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QUESTION #1

In re Wendy Martel (MPT-1)

In this performance test, examinees are employed by the law firm that represents Wendy Martel, a Franklin attorney. Martel seeks the law firm's advice regarding her representation of David Panelli, M.D. Martel recently settled Panelli's case and has received the settlement funds (\$600,000) in her trust account. When Martel informed Panelli that she had the funds and needed to determine how much Panelli's former attorney, Rebecca Blair, was entitled to for her work on the case, Panelli was adamant that Blair should receive nothing, and not even be told of the settlement. (Panelli had fired Blair as a result of a personality conflict.) Martel wants to be sure that she acts ethically with regard to what information about the settlement Blair is entitled to have. Examinees' task is to draft an opinion letter, following the firm's guidelines, identifying the ethical issues raised by Panelli's position and advising Martel as to how she should proceed. The File contains the instructional memo from the supervising attorney, a format memo for opinion letters, the client interview, copies of the Martel/Panelli emails, and a copy of Blair's lien. The Library contains excerpts from the Franklin Rules of Professional Conduct, a Franklin State Bar ethics opinion, and a case from the Franklin Supreme Court.

**MINNESOTA BAR EXAMINATION
FEBRUARY 2013
REPRESENTATIVE GOOD ANSWER
QUESTION 1**

Walden, Martin & Watterson, LLP
Attorneys at Law

February 26, 2013

Dear Attorney Martel:

You came to us for advisement as to your responsibilities regarding the disbursement of settlement funds you received in the case of David Panelli. You have indicated you want to ensure you are in compliance with Franklin's ethical rules. You have informed us that you are the successor attorney on the case and that Mr. Panelli entered into a contingency fee arrangement with both you and your predecessor, Rebecca Blair. He has now instructed you not to pay any funds from the settlement agreement to Attorney Blair who has filed a statutory lien on any recovery she obtained for your client.

According to Franklin's ethical rules and case law, you are required to disperse uncontested fees to the client. Any contested fees must be retained by you in a separate trust account until the matter can be resolved either between the parties or the court. Because of your knowledge that Attorney Blair filed a statutory lien on the recovery in this case, you owe her fiduciary duties and must deal with her in good faith and fairness. However, you should discuss this duty with Mr. Panelli and inform him that disclosing this information would qualify as an exception to the confidentiality you owe him.

Legal Operation of a Contingent Fee Agreement

Under a contingent fee agreement, an attorney does not have any right to fees unless and until the contingency specified has occurred. [Clements v. Summerfield] Without a right to fees, the attorney doesn't have a cause of action against the client. [Clements] However, when a client hires an attorney under a contingency fee agreement and subsequently discharges him/her, the discharged attorney's right to recovery is limited to quantum meruit, or the reasonable value of the services rendered during his or her representation. [Id.] Where the client has hired a successor attorney under the same contingency agreement, the money owed under the theory of quantum meruit is paid as a share of the total fees payable to the successor attorney. [Id.]

In Clements, the client and attorney entered into a contingency fee agreement, under which the client agreed to pay the attorney one-third of any recovery he obtained during his representation. However, before recovery was obtained, he discharged the attorney and retained a new one. The first attorney filed an action for the breach of the contingency fee agreement because his client refused to pay him his fees. The court held that because the contingency in the agreement had not occurred when the client discharged the first attorney (or even at the time the case was filed), he was not entitled to relief under the terms of that agreement. To hold otherwise, says the court, would be

to unduly burden the client's absolute right to discharge an attorney. However, the court found no injustice in permitting the fees of the discharged attorney to the reasonable value of services rendered during the representation. The Clements court provided an illustration which is relevant here: "If a successor attorney subsequently obtained a recovery during her representation, she would be entitled to receive whatever her contingent fee agreement specified – for example, if she had a one-third contingent fee agreement and obtained a \$300,000 recovery, she would be entitled to receive \$100,000. The discharged attorney would then be entitled to receive whatever share, if any, of the \$100,000 fee received by the successor attorney for the reasonable value of services under the circumstances."

Your case is similar Clements, with the exception that the contingency in this case (settlement) has occurred. Mr. Panelli entered into a contingent fee agreement with both you and Attorney Blair. His agreement with Attorney Blair stated that Blair would recover one-third of any recovery obtained. This is the same agreement that you entered into after Mr. Panelli discharged Attorney Blair. During the course of Attorney Blair's representation, she filed the complaint and completed some initial discovery. You completed discovery, filed a summary judgment motion and settled the case. According to the court in Clements, of the \$200,000 you would receive under the contingent fee agreement, Attorney Blair would be entitled to the reasonable value of the services rendered in filing the complaint and completing initial discovery.

Ability to Comply with Mr. Panelli's Request

According to Franklin Rule of Professional Conduct 1.15, upon receiving funds or other property in which a client or third person has an interest, a client shall promptly notify the client or third person. Where there is a dispute, the attorney should contact the client and the third party, describing the existence and details of the dispute and state that (1) the attorney cannot represent either the client or the third party, and (2) that if the client and the third party agree, attorney can retain the disputed money in trust until the dispute is resolved, but that in absence of an agreement, the attorney will seek guidance from the court. [Ethics Opinion No. 2003-101]

Franklin Rules of Professional Conduct, Comment to Rule 1.15 states that "Third parties may have lawful claims against funds held in trust by an attorney, such as a client's creditor who has a lien on funds recovered in a personal injury action. An attorney may have a duty to protect such third-party claim against wrongful interference by the client, as when the attorney has entered into a fiduciary relationship with the third party." According to Johnson v. State Bar, by representing a client with knowledge of chiropractor's lien, an attorney entered into fiduciary relationship and subjected herself to fiduciary duties to deal with the chiropractor with utmost good faith and fairness and to disclose material facts, that is, those facts that are "significant or essential to the matter at hand." While it is true that a lawyer shall abide by a client's decisions concerning objectives of representation under Rule 1.2(a), a lawyer may not assist a client to engage in conduct the attorney knows is fraudulent. [See Rule 1.2(d)] Additionally, when a third party fiduciary relationship is formed with a third party, the attorney must consult with the client about this limitation on the lawyer's ability to engage in an activity that the client expects when it is not permitted by the ethical rules. Franklin Rule of Professional Conduct 1.4(a)(5).

In this case, it appears that you owe Attorney Blair fiduciary duties. These duties stem from the statutory lien that Attorney Blair filed with the court on November 20, 2009. By filing this lien, Attorney Blair gave you constructive knowledge of her interest in any recovery. Additionally, you indicated that you had actual knowledge by having a copy of the lien, which you indicated is standard practice in Franklin. Thus, based upon the fact that the statutory lien is similar to the chiropractor's lien in Johnson, which created a fiduciary duty between the attorney and the chiropractor, you similarly have a fiduciary relationship to Attorney Blair. As such, you must act in good faith and with fair dealing in protecting her against any wrongful interference by Mr. Panelli – that is, his request that you withhold funds and information of the settlement from her, is not advisable. You stand to suffer severe consequences, including compensatory and possibly punitive damages if found to violate these fiduciary duties to her. [See Ethics Opinion].

Therefore, you should speak directly to Mr. Panelli and explain the legal consequences of his request, including the liability that may result to you as well as to him (Attorney Blair may file a breach of contract action against him). [See Rule 1.4(a)(5)] You should also explain that given the high-profile nature of the case when it was first filed, it is likely that the press may inform the public of the ultimate resolution of the case. Even though specific dollar amounts won't be discussed, it increases the likelihood that Attorney Blair may find out about the result in an improper way and come to you or Mr. Panelli seeking her share.

Disbursement of Settlement Funds

According to Franklin Rules of Professional Conduct, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property. [Rule 1.1.5(d)] However, when in the course of representation, a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute. [Rule 1.15(e); Greenbaum v. State Bar]

Here, the dispute is regarding the contingent fee agreement. The case settled for \$600,000. According to the contingent fee agreement, Mr. Panelli will be entitled to keep \$400,000 and this should be distributed to him immediately. The disputed portion of the funds comes from the \$200,000 (or one-third) of the amount recovered. Here, Attorney Blair has a known interest in the funds that the ethical rules and Franklin case law support [Clements; Ethics Opinion], yet Mr. Panelli explicitly informed you not to give it to her. This property should remain in a trust account until the parties can resolve the dispute without court involvement, or if not, with court involvement.

Disclosing Client Information

You have shared a lot of client information. And we have recommended that you disclosed additional information to Attorney Blair that goes against your client's instruction. While generally an attorney is prohibited from revealing information relating to the representation of a client without informed consent, we believe that it is permissible for you to discuss this matter with Attorney Blair under the exception that you comply with other laws or a court order. Rule 1.6(b)(6). Additionally, your

disclosure of information is permissible according to Johnson, which imposes upon you the affirmative duty to act in good faith and disclose material facts – that is, those facts that are significant or essential to the matter. Johnson It is our belief that the award of a settlement amount is indeed, a material fact related to Attorney Blair's interest in this case. Additionally, the Ethics Opinions indicates that it is permissible for you to reveal this information because she is a third-party with interest in the funds and because you know of her statutory lien, you owe her fiduciary duties. Therefore, it is unlikely that Mr. Panelli will be able to successfully assert that you are in violation of any ethical rules by failing to abide by his instruction not to communicate with Attorney Blair.

Please let us know if we can be of any further assistance in this matter. We know you would like to come to a swift resolution to this issue and appreciate you entrusting us to guide you in this matter.

Very truly yours,

Applicant

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QUESTION #2

In re Guardianship of Will Fox (MPT-2)

Examinees' law firm represents Betty Fox, a member of the Blackhawk Tribe, who has petitioned for guardianship of her minor grandson, Will. Will's mother died when he was born and his father, Betty's son, has been in a coma for several months as a result of a car accident. Betty is petitioning for guardianship in the Blackhawk Tribal Court in response to a petition for guardianship in Franklin state court filed by Will's maternal grandparents, the Lodens, who are not members of the tribe. In addition, the law firm has filed on Betty's behalf a motion to transfer the Lodens' state court action to the tribal court. Examinees are asked to prepare a brief in support of the motion to transfer, following the firm's format for persuasive briefs, and anticipating those arguments likely to be raised by the Lodens against the transfer. The File includes the instructional memo from the supervising attorney, a format memo for persuasive briefs, the competing petitions for guardianship filed in state and tribal court, a letter from the tribal court, the motion to transfer, an email from Betty's son, and an excerpt from the Journal of Native American Law. The Library contains excerpts from the Indian Child Welfare Act of 1978, guidelines from the Bureau of Indian Affairs for Indian child custody proceedings, and a case from the Franklin Supreme Court bearing on the subject.

**MINNESOTA BAR EXAMINATION
FEBRUARY 2013
REPRESENTATIVE GOOD ANSWER
QUESTION 2**

MEMORANDUM

TO: The District Court of Oak County

FROM: Applicant

DATE: February 26, 2013

RE: Guardianship of Will Fox

Statement of the Case

Betty Fox, the paternal grandmother of Will fox, moved to transfer a petition for guardianship and temporary custody to the Tribal Court of the Blackhawk Tribe. The pleadings demonstrate that the transfer is subject to the Indian Child Welfare Act of 1978 (ICWA), and that no good cause exists not to transfer. Pleadings from both parties have been submitted to the District Court of Oak County, a Petition for Guardianship has been filed by Betty Fox in the Tribal Court of the Blackhawk Tribe, and the Blackhawk Tribal Court has certified that Betty, Joseph, and Will Fox are all members of the Blackhawk Tribe. Betty Fox respectfully requests that this Court transfer the case to the Tribal Court of the Blackhawk Tribe.

Body of the Argument

Because Don and Frances Loden are requesting guardianship and temporary custody of Will Fox, an Indian child, the ICWA is applicable.

This petition for guardianship and custody of Will Fox invokes ICWA because, in effect, it is an application for “foster care placement,” to which ICWA applies. ICWA applies “in any State court proceeding for the foster care placement of, or termination of parental rights to, and Indian child not domiciled or residing within the reservation of the Indian child’s tribe.” ICWA § 1911 (b).

