MPT 1
FEBRUARY 2016

In re Anderson (MPT-1)

Examinees' law firm represents Nicole Anderson, a residential landlord in Lafayette, Franklin. Anderson seeks legal advice regarding a workers' compensation claim that has just been filed against her by Rick Greer, a handyman Anderson retained to perform general maintenance and repair work on the 11 single-family homes that she rents out. Greer fell off a ladder and broke his arm while he was painting the exterior of one of Anderson's houses. Anderson did not maintain workers' compensation insurance coverage because she did not believe she was required to insure Greer against injury. If Greer is found to be Anderson's employee, she could face substantial personal liability as well as penalties under the Workers' Compensation Act for failing to provide this coverage. However, if Greer was an independent contractor at the time that he was injured, he is not covered by the protections of the Workers' Compensation Act. Examinees' task is to draft an objective memorandum analyzing whether Greer would likely be considered an employee of Anderson or an independent contractor under the applicable statutory provisions and case law. The File contains the instructional memo from the supervising attorney, a transcript of a client interview, an email exchange between Anderson and Greer, and a copy of the workers' compensation claim submitted by Greer to Anderson for processing. The Library contains excerpts from the Franklin Labor Code and two Franklin cases.

MINNESOTA BAR EXAMINATION
FEBRUARY 2016
REPRESENTATIVE GOOD ANSWER
MPT 1

Memorandum

TO: David Lawrence
FROM: Examinee
Date: February 23, 2016
RE: Worker's Compensation Claim

Short Answer:

Mr. Greer is an independent contractor under the three tests used by the Franklin courts in interpreting the Franklin Workers' Compensation Act.

Issue:

Whether Rick Greer ("Mr. Greer") would be considered an employee of Nicole Anderson ("Ms. Anderson") or an independent contractor under the applicable worker's compensation statutory provisions and case law.

Analysis:

Under the Franklin Labor Code (the "Code"), § 251 defines employees as "every person in the service of an employer under any appointment or contract of hire, whether express or implied, oral or written." An independent contractor is defined under § 253 as "any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." § 280 of the Code states that the provisions of the Code "shall be liberally construed by the courts" and, under § 705 the employer has the burden of proof to establish that a supposed employee is actually an independent contractor.

The principal test to determine whether a person is an independent contractor or an employee is the "right of control" test. *Robbins v. Workers' Compensation Appeals Board* (Fr. Ct. App. 2007). The test looks to "whether the person to whom service is rendered has the 'right to control' the manner and means of accomplishing the result

desired. *Id.* It is the existence of this control and not the extent to which it is exercised that is important. *Id.* This test is not exclusive, however. The courts will also consider the eight *Doyle* factors and public policy considerations to determine the relationship between the plaintiff and defendant.

Right of Control Test

The Right of Control Test looks at whether the alleged employer maintained and exercised "pervasive control over the operation as a whole," *Doyle v. Workers' Compensation Appeals Board* (Fr. Sup. Ct. 1991), and whether the alleged employee's work "was an integral component" of the alleged employer's operations. *Robbins*. Three cases illustrate the distinction between the control exercised over an employee and the control exercised over an independent contractor.

In *Doyle*, the court held that the alleged employees were in fact employees because all meaningful aspects of the relationship were controlled by the defendant employer and not the employees. The defendant, Doyle, ran a growing and harvesting business and directed his employees on issues of price, crop cultivation, fertilization, insect prevention, payment and the right to deal with buyers. The only discretion and control the employees had over their jobs was determining which plants were ready to pick and which plants to weed. Thus, the court held that the defendant had the pervasive control over his employees conduct to be liable to them as their employer for worker's compensation claims.

Similarly, in *Harris v. Workers' Compensation Appeals Board*, (Fr. Ct. App. 2003), the court found that a country club was the employer of the plaintiff golf caddy even though the country club did not exercise total control over the caddy. In *Harris*, the court held that while "a person who engages an independent contractor to perform a job for him or her may retain broad general power of supervision and control as to the results of the work so as to ensure satisfactory performance of the contract," the country club's control over determining which assignments the caddy performed based on the caddy's skills and the caddy's importance to the club's business, was sufficient control to establish an employer-employee relationship.

Compare the control exercised in *Doyle* and *Harris* to the control exercised in Robbins where no employee-employer relationship was found. In *Robbins*, the plaintiff filed a workman's compensation claim for injuries sustained while trimming the bushes of defendant's diner. While the defendant told the plaintiff what to do, the court found that because the plaintiff brought all of the equipment he needed to do the job, arrived in his

own truck, and was not told how to do the job or when to do it, the plaintiff was an independent contractor and not an employee. The court noted that in this case, unlike *Doyle*, the defendant did not control the means and manner in which the trimming services by the plaintiff were provided, while in Doyle, the defendant controlled his unskilled employee-laborers. In *Robbins*, the defendant "did not have the right to control" the plaintiff's work.

Ms. Anderson's case is more similar to *Robbins* than either *Doyle* or *Harris*. Like in *Robbins*, Mr. Greer exercised control over his own performance rather than being controlled by Ms. Anderson. Ms. Anderson engaged Mr. Greer to provide maintenance to her eleven rental properties throughout Franklin. While she directs some control over Mr. Greer in terms of what fixtures to install, what paint to use or a checklist for inspections, Mr. Greer is responsible for the performance and uses his skilled discretion to complete the work. This is similar to the defendant in *Robbins* who engaged a contractor to perform yardwork. In that case, the plaintiff was engaged to produce the result of trimming the bushes and the defendant did not have the power to control the manner or means of accomplishing the trimming. In the present case, Mr. Greer was engaged to produce the result of painting the rental property on Clover Circle in a way Ms. Anderson wanted, but Mr. Greer was responsible for the manner or means of accomplishing the painting. In addition, in their past engagements, Mr. Greer was responsible for the manner and means of accomplishing the tasks Ms. Anderson wanted accomplished. Mr. Greer had the discretion as to when to complete many of the tasks. In none of the tasks that Ms. Anderson engaged Mr. Greer did she maintain or have the level of control that was seen in *Doyle* or *Harris*. In *Harris*, the country club exercised control over the plaintiff's "dress, his behavior, and the types of services he rendered..." and in *Doyle* the defendant controlled how the plants were grown and harvested. This level of control is not seen in the current case, and thus, under the Right of Control Test, Mr. Greer is an independent contractor and not an employee.

Doyle Factors

The Right of Control Test is not dispositive to whether an employee-employer relationship existed between Mr. Greer and Ms. Anderson. The court will also look to the secondary *Doyle* factors to determine whether an employee-employer relationship existed between the two. *Robbins*. There are eight *Doyle* factors but each is not to be "applied mechanically as separate tests but are intertwined, and their weight often depends on particular combinations of the factors." *Id*. The application of the factors is fact-specific and qualitative, rather than quantitative. *Id*. The eight factors are (1) whether the worker is engaged in a distinct occupation or an independently established business; (2) whether the worker or the principal supplies the tools or instrumentalities

used in the work, other than those customarily supplied by employees; (3) the method of payment, whether by time or by the job; (4) whether the work is part of the regular business of the principal; (5) whether the worker has a substantial investment in the worker's business other than personal services; (6) whether the worker hires employees to assist him; (7) whether the parties believe they are creating an employer- employee relationship; and (8) the degree of permanence of the working relationship.

1. Engaged in a distinct occupation or an independently established business

This factor, as its name suggests, looks to whether the plaintiff performs the work as part of an established business. The facts presented to us in this case suggest that Mr. Greer does engage in the services as part of an established, independent business. Ms. Anderson says she found out about Mr. Greer in the yellow pages in an advertisement for his company "Greer's Fix-Its." An employee would not advertise himself for services in the yellow pages under a trade name. Mr. Greer also referred to Ms. Anderson as a customer in the email correspondence between the two, suggesting that Mr. Greer saw Ms. Anderson as a customer to this independent business. This factor strongly suggests that Mr. Greer is an independent contractor

2. Supplying the tools or instrumentalities

This factor looks to whether the supposed employer supplies his own tools and whether the tools were something the defendant's business would normally have. In this case, as seen in the interview with Ms. Anderson, Mr. Greer supplied some of the tools, while Ms. Anderson occasionally provided paint and fixtures. While tools are commonly found in houses, it is not overwhelming evidence of an employee-employer relationship. This factor does not provided much evidence on either side.

3. Method of payment

This factor looks at whether the plaintiff was paid by the job or by the hour, and whether taxes were deducted or not. Here, the court looks to whether the plaintiff was paid in a manner evidencing an employer or independent contractor. In this case, Mr. Greer is paid by the project, sometimes calculated by the hour, other times calculated as a flat fee and Mr. Greer is guaranteed $250 a month, minimum.

4. Whether the work is part of the regular business

This factor looks to whether the work constitutes "a regular and integrated portion" of the defendant's business. *Robbins*. In this case, like in *Robbins*, maintenance, while important, is not an integral part of the business as growing crops was in *Doyle*. Rather, maintenance and other work provided by Mr. Greer is only occasional and discrete, like in *Robbins*. Ms. Anderson's business is the renting of housing properties. Mr. Greer is

involved in a separate, wholly-independent business of providing maintenance. This factor suggests no employee-employer relationship.

5. Substantial investment in the worker's business

Mr. Greer, like the plaintiff in *Robbins*, has put substantial investment into creating his own business. This is supported by his advertisements, his email, and the existence of a website. Mr. Greer also has his own truck with a built in toolbox as well as other tools such as ladders, which all suggest a substantial investment by Mr. Greer in his own independent business, providing additional weight to the argument that he is an independent contractor.

6. Whether the worker hires employers

There is no evidence of whether Mr. Greer hires additional employees, but this factor does not negate the overwhelming evidence that Mr. Greer is an independent contractor provided in the other factors.

7. Parties belief

Mr. Greer's emails suggest that he believes he is obtaining a new customer when he contracts with Ms. Anderson. His email directly states that Ms. Anderson is a customer and that he'll deal with her like he deals with his other customers. This provides strong evidence that Mr. Greer believes he is dealing with a customer and not an employer. Ms. Anderson also does not believe Mr. Greer is an employee as evidenced by her interview.

8. Permanence of the working relationship

Mr. Greer was engaged in a monthly contract with Ms. Anderson, however, there is nothing suggesting that either party was unable to terminate the agreement at will. While this relationship between the two was more permanent than the relationship between the plaintiff and defendant in *Robbins*, it is nothing like the clear employee-employer relationship found in *Harris* or *Doyle*. Additionally, the minor evidence supplied by this factor does not outweigh the evidence of the other factors.

Taken as a whole, the eight *Doyle* factors provide overwhelming evidence that Mr. Greer was an independent contractor and not an employee. The fact that he had his own business which he advertised and that he referred to Ms. Anderson as a customer greatly outweighs the limited evidence of an employee-employer relationship provided by the other factors - even though the statute is liberally construed.

Public Policy Considerations

The final thing the courts look to in determining the relationship between the parties is whether the statute was intended to protect the class of persons involved and whether there was a disparate strength of bargaining position. *Robbins*. In this case, the statute's purpose of protecting employers is not frustrated by finding Mr. Greer as an independent contractor as the evidence strongly suggests that at the time of their relationship, even Mr. Greer believed that he was involved in a separate business that engaged Ms. Anderson as a client. Additionally, there were no disparate bargaining positions as the two entered into a contract as two equal businesses and were free to start or end the business relationship as any time. Thus, no public policy considerations favor characterizing the relationship as an employer-employee relationship.

Conclusion

Based on the application of the three tests used by Franklin courts, Mr. Greer was an independent contractor at the time of his injury and not an employee of Ms. Andersons.

MPT 2
FEBRUARY 2016

Miller v. Trapp (MPT-2)
In this performance test item, examinees are associates at a law firm representing Katie Miller, a college student. Miller would like to pursue claims for civil assault and battery against musician Steve Trapp in connection with an incident that occurred after a concert by Trapp's band, the Revengers. Miller was injured when, after the concert, Trapp stormed offstage, punched a photographer, and then yelled at Miller and grabbed her upheld smartphone with such force that he dislocated her shoulder. Examinees have two tasks to complete: (1) draft a demand letter on behalf of Miller in anticipation of a lawsuit for assault and battery against Trapp, and (2) draft a brief memo to the partner setting forth an analysis and recommendation of the compensatory and punitive damages that Miller can reasonably and realistically expect to recover from Trapp at trial. The File contains an instructional memorandum from the assigning partner, the law firm's guidelines for drafting demand letters, an excerpt from Miller's blog RockNation, a magazine article about the incident at the concert, a file memorandum summarizing a phone conversation with Trapp's attorney, and summaries of Franklin jury verdicts in civil cases. The Library contains three Franklin cases.

MINNTESOTA BAR EXAMINATION
FEBRUARY 2016
REPRESENTATIVE GOOD ANSWER
MPT 2

Stuart, Parks & Howard LLC
Attorneys at Law
1500 Clark Street
Franklin City, Franklin 33007

February 23, 2016

Dear Mr. Leffler,

As we discussed yesterday, my firm represents Katie Miller in regards to her situation with your client, Steve Trapp. As I explained over the phone, your client faces significant liability for assault and battery of Ms. Miller. If we are unable to resolve this matter, my firm will not hesitate to file suit against Mr. Trapp.

Statement of Facts

We understand the facts of the situation to be as follows: On the evening of February 9, 2016, Ms. Miller attended a performance by Mr. Trapp's band, the Revengers, at the Franklin City Arena. Pursuant to her job with a college newspaper, Ms. Miller was scheduled to interview Mr. Trapp for her blog and had received clearance to await the end of the band's performance backstage. Ms. Miller was extremely excited to conduct the interview because she is a dedicated music fan and the Revengers are her favorite band.

After the end of the Revengers' set, Ms. Miller stood with a number of other journalists and photographers just offstage. As Mr. Trapp approached the group, a photographer, Nina Pender, stepped forward to take his picture. Mr. Trapp punched Ms. Pender in the face, and violently slammed her camera to the ground. Terrified, Ms. Miller, phone still in hand, ready to record her interview with her idol, stood frozen in place. Mr. Trapp then turned his violent temper on Ms. Miller, telling her "Get out of my way, you little punk, or I'll beat the hell out of you." Mr. Trapp then raised his arm to hit Ms. Miller, just as he had done to Ms. Pender only moments before. Mr. Trapp then seized Ms. Miller's

smartphone and pulled it out of her hand with such force and violence that he dislocated her shoulder. Mr. Trapp then smashed her smartphone on the ground.

Ms. Miller endured four hours of unbelievable pain before her shoulder was re- set. She has amassed significant medical bills, missed work and had to replace her phone.

Claims

At minimum, Mr. Trapp's actions expose him to liability for battery and assault.

Under Franklin law, an actor is subject to liability for battery when he acts intending to cause a harmful or offensive contact, or an imminent apprehension of such contact, and a harmful or offensive contact actually results. *Horton v. Suzuki.* As to the intent element, it is sufficient that the tortfeasor only intended to cause the contact; it is not required that the tortfeasor intended to cause the harm or offense that later resulted. *Id.* A sufficient "contact" can include a physical touching of the other person's body, or some item or article they are holding. *Polk v. Eugene.*

Mr. Trapp is liable to Ms. Miller for battery. Mr. Trapp clearly acted intentionally when grabbed Ms. Miller's phone and ripped it from her hand. Grabbing her phone was a sufficient contact for the tort of battery, and it caused her not only physical pain, and a dislocated shoulder, but fear, anguish and humiliation.

None of Mr. Trapp's purported defenses will be the least bit availing. Your contention that Mr. Trapp will escape liability because he supposedly did not intend to offend Ms. Miller is, frankly, not supported by the facts or the law. The law of Franklin is clear that our client need not prove that Mr. Trapp intended harm or offense - although were it otherwise, we would have no difficulty in doing so.

Additionally, your argument that Ms. Miller somehow consented to Mr. Trapp's brutal attack by waiting to interview him is likewise without merit. Consent is a defense to battery but, where it exists, the defense only applies within the reasonable scope of the consent given. *Horton v. Suzuki.* When a person consents to certain activities, an action that clearly exceeds that consent will still be actionable as a battery. Id. Here, if Ms. Miller did consent to a certain amount of "jostling" by joining the press backstage, that consent never included permission for Mr. Trapp to viciously attack her, harm her body, and destroy her property.

I will turn now to the matter of assault. An actor is liable for assault if he acts intending to cause a battery or imminent apprehension of a battery and the plaintiff is put in a well-founded apprehension of an imminent battery. *Brown v. Orr.* In general, threatening words alone are not enough to constitute an assault, but when combined with acts that corroborate the threat, they will be actionable. In this case, the threats Mr. Trapp shouted at Ms. Miller, namely to "Get the hell out of the way," calling her a "little punk" and expressly threatening to "beat the hell out of [her]" are enough to constitute an assault, particularly given that Mr. Trapp had just made good on an identical threat by violently attack Ms. Pender. Taken together, Ms. Miller had a well- founded fear that she would be Mr. Trapp's next victim - as she tragically was.

Damages

In light of the foregoing, your client faces significant liability. We are willing to forego litigation on this matter in lieu of a settlement of

_____

We await your prompt response. If you do not respond to this offer of settlement within 14 days of the above date, we will be forced to file suit against Mr. Trapp.

Sincerely,

Timothy Howard

Stuart, Parks & Howard LLC
Attorneys at Law
1500 Clark Street
Franklin City, Franklin 33007

MEMORANDUM

To: Timothy Howard, Partner
From: Examinee
Date: February 23, 2016
Re: Katie Miller

As requested, here is a brief memorandum detailing the damages that may be recoverable by Ms. Miller in her suit against Mr. Trapