, who has asked you to prepare a memorandum addressing each of the following questions applying Georgia law:

1. One of the three elements of a valid marriage is that the parties must be able to contract for marriage. What is required under Georgia law to be able to contract for marriage? What are the other two elements of a valid marriage in Georgia? Explain your answer fully.
2. Because Jeb and Susie did not participate in a ceremonial marriage, Jeb wants to claim that his relationship with Susie in 1996 established a common law marriage. What facts could be used to support such a claim? Explain your answer fully.
3. Could Jeb and Susie's renewed relationship in 2005 establish a common law marriage? Why or why not? Explain your answer fully.
4. Assuming Jeb and Susie were never married, either by ceremony or common law, could Jeb establish a legally enforceable right to have custody, parenting time, and/or visitation rights with the child? If he can, what legal action could he bring and what standard would apply in determining whether Jeb should receive custody, parenting time, and/or visitation rights?
5. As the child is presently 13 years of age, what must a court consider when determining to whom to award custody? How do those considerations change, if at all, when the child reaches age 14? Explain your answer fully.
6. Assuming Jeb and Susie were never married, either by ceremony or common law, and Jeb does not file any legal action affecting his rights to the child, what action, if any, can Susie bring to obtain child support from Jeb for the child? Explain your answer fully.
7. Assuming Jeb and Susie were never married, either by ceremony or common law, does Susie have a right to alimony from Jeb? Explain your answer fully.

ESSAY IV

You were admitted to the Georgia Bar three months ago and have just opened your own law office as a sole practitioner. You want to focus on litigation and have completed all the requirements to appear as lead counsel in a civil case in the Superior and State Courts of Georgia and have been admitted in the U.S. District Court for the Northern District of Georgia. Ann has consulted you about her October 2019 purchase of a "PuppyPalace"-a luxury dog house equipped with everything a dog or besotted dog owner could dream of. PuppyPalace is made by DOG, Inc., a Nevada corporation with its principal place of business also in Nevada. Ann bought her PuppyPalace at DOG's Atlanta store, where it

retails for \$1,125. Ann signed a retail installment sales contract ("the contract") pursuant to which she paid DOG an initial installment of \$300, with the balance payable in equal installments over a 24-month period.

Ann's PuppyPalace turned out to be a PuppyShack. The product did not work as advertised after she had assembled the unit in accordance with the instructions DOG provided. The workmanship overall was poor and the PuppyPalace did not live up to the online advertising claims that attracted Ann in the first place or to the quality of the PuppyPalace she was shown in DOG's Atlanta store. She has complained to DOG that she was misled and asked for her money back. DOG responded that she must have assembled her PuppyPalace incorrectly and demanded that she keep making her payments or DOG would sue her.

Before you agreed to represent Ann and begin work on her potential claim against DOG, you ordered credit and background reports on her, all of which came back clean. She has good credit, stable employment, no criminal record, and is a respected Georgia citizen.

You have now determined that the retail installment sales contract Ann signed expressly adopts Georgia law as the governing law (though there is no venue provision) and is a printed form contract DOG uses nationwide for all its installment sales of PuppyPalace, so that anyone who bought on DOG's installment plan signed a contract with the same terms as the contract Ann signed. Advertising by DOG boasts that in Georgia alone it sold 1,000 PuppyPalaces each year in 2018 and 2019, half of which were retail installment sales. Nationally, DOG's 2019 PuppyPalace sales totaled \$100 million; again, one-half were retail installment sales. Online consumer reviews of PuppyPalace (you found about 100) are mixed-some are raves, while others report experiences similar to Ann's. There has been only one suit based on deceptive advertising related to the PuppyPalace.

You are starting to think that you may be able to bring some type of class action case against DOG, and having your first case turn into a big class action suit would be an exciting way to begin your practice, but before proceeding, you must address some important questions.

Assume, for purposes of the questions below, that Ann has only one potential cause of action, a state law claim for deceptive advertising that induced her purchase of the PuppyPalace, whose quality fell short of DOG's advertising claims, pursuant to which she wants to get her \$300 back and be released of any further payment obligation under the contract. Assume also that Georgia recognizes a cause of action for damages, with a two year statute of limitations, when a consumer is deceived by advertising into buying a product that did not live up to the advertising, and that most states recognize a similar cause of action, although there are substantive variances among the states about the elements of this cause of action. You also should assume that DOG made the same advertising claims nationwide that Ann read and used the same type of PuppyPalace model in all its stores as the one Ann saw.

If there are differences between federal and Georgia law so that your answer might be different to any of the following questions, depending on whether the case is brought in a state court in Georgia or in a federal court, comment on the differences in your responses.