“Foster care placement,” as defined by ICWA, is “any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated. An Indian custodian is defined as “any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.” ICWA § 1903 (7). Here, the father is incapacitated due to a brain injury, and while his parental rights are not being terminated, Will Fox is being removed from the custody of his Indian grandmother, Betty Fox, and she will not be able to have the

child returned upon demand. Betty Fox is the temporary physical custodian of Will Fox, which makes her the Indian custodian under the statute. In the similar case *In re Custody of R.M.*, the Franklin Supreme Court held that the terms “custodian” and “guardian” describe the powers that fall within the definition of “foster care placement” to which ICWA applies.

Furthermore, Will fox is an Indian child not domiciled or residing within the reservation of the Indian child’s tribe. “Indian child” is defined by ICWA as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe, or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” ICWA § 1903 (4). Will Fox lived some distance from the reservation, as indicated by his father’s letter concerning the drive to the reservation for the yearly pow wow. Further, the letter from Sam Waters, Director of ICWA, demonstrates that Will Fox is in fact a minor, and a member of the Blackhawk Tribe. Thus, the statutory requirements of § 1911 (b) are met, and ICWA applies to this proceeding.

Because good cause cannot be shown to have the case remain in State court, and the Tribal court is willing to accept jurisdiction, the proceedings must be transferred to Tribal court.

In general, a case must be transferred to Tribal Court absent good cause to the contrary, provided that the tribe has a tribal court and that such transfer shall be subject to declination by the tribal court of such tribe. ICWA § 1911 (b). In this case, good cause does not exist to the contrary, and the tribal court has not declined jurisdiction.

The Blackhawk tribe has a tribal court, and thus transfer is appropriate. Good cause not to transfer exists if the Indian child’s tribe does not have a tribal court as defined by ICWA. Here, the letter from Sam Waters, Director of ICWA, demonstrates that the Blackhawk Tribe does have an ICWA-recognized Tribal Court, complete with a family law unit.

Proceedings may be kept in state court if good cause exists for preventing removal to the Tribal Court. Guidelines for State Courts; Indian Child Custody Proceedings ICCP. The burden of showing such good cause is on the party opposing the transfer. ICCP. Don and Frances Loden have not alleged or proven any good cause to prevent the transfer. Good cause may be shown by the absence of a tribal court, where the proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly, where the Indian child is over 12 years of age and objects to the transfer, where the evidence necessary to decide the case could not adequately be presented in tribal court without undue hardship, or where the parents of a child 5 years of age or older are not available and the child has had little or no contact with the tribe members of the child’s tribe. ICCP. Socio-economic conditions are not considered in a good cause determination. *Id.*

Here, none of the good cause factors are met. The proceedings are still at an early stage; there has not been discovery, nor have there been any warnings in court. Will Fox is not yet 12 years of age, as he was born in 2003, nor has he objected to the transfer. In fact, Will has shown enthusiasm for the tribal pow wows. Don and Frances Loden have not alleged nor met their burden of proof to show that there is evidence that could not be presented in the tribal court without undue hardship to the parties or

witnesses. Don and Frances Loden may allege that Will has had little or no contact with his tribe or its members. However, Joseph Fox's letter of August 23, 2011 shows that Will has had substantial contact with this tribe and "can't stop talking about it." Under these conditions, Don and Frances Loden have not met their burden of proof to show that there is little or no contact with the tribe or its members.

Don and Frances Loden may argue that there is an undue burden caused by the transfer, but this is likely not persuasive. The Guidelines recognize that the distance to the reservation may be an undue hardship that could result in a showing of good cause not to transfer. ICCP. However, as in *In re Custody of R.M.*, Don and Frances Loden have not met their burden of proof related to this good cause argument. While it is true that the drive to the reservation took several hours from Joseph Fox's home, it is unclear how far the reservation is from his grandparents' home. Since these facts are not shown in the complaint and the burden of proof rests on the party opposing transfer, this good cause argument is not sufficiently demonstrated to prevent transfer of this case.

The tribal court has not declined jurisdiction. A transfer under ICWA is always subject to the declination of the tribal court. Here, although a petition has been filed for the tribal court to accept the case, it may decline to do so. Absent such declination, however, the transfer is appropriate.

Betty Fox is the appropriate guardian to request a transfer under ICWA, because she is the Indian custodian of Will Fox.

Betty Fox has appropriate standing to ask for transfer because she is the Indian custodian. As discussed previously, Betty Fox is an "Indian person . . . to whom temporary physical care, custody, and control has been transferred." ICWA § 1903 (6). There is some question as to whether the control was transferred by the parent, as required by the statute to make Betty the Indian Custodian. However, the Indian custodian may also be one who is given legal custody of an Indian child under tribal law or custom. As noted in the *Journal of Native American Law*, Vol. 8 (2005), the Blackhawk tribe expects that the Native American grandparents, maternal or paternal, will become the custodians. Here, Will Fox's only Native American grandparent is Betty Fox. Thus, she is the appropriate Indian custodian under ICWA § 1903 (6). Accordingly, Betty Fox may bring this petition for transfer.

Public policy supports transfer of this case to tribal court, because the Tribal Court will best reflect the unique values of Indian culture and prevent separation of Indian children from their families and tribes.

The policy underlying the ICWA supports transfer of this case to the Tribal Court. Congress included a statement of policy in the statute, stating that "it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families" This policy is served by transfer to the tribal court. As indicated in the *Journal of Native American Law*, Vol. 8 (2003), the Blackhawk tribe is unique even among Native American culture. Will Fox has expressed enthusiasm for his tribe, and has attended pow wows every year since he was 3. Thus, public policy as expressed in the ICWA supports transfer.

Transfer is likewise supported by the policy expressed in *In re Custody of R.M.* In that case, the Court noted that the ICWA “was the product of rising concern over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement.” A concern in passing ICWA was to keep tribal courts in control over those issues which tribes have the best understanding. *Id.* Here, the Blackhawk Tribal Court will have the best understanding of the appropriate placement for one of its members, Will Fox. Thus, public policy as indicated by *In re Custody of R.M.* also supports transfer.

QUESTION #3

In 2008, a landlord and a tenant entered into a 10-year written lease, commencing September 1, 2008, for the exclusive use of a commercial building at a monthly rent of \$2,500. The lease contained a covenant of quiet enjoyment but no other covenants or promises on the part of the landlord.

When the landlord and tenant negotiated the lease, the tenant asked the landlord if the building had an air-conditioning system. The landlord answered, "Yes, it does." The tenant responded, "Great! I will be using the building to manufacture a product that will be irreparably damaged if the temperature during manufacture exceeds 81 degrees for more than six consecutive hours."

On April 15, 2012, the building's air-conditioning system malfunctioned, causing the building temperature to rise above 81 degrees for three hours. The tenant immediately telephoned the landlord about this malfunction. The tenant left a message in which he explained what had happened and asked the landlord, "What are you going to do about it?" The landlord did not respond to the tenant's message.

On May 15, 2012, the air-conditioning system again malfunctioned. This time, the malfunction caused the building temperature to rise above 81 degrees for six hours. The tenant telephoned the landlord and left a message describing the malfunction. As before, the landlord did not respond.

On August 24, 2012, the air-conditioning system malfunctioned again, causing the temperature to rise above 81 degrees for 10 hours. Again, the tenant promptly telephoned the landlord. The landlord answered the phone, and the tenant begged her to fix the system. The landlord refused. The tenant then attempted to fix the system himself, but he failed. As a result of the air-conditioning malfunction, products worth \$150,000 were destroyed.

The next day, the tenant wrote the following letter to the landlord:

I've had enough. I told you about the air-conditioning problem twice before yesterday's disaster, and you failed to correct it. I will vacate the building by the end of the month and will bring you the keys when I leave.

The tenant vacated the building on August 31, 2012, and returned the keys to the landlord that day. At that time, there were six years remaining on the lease.

On September 1, 2012, the landlord returned the keys to the tenant with a note that said, "I repeat, the air-conditioning is not my problem. You have leased the building, and you should fix it." The tenant promptly sent the keys back to the landlord with a letter that said, "I have terminated the lease, and I will not be returning to the building or making further rent payments." After receiving the keys and letter, the landlord put the keys into her desk. To date, she has neither responded to the tenant's letter nor taken steps to lease the building to another tenant.

On November 1, 2012, two months after the tenant vacated the property, the landlord sued the tenant, claiming that she is entitled to the remaining unpaid rent (\$180,000) from September 1 for the balance of the lease term (reduced to present value) or, if not that, then damages for the tenant's wrongful termination.

Is the landlord correct? Explain.

**MINNESOTA BAR EXAMINATION
FEBRUARY 2013
REPRESENTATIVE GOOD ANSWER
QUESTION 3**

Is the Landlord or Tenant responsible for maintaining the premises?

At old-common law, a landlord was under no duty to keep the leased premises safe or perform any upkeep or maintenance on the property. Thus, tenants who leased property and remained in possession of the property had the duty to maintain the property under all circumstances. Modern courts, however, have abandoned this old common law principle and instead hold landlords responsible for maintaining the property. As for commercial leases, however, it is assumed that both parties are sophisticated and can contract to repair or maintain the premises.

Here, the landlord and tenant are commercial parties. As sophisticated commercial parties they should have placed a maintenance clause in the contract outlining which party is responsible for what types of repairs. Although the contract is silent and only mentions the covenant of quiet enjoyment, the burden of maintaining the property ought to rest with the landlord because the landlord had notice of the tenant's reliance on adequate air conditioning. There is nothing in the facts that suggest the landlord did not hear the tenant explain the need and reliance on adequate air conditioning. Thus, absent an agreement to the contrary the landlord is responsible to repair the air conditioning.

Was the Tenant constructively evicted by the Landlord's failure to fix the air conditioning system?

Assuming the landlord has the duty to maintain the premises and make repairs, a tenant is constructively evicted when the premises fail to conform to the commercial tenants express needs. Also, to qualify for a constructive eviction, the tenant must give the landlord adequate notice of the problems and also vacate the premises.

Here, the failure of the air-conditioning greatly affected the tenant's use of the property. The tenant relied on the air conditioning system to work properly to the point that it should not allow the temperature to rise above 81 degrees for six consecutive hours. The working air conditioner is essential to the tenant and without such, the premises are useless to the tenant.

Notice: The tenant told the landlord about the air conditioning problems on April 15, 2012; on May 15, 2012; and on August 24, 2012. Yet the landlord failed to remedy the problem. Not only did the landlord fail to remedy the problem, the landlord did not even communicate or acknowledge the tenant's complaint. At the very least, the landlord should have told the tenant that the tenant was responsible for maintaining the air conditioning after the initial complaint on April 15, 2012. The tenant ultimately provided the landlord with adequate notice of the tenant's desire to terminate the lease on August 25, 2012.

Evicted: To be constructively evicted, the tenant must also leave the property. Here, the tenant did just that when the tenant returned the keys. Thus, the tenant was

constructively evicted by the landlord for the failure to maintain the premises in a suitable manner.

Measure of Damages?

The landlord should not be awarded any damages because the landlord did not mitigate their losses in any fashion. When a contract or lease is terminated prior to an agreed upon end-date, the non-breaching party has the duty to mitigate damages. The landlord could mitigate damages by placing an ad to lease the property to another tenant. The landlord's failure to place an ad or at least try to re-lease the property in some manner shows the landlord's failure to mitigate.

At most, the landlord could be able to recover \$30,000 in damages against the tenant. While there was \$180,000 of unpaid rent, the failure of the air conditioning system cost the tenant \$150,000 in damages, which can be attributed to the landlord's failure to repair the air conditioner.

QUESTION #4

On January 2, a boat builder and a sailor entered into a contract pursuant to which the builder was to sell to the sailor a boat to be specially manufactured for the sailor by the builder. The contract price was \$100,000. The written contract, signed by both parties, stated that the builder would tender the boat to the sailor on December 15, at which time payment in full would be due.

On October 15, the builder's workers went on strike and there were no available replacements.

On October 31, the builder's workers were still on strike, and no work was being done on the boat. The sailor read a news report about the strike and immediately sent a letter to the builder stating, "I am very concerned that my boat will not be completed by December 15. I insist that you provide me with assurance that you will perform in accordance with the contract." The builder received the letter on the next day, November 1.

On November 25, the builder responded to the letter, stating, "I'm sorry about the strike, but it is really out of my hands. I hope we settle it soon so that we can get back to work."

Nothing further happened until December 3, when the builder called the sailor and said, "My workers are back, and I have two crews working overtime to finish your boat. Your boat is task one. Don't worry; we'll deliver your boat by December 15th." The sailor immediately replied, "I don't trust you. As far as I'm concerned, our contract is over. I am going to buy my boat from a shipyard." Two days later, the sailor entered into a contract with a competing manufacturer to buy a boat similar to the boat that was the subject of the contract with the builder.

The builder finished the boat on time and tendered it to the sailor on December 15. The sailor reminded the builder about the December 3 conversation in which the sailor had announced that "our contract is over," and refused to take the boat and pay for it.

The builder has sued the sailor for breach of contract.

1. What was the legal effect of the sailor's October 31 letter to the builder? Explain.
2. What was the legal effect of the builder's November 25 response to the sailor's October 31 letter? Explain.
3. What was the legal effect of the sailor's refusal to take and pay for the boat on December 15? Explain.

**MINNESOTA BAR EXAMINATION
FEBRUARY 2013
REPRESENTATIVE GOOD ANSWER
QUESTION 4**

1. The letter by the sailor on October 31st was a notice of anticipatory breach of contract, and a request for assurances. The contract between the builder and the sailor was validly entered into in January, and the time frame for performance was December 15th. Under normal contract law, the builder has until December 15th, the contract date, to perform on the contract.

The doctrine of anticipatory breach allows a party who can reasonably foresee a breach to demand assurances that that breach will not happen. This can be the result of a strike, such as the one at issue here, which would have the effect of forcing the other party to breach the contract. Because this breach is foreseeable, the party asking for assurances is allowed to give notice to the burdened party expressing their concerns for the performance of the contract and demand assurances. If assurances are not provided, the party anticipating the breach is entitled to mitigate the damages which may include terminating the contract and buying elsewhere.

In this case, the letter on October 31st after the builder's workers had been on strike since October 15th, gave the sailor reasonable doubt that the builder would be able to perform by December 15th as stated in the contract. Upon receipt of the letter, the builder had a duty to reasonably assure the sailor that he would fulfill the terms of the contract, and provide collateral, assuring the sailor that he would be able to perform.

2. The communication by the builder on November 25th did not adequately re-assure the sailor that there would be no breach of contract. The builder responded to the sailor, explaining that he was sorry about the strike, and that he hoped that it would settle soon so that they could get back to work. This letter did not adequately re-assure the sailor that the contract terms would be satisfied. At this point, the sailor had a right to mitigate his damages from the anticipatory breach, and would have been permitted to purchase another boat from a shipyard or competitor. This right lasted until December 3rd after which it lapsed.

The anticipatory breach was cured on December 3rd by the builder's assurances. On December 3rd the builder contacted the sailor and informed him that his workers were back, and that he would get the contract performed by December 15th, as per the contract. Because at this point the builder was paying his workers overtime, and he had put two crews onto the sailor's project to ensure that it would be done by the contract date, he has adequately assured the sailor that the contract would be performed. This served to cure the anticipatory breach, and cut off the sailor's ability to mitigate damages until after the contract. Therefore, the builder's right to mitigate damages by purchasing a boat from a third party in anticipatory breach lasted from a reasonable time after the builder had received his notice, until December 3rd. Thus

the sailor's contract with the builder's competitor was not an appropriate mitigation of damages.

3. The sailor's refusal to take the boat and render payment on December 15th was a breach of contract. On December 15th, the sailor refused to take the boat or render payment, referring builder to the December 3rd conversation that the contract was over. However, at this point the sailor had breached the contract because the builder has tendered performance by the contract date after assuring the sailor that it would be complete at least 11 days prior.

The builder is under a contract obligation to mitigate his losses by selling the boat to a third party. Because the boat was "specifically manufactured for the sailor" the builder will be limited to the difference between the contract price and what he actually obtains from a purchaser. This is because the boat is not one of many produced, it is unique, and as such the seller cannot show that a subsequent purchaser would have bought a copy anyway. Thus, the builder is required to sell his boat, and he may recover from the sailor the difference in price and any cost associated with selling the boat and mitigating his losses.

QUESTION #5

AutoCo is a privately owned corporation that manufactures automobiles. Ten years ago, AutoCo purchased a five-square-mile parcel of unincorporated land in a remote region of the state and built a large automobile assembly plant on the land. To attract workers to the remote location of the plant, AutoCo built apartment buildings and houses on the land and leased them to its employees. AutoCo owns and operates a commercial district with shops and streets open to the general public. AutoCo named the area Oakwood and provides security, fire protection, and sanitation services for Oakwood's residents. AutoCo also built, operates, and fully funds the only school in the region, which it makes available free of charge to the children of its employees.

A family recently moved to Oakwood. The father and mother work in AutoCo's plant, rent an apartment from AutoCo, and have enrolled their 10-year-old son in Oakwood's school. Every morning, the students are required to recite the Pledge of Allegiance while standing and saluting an American flag. With the approval of his parents, the son has politely but insistently refused to recite the Pledge and salute the flag at the school on the grounds that doing so violates his own political beliefs and the political beliefs of his family. As a result of his refusal to say the Pledge, the son has been expelled from the school.

To protest the school's actions, the father walked into the commercial district of Oakwood. While standing on a street corner, he handed out leaflets that contained a short essay critical of the school's Pledge of Allegiance policy. Some of the passersby who took the leaflets dropped them to the ground. An AutoCo security guard saw the litter, told the father that Oakwood's anti-litter rule prohibits leaflet distribution that results in littering, and directed him to cease distribution of the leaflets and leave the commercial district. When the father did not leave and continued to distribute the leaflets, the security guard called the state police, which sent officers who arrested the father for trespass.

1. Did the son's expulsion from the school violate the First Amendment as applied through the Fourteenth Amendment? Explain.
2. Did the father's arrest violate the First Amendment as applied through the Fourteenth Amendment? Explain.

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QUESTION 5**

Son's Expulsion:

The Son's expulsion from school violates the 1st Amendment of the Constitution as applied to the States by the 14th Amendment. The 1st Amendment of the Constitution provides for the freedom of speech from infringement by the government. The government generally may not regulate speech unless the regulation passes intermediate scrutiny, in that regulations of speech must be narrowly tailored to serve an important government interest. While the 1st Amendment only bars the Federal Government from taking actions, it is applied to the states under the 14th Amendment, and so the state is equally restrained. Not only does the 1st Amendment bar restrictions of speech, it bars compelled speech. This means that the government cannot force someone to make a statement orally or physically.

AutoCo is a privately owned corporation, and thus not the government. A violation of an individual's constitutional right generally can only be achieved by a state actor. However, AutoCo is most likely a state actor because it is acting as a company town. Case law has held that when a company performs almost all of the traditional roles of the government, they will be held to the same constitutional standards. AutoCo owned a large portion of land, supplied the jobs at the location, supplied the housing and the land, owned and operated the other commercial activities in the area, provided security, fire protection, sanitation services, and built and operated the only school in the area. This is more than sufficient to qualify AutoCo as a state actor, subject to the 1st Amendment.

The student was expelled for failing to recite the Pledge of Allegiance while standing and saluting an American flag. This is a violation of the freedom of speech, both as being compelled to speak orally and compelled to speak by the conduct of standing and saluting the flag. Generally, this is not allowed and would be a violation of the student's rights. However, schools are given certain latitude in the treatment of students to meet their educational needs. A school classroom is not a public forum and speech rights are limited. Despite this latitude, the school run by AutoCo probably overstepped its bounds by expelling the student for failure to speak. The student did not engage in other poor behavior or otherwise disrupt the school. Moreover, the student believes the requirement to recite the Pledge is a violation of his political beliefs. Political speech is one of the most protected kinds of speech and thus should not be deprived lightly. It may be significant that the student is only 10 years old, however, because of the rights of parents to raise their children, this most likely would not alter the result.

In summary, because the 1st Amendment bars the government from compelling speech, and because AutoCo is a state actor by running a company town, it was most likely a violation of the student's freedom of speech when he was expelled for not reciting the pledge.

Father's Arrest:

Additionally, the Father's 1st Amendment rights were possibly violated as well, but probably not because the regulation against leaflets may pass time, place and manner restrictions. A different standard is applied because he was engaging in speech activities in a public forum. Public forums are places that have traditionally been left open for speeches such as sidewalks and parks. In these places, the government may still regulate speech subject to time, place and manner restrictions. Under that test, the government (or state actor like a company town), may regulate speech so long as the regulation is narrowly tailored to serve an important governmental interest, other opportunities for speech are left open, and the regulations are content-neutral in that they do not prefer any specific preference concerning the message of the speech. The father was arrested by the state police for distributing leaflets (a form of speech) in a public forum, a street corner. Again, while technically the street corner is private property, it is most likely a public forum anyway because the owner is acting as a company town. Thus, the restriction must meet the above standard. The regulation banning the distribution of leaflets may meet the standard because it is to prevent littering, which is an important government interest. It is difficult to tell if this restriction is narrowly tailored from the facts. It is also unclear from the facts whether or not there are other opportunities to speak or if the regulation is content neutral. It may be that the regulation is not content neutral given the town's action of expelling the student for his failure to give the pledge. However, these are facts that would need to be determined in a lawsuit by the Father. It is important that the father was arrested for trespass rather than for violating a littering law. Because the town is opened to the public, the father probably was not trespassing and thus his rights may have been violated in that regard. Because a state officer arrested the father, the state may be a party to the father's action.

In summary, if the regulation does not meet the time, place and manner restrictions, the father's rights have been violated. If the regulation is adequate under the constitutional analysis, the father's rights have probably not been violated because he was arrested for breaking a law. Other concerns may be in play because the father was arrested for trespass and not under a littering law.

QUESTION #6

Mother and Son, who are both adults, are citizens and residents of State A. Mother owned an expensive luxury car valued in excess of \$100,000. Son borrowed Mother's car to drive to a store in State A. As Son approached a traffic light that had just turned yellow, he carefully braked and brought the car to a complete stop. Driver, who was following immediately behind him, failed to stop and rear-ended Mother's car, which was damaged beyond repair. Son was seriously injured. Driver is a citizen of State B.

Son sued Driver in the United States District Court for the District of State A, alleging that she was negligent in the operation of her vehicle. Son sought damages in excess of \$75,000 for his personal injuries, exclusive of costs and interest. In her answer, Driver alleged that Son was contributorily negligent in the operation of Mother's car. She further alleged that the brake lights on Mother's car were burned out and that Mother's negligent failure to properly maintain the car was a contributing cause of the accident.

Following a trial on the merits in Son's case against Driver, the jury answered the following special interrogatories:

Do you find that Driver was negligent in the operation of her vehicle? Yes.

Do you find that Son was negligent in the operation of Mother's car? No.

Do you find that Mother negligently failed to ensure that the brake lights on her car were in proper working order? Yes.

The judge then entered a judgment in favor of Son against Driver. Driver did not appeal.

Two months later, Mother sued Driver in the United States District Court for the District of State A, alleging that Driver's negligence in the operation of her vehicle destroyed Mother's luxury car. Mother sought damages in excess of \$75,000, exclusive of costs and interest.

State A follows the same preclusion principles that federal courts follow in federal-question cases.

1. Is Mother's claim against Driver barred by the judgment in *Son v. Driver*? Explain.
2. Does the jury's conclusion in *Son v. Driver* that Mother had negligently failed to maintain the brake lights on her car preclude Mother from litigating that issue in her subsequent suit against Driver? Explain.
3. Does the jury's conclusion in *Son v. Driver* that Driver was negligent preclude Driver from litigating that issue in the *Mother v. Driver* lawsuit? Explain.

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QUESTION 6**

Mother's Claim Against Driver is NOT Barred by the Previous Judgment

Mother's claim against Driver is not barred by the judgment in *Son v. Driver*, federal claim preclusion does not apply.

As a preliminary point, Mother's claim did not constitute a compulsory counterclaim in the first action, which would have been waived had she not brought it in the first action. A compulsory counterclaim is one that must be asserted by the defendant against the plaintiff in the suit that arises from the same transaction or occurrence at issue. Because Mother was not a party to the first suit, her claim does not constitute a waivable compulsory counterclaim.

Federal claim preclusion prohibits a party from bringing a claim that has previously been adjudicated if the subsequent action 1) involves the same parties; 2) involves essentially the same claim as was previously brought into court (actual litigation on the merits is not required – i.e. a dismissal not on the merits is sufficient to satisfy this requirement because the claim was nevertheless brought into court); and 3) a final judgment on the claim by a court with jurisdiction (again, not necessarily litigated on the merits). Claim preclusion does not bar Mother's claim because she was not a party in the previous lawsuit, her adult son was.

The Jury's Conclusion that Mother had Negligently Failed to Maintain the Brake Lights DOES Preclude Mother From Litigating the Issue – IF DRIVER ASSERTS ISSUE PRECLUSION

Federal Issue Preclusion, a stricter test than claim preclusion, prohibits subsequent litigation of an issue previously adjudicated provided 1) the issue was *actually litigated* (i.e. adjudicated on the merits); 2) by a court with jurisdiction; and 3) at least one party is common to both the first suit and the subsequent suit. The facts establish that the issues in *Son v. Driver* were adjudicated on the merits after actual litigation (a jury made the findings of fact), and the facts further indicate that the court has jurisdiction. The federal court had subject matter jurisdiction over the claim via diversity jurisdiction – the parties were citizens of different states, and the amount in controversy exceeded \$75K. Further, the court had personal jurisdiction over the defendant because his contract with State A gave rise to the suit (specific jurisdiction), and jurisdiction does not offend traditional notions of fair play and substantial justice. That leaves the issue of mutuality of the parties.

In many states, the traditional requirement of mutuality (i.e. the requirement that, like claim preclusion, the parties both participated in the original suit that decided the issue) has been abandoned in favor of two non-mutuality standards: offensive and defensive issue preclusion. In defensive issue preclusion, a defendant in the present suit who was a party to the previous suit in which the issue was decided (in this case, Driver)

may assert issue preclusion against the plaintiff, who was not a party to the original suit. In this case, Driver participated in a suit in which the issue of Mother's negligence was adjudicated by a jury. As a result, defensive issue preclusion allows him to assert this issue and relieves him of the duty to litigate the issue once again.

The Jury's Conclusion that Driver was Negligent DOES NOT PRECLUDE Drive from litigating that issue in the Mother v. Driver Suit

Unlike the previous issue, Driver is not precluded from litigating this issue, and Mother cannot rely on the previous adjudication of the issue. In offensive issue preclusion, the plaintiff is not a party to the original suit and asserts a previously adjudicated issue against the defendant, who was a party to the original suit. Generally speaking, offensive issue preclusion is not permitted, primarily because it seems unjust to allow a plaintiff who was not a party to the original litigation to prove her claims against a defendant without additional litigation. The plaintiff, Mother, brought the suit and therefore she cannot be relieved of her burden of proof.

QUESTION #7

A woman who owns a motorized scooter brought her scooter to a mechanic for routine maintenance service. As part of the maintenance service, the mechanic inspected the braking system on the scooter. As soon as the mechanic finished inspecting and servicing the scooter, he sent the woman a text message to her cell phone that read, "Just finished your service. When you pick up your scooter, you need to schedule a follow-up brake repair. We'll order the parts."

The woman read the mechanic's text message and returned the next day to pick up her scooter. As the woman was wheeling her scooter out of the shop, she saw the mechanic working nearby and asked, "Is my scooter safe to ride for a while?" The mechanic responded by giving her a thumbs-up. The woman waved and rode away on the scooter.

One week later, while the woman was riding her scooter, a pedestrian stepped off the curb into a crosswalk and the woman collided with him, causing the pedestrian severe injuries. The woman had not had the scooter's brakes repaired before the accident.

The pedestrian has sued the woman for damages for his injuries resulting from the accident. The pedestrian has alleged that (1) the woman lost control of the scooter due to its defective brakes, (2) the woman knew that the brakes needed repair, and (3) it was negligent for the woman to ride the scooter knowing that its brakes needed to be repaired.

The woman claims that the brakes on the scooter worked perfectly and that the accident happened because the pedestrian stepped into the crosswalk without looking and the woman had no time to stop. The woman, the pedestrian, and the mechanic will testify at the upcoming trial.

The pedestrian has proffered an authenticated copy of the mechanic's text message to the woman.

The woman plans to testify that she asked the mechanic, "Is my scooter safe to ride for a while?" and that he gave her a thumbs-up in response.

The evidence rules in this jurisdiction are identical to the Federal Rules of Evidence.

Analyze whether each of these items of evidence is relevant and admissible at trial:

1. The authenticated copy of the mechanic's text message;
2. The woman's testimony that she asked the mechanic, "Is my scooter safe to ride for a while?"; and
3. The woman's testimony describing the mechanic's thumbs-up.

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QUESTION 7**

Relevant evidence is evidence offered which, if accepted, tends to make the existence or non-existence of a material fact more or less likely than without the evidence. This is a very easy threshold to meet. Additionally if found to be relevant, the evidence may be excluded if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

Relevant evidence may also be excluded if it is hearsay and does not fit into any hearsay exceptions. Hearsay is an out-of-court statement made by a declarant which is being offered to prove the truth of the matter asserted. A statement can be actual words or a writing, as well as conduct meant to communicate a message.

Pedestrian (“P”) v. (“W”)

1. The pedestrian plans to introduce the authenticated copy of the text message. The text message stated “Just finished your service. When you pick up your scooter, you need to schedule a follow-up brake repair. We’ll order the part.” This is relevant as it makes P claim that the woman knew about the brakes more likely. It is also an out-of-court statement being offered to prove the truth of the matter asserted; namely that W in fact knew that the brakes were faulty. Since it is hearsay, it must be excluded unless it falls into an exception. Here it might be admitted as a business record. It states that the copy has been authenticated. Then P could call the person from the phone company who authenticated the record to testify that authentication of text messages is a regularly conducted business procedure and that those procedures were in fact used in authenticating this particular message. It is also necessary that the person who authenticated the message was under a duty to do so. If P can establish this, the authenticated copy of the text message is relevant and admissible. It may also be accepted under the best evidence rule since providing a copy of the text is much more reliable than stating or reading it. The fact that the copy is certified adds to its creditability.
2. The W’s statement “Is my scooter safe to ride for a while?” is relevant because it goes to her knowledge as to the condition of the scooter. Admissions of party opponents, even if made out of court and offered to prove the truth of the matter asserted are not considered hearsay. Here, W is a party to the action, so her statement is admissible as an admission of a party opponent.
3. The woman’s testimony that the mechanic gave her a thumbs up is admissible. It is relevant because it makes W’s knowledge of the condition of the scooter more or less likely. Also, technically this is conduct meant to communicate a message. It is made out of court, but is not offered to prove the truth of the matter asserted, rather it is being offered to show the effect on the listener. In this case, W interpreted the mechanics thumbs up as an affirmative response to her question about whether or not the scooter was safe to drive. Thus it is technically not hearsay and will be admissible.

QUESTION #8

While driving her car, Plaintiff collided with Other Driver. Plaintiff retained lawyer Able to bring a negligence action for damages against Other Driver. Able filed the complaint on August 1.

After the complaint was filed, Able received a call from a lawyer named Baker, who reported that Baker's client, Ted, was a pedestrian who had fractured a lower vertebra while jumping out of the way to avoid being hit by Plaintiff's car during her collision with the Other Driver. Baker said he had just filed a negligence claim on Ted's behalf against Plaintiff.

Two months earlier, on June 1, Ted had been arrested for burglary, and hired Able to represent him. In the course of that representation, Ted told Able that he had broken a lower vertebra jumping from the victim's window.

Ted terminated his relationship with Able after Ted pled guilty to a lesser charge and was placed on probation. Two weeks before Plaintiff's accident, Ted was sentenced to probation.

Able told Baker that Ted's claim was frivolous, because Able knew Ted's back injury was pre-existing.

Able then called Ted and told him that if Ted persisted in his suit against Plaintiff, Able would expose Ted as a fraud.

Analyze and discuss all arguments that can be made that Able has violated the rules of professional conduct.

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QUESTION 8**

1. Able's first violation is that he breached his duty of confidentiality with Ted. An attorney has a duty to not reveal any information obtained during the course of his/her representation, subject to a few limited exceptions. The duty of confidentiality survives the lawyer-client relationship and even survives death. While the attorney-client privilege is limited to a confidential communication made between the lawyer and client for the purpose of receiving legal advice, the duty of confidentiality is much broader. Additionally, while a lawyer may be compelled to reveal information protected under the duty of confidentiality, he cannot be compelled to reveal information that is privileged.

Here, Able formerly represented Ted. During the course of his representation, Able received information relating to Ted's crime and the injuries he sustained from that crime. When Able told Baker that he knew Ted's back injury was pre-existing, he revealed information that was obtained during the course of his representation.

However, Able may argue that he has the discretion to reveal this information when he knows that the client is engaging or attempting to engage in criminal conduct or fraud that may have a detrimental effect on another person or another person's property or financial interest. Here, Able may claim that he is revealing this information to Baker to encourage Baker to counsel Ted out of continuing in this lawsuit because he knows the claims are false. Able may also claim that he provided Baker with the information so Baker could protect himself about a possible violation for filing a frivolous claim.

2. Able's second violation is that he communicated with a represented party. Under the rules of professional conduct, an attorney may not communicate with a party who has obtained representation. The rules impose this to prevent an attorney from exerting undue influence or pressure on an opposing party without the protection of their attorney. There is a lot of room for an attorney to abuse their knowledge and skill in the law to influence an opposing party to engage in a course of conduct that may not be in his/her best interest. Here, even though Able formerly represented Ted, Ted is now the client of another attorney Baker. Furthermore, Ted has filed a suit against Able's client, so their interests are directly adverse to each other. More importantly, when he did speak with Ted, he threatened to expose him as a fraud. This is exactly the type of abuse that this rule of professional conduct seeks to avoid. Able is using his legal expertise to threaten and influence Ted. Even though morally Able is doing the right thing, it is violative of the ethical rules. For these reasons, Able has likely violated the rules of professional conduct by communicating with a represented party.
3. Able's third violation may be the conflict of interest involving his former client. There is a conflict of interest when an attorney represents a client who has a claim that involves a former client of the attorney. The conflict of interest exists when the

party's claims are directly adverse to each other, the attorney would be materially limited in providing competent representation to his existing client, and the attorney obtained information in the course of his representation of his former client that he could now use against the former client. An attorney may be able to continue representation if he reasonably believes he can competently and diligently represent the interests of the parties, inform the parties of the conflict, and receive written consent to continue with the representation. If an attorney is unable to do so, he must withdraw from the representation.

In this case, Able's former client, Ted, and current client, Plaintiff, are directly adverse to each other. This conflict will materially affect Able's duty to remain loyal to both clients. Additionally, Able has obtained information from Ted during the course of his representation of him in his criminal action that will affect his ability to represent Plaintiff in the present action. Able knows that Ted has a pre-existing back injury and that he may be filing suit to recover damages from the injury since he received it while committing a burglary and will not receive compensatory damages from the state.

Indeed, Able has already confronted Ted with this information. And not only has he confronted Ted, he has threatened Ted. It is unlikely the emotions that Able is feeling would allow one to reasonably conclude that he could adequately and competently represent Plaintiff in Ted's action against him. Furthermore, it is unlikely that Ted will give Able continued permission to represent Plaintiff. This permission should usually be obtained after the parties have had an opportunity to consult with outside counsel and it would be unlikely that Baker would allow Ted to consent to this representation.

Therefore, Able should have withdrawn from his representation in Ted's action against Plaintiff. For these reasons, it is likely that Able violated the rule against conflicts of interest with a former client.