1. What threshold requirements must be satisfied to maintain any type of class action? Assess the likelihood of a court finding that Ann's claim satisfies these requirements. Explain the reasons for your assessment, including any potential impact of the geographic scope of the class you request the court to certify.
2. Assuming Ann's claim meets the threshold requirements for a class action, you have decided to seek certification for the type of class action allowed when common questions of law and fact predominate over any individual questions that would affect a class member's personal claim and a class action would be superior to other means of adjudication. Identify any additional factors the court will consider to determine whether your proposed class action meets the standard for certification as this type of class action and assess the likelihood that a motion for such certification will be granted. Explain the reasons for your assessment, including any potential impact of the geographic scope of the proposed class.
3. Assess whether a federal district court in Georgia could exercise jurisdiction over Ann's claim, if brought as a class action, based on diversity of citizenship, assuming all other requirements for class action treatment were met. In answering this question, explain your reasoning.
4. If you received an unfavorable ruling on class action treatment, explain how you could appeal such a ruling.
5. Are there any ethical or legal issues related to your personal ability to serve as lead counsel in a class action? If so, explain and describe any steps you would take to try to overcome them.

Applicant Number



MPT-1
220

THE
MPT[®]

MULTISTATE PERFORMANCE TEST

*Downey v. Achilles Medical
Device Company*

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Downey v. Achilles Medical Device Company

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FILE

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

MEMORANDUM

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

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

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

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

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

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

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

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

BETTS & FLORES
Attorneys at Law

FILE MEMORANDUM

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

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

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

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

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

BETTS & FLORES
Attorneys at Law

FILE MEMORANDUM

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

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

INTERVIEW WITH RON ADAMS

- Q:** Mr. Adams, are you a current employee or agent of Achilles Medical Device Company, commonly known as AMDC?
- A:** No.
- Q:** Have you ever been an employee of AMDC?
- A:** Yes, I worked for AMDC from 2003 to 2017. I was director of quality control during that time. Now I am happily retired.
- Q:** When you were at AMDC, what were your responsibilities as director of quality control?
- A:** I was in charge of the quality control department. Employees in my department, whom I supervised, inspected every product that left the manufacturing plant and was made available for sale. I am very proud of the work we did.
- Q:** So the department for which you were responsible would have inspected the walkers that were manufactured in 2010 and sold between 2010 and 2015?
- A:** Yes.
- Q:** Do you have any specific knowledge about the walkers that are alleged to have been defective?
- A:** No, not specifically. I do know that every piece of equipment that left the factory was inspected. If it did not meet company standards, it was rejected. I would like to know what the purchasers are complaining about.

Q: What do you mean by “rejected”?

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

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

A: No, not really.

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

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

Q: How did you respond to this request?

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

INTERVIEW WITH GUS BARTHOLOMEW

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

A: I have worked there continuously since 2003.

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

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

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

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

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

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

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

A: Yes.

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

A: Yes.

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

A: No, I do not.

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

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

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

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

INTERVIEW WITH AGNES CORLEW

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

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

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

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

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

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

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

- A: No. I present only the information that has been provided to me and has been approved by the president's office.
- Q: Have you ever met with counsel for AMDC regarding the *Downey* case?
- A: Absolutely not.
- Q: Has anyone associated with the plaintiffs' lawyers in the *Downey* case tried to contact you?
- A: My assistant told me that I had a call from Ashley Parks, an investigator who works for the plaintiffs' law firm. I haven't returned the call.

INTERVIEW WITH ELISE DUNHAM

- Q: Ms. Dunham, what is your job with AMDC and how long have you worked there?
- A: I am the plant manager at AMDC. I have been employed in that position continuously since March of 2009.
- Q: What are your responsibilities in that position?
- A: I oversee all the manufacturing at the plant. I also make sure that every product meets our quality control standards.
- Q: So the director of quality control reports to you?
- A: Yes, as does the director of manufacturing.
- Q: So you were manager of the plant at the time AMDC manufactured the walkers, model 2852, that are alleged to have been defective in the *Downey* case.
- A: Yes, although I honestly don't remember anything about those particular walkers.
- Q: Have you been contacted by any of the plaintiffs' counsel or their representatives?
- A: I received a note from Ashley Parks, an investigator with the plaintiffs' law firm, saying that she wanted to speak with me. Since then, I've hired a lawyer, and I called Ms. Parks to give her my lawyer's name and contact information.

INTERVIEW WITH PENNY ELLIS

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

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

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

A: Yes, definitely.

Q: Do you remember anything specifically about the walkers?

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

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

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

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

A: Yes, I serve as treasurer.

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

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

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

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

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

A: Yes.

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

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

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LIBRARY

Excerpts from the Franklin Rules of Professional Conduct

Rule 1.0(f)

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

...

Rule 4.2 Communication with Person Represented by Counsel

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

Comment [1]: This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

...

Comment [3]: The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

...

Comment [7]: In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization’s lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

...

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

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

...

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

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

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

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

FRANKLIN BOARD OF PROFESSIONAL CONDUCT
Ethics Opinion 2016-12

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Reversed in part and modified.

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MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

Applicant Number



MPT-2

220

THE MPT[®]

MULTISTATE PERFORMANCE TEST

In re Eli Doran

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In re Eli Doran

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FILE

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

MEMORANDUM

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

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

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

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

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

COOK AND STONE LLC

OFFICE MEMORANDUM

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

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

For each claim or issue:

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

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

Excerpts from Hearing on February 24, 2020

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

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

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

EXCERPTS OF TESTIMONY

DIRECT EXAMINATION OF CAROL RICHARDS BY ATTORNEY ROBERT COOK

- Q:** How do you know Eli Doran?
- A:** I am Eli's niece. Eli was married to my Aunt Janet, who died about four years ago.
- Q:** How often did you have contact with Eli?
- A:** After my aunt died, I regularly took Uncle Eli to the bank, to the barbershop, and on any other errands. We also went out for barbecue, his favorite, usually once a month. And about once a month, I took him to his church and then to dinner at my home. I also took him to his family doctor.
- Q:** What did you notice about Eli over time?
- A:** A bit over two years ago, I noticed that he asked questions that he should know the answers to—like where I worked, even though he knew I was retired, and whether I was married, even though he knew I was. He was not dressing well. He was forgetting to pay bills. I saw

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

Q: Did you find someone who could help?

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

Q: What did you learn from the doctor?

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

Q: Did you meet with Paula Daws?

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

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

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

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

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

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

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

Q: Did she say when they had married?

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

Q: Did you discuss this matter with Paula?

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

Q: Why did that concern you?

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

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

A: Not at all.

CROSS-EXAMINATION OF CAROL RICHARDS BY ATTORNEY ANDREWS

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

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

* * *

DIRECT EXAMINATION OF DR. ANITA BUSH BY ATTORNEY COOK

Q: Dr. Bush, what is your specialty?

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

Q: How do you know Eli Doran?

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

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

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

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

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

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

Q: What did you conclude from these assessments?

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

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

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

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

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

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

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

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

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

Q: Does Eli have periods of being lucid?

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

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

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

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

A: He did not.

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

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

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

A: No.

CROSS-EXAMINATION OF DR. BUSH BY ATTORNEY ANDREWS

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

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

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

A: No.

- Q:** You are not a medical doctor, are you?
- A:** No, I am not. His medical doctor sought my expertise to evaluate Eli's cognitive status.
- Q:** Doctor, under Franklin law, if an elderly person is in danger of being abused or exploited, you are required to call Franklin Elder Protective Services, are you not?
- A:** Yes.
- Q:** You did not make that call, you did not report Eli as in need, did you?
- A:** No. He was getting the care he needed.

* * *

DIRECT EXAMINATION OF PAULA DAWES BY ATTORNEY ANDREWS

- Q:** When did you meet Eli Doran?
- A:** Almost two years ago, Carol Richards and Eli Doran came to my home to see if Eli could live there. I had two other men living there; they needed assistance in their daily living.
- Q:** Other than providing a room, what other services do you offer?
- A:** I provide a very clean home, three meals a day, and laundry service, and I supervise their medications. Each man has a bedroom, and there is a TV room where they eat, watch TV, and socialize.
- Q:** What did Eli and Carol tell you when you met with them?
- A:** Carol did most of the talking and said that Eli's doctor wanted him to live somewhere where he would be sure to take his medicine. We discussed the fee, and Carol said he could afford that. Carol and Eli arranged for direct payment to me each month, and he moved in.
- Q:** Tell us about the marriage.
- A:** Eli was always very pleasant and kind to me. One night as I brought his laundry to him, he said, "You take good care of me. We should get married." I laughed it off. But a few days later, he took my hand and said, "We should get married." I asked if he was serious, and he said, "You are nice. I love you." The next day, I called my minister and got a license, and we were married on January 15, 2019.
- Q:** And tell us about the will.
- A:** One day, I said, "Eli, you have a lot of stuff in your room," and he said, "When I am gone, I want you to have it all." Again, I laughed it off, but for several days, he said, "I want you to have what I have." I asked him, "Do you want to make a will?" and he said, "Yes." I went online and found a will kit for him, but he said, "You do it," so I filled it in. My daughter and son-in-law witnessed Eli signing it—two witnesses as required!

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

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

CROSS-EXAMINATION OF PAULA DAWS BY ATTORNEY COOK

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

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

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

A: I did not know who his minister was.

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

A: No.

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

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

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

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

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

A: I did not know he had a lawyer.

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

A: Yes, but so does everyone.

* * *

DIRECT EXAMINATION OF REV. JOSEPH SIMMS BY ATTORNEY ANDREWS

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

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

Q: Explain what you mean.

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

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

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

CROSS-EXAMINATION OF REV. JOSEPH SIMMS BY ATTORNEY COOK

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

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

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

A: No. I am not a doctor.

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

A: Yes.

* * *

DIRECT EXAMINATION OF MARY DAWS JOHNSON BY ATTORNEY ANDREWS

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

A: Yes, I was.

Q: Was he aware of what he was doing?

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

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

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

CROSS-EXAMINATION OF MARY DAWS JOHNSON BY ATTORNEY COOK

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Affirmed.

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

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

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

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

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

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

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

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

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

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

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

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

Affirmed.

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MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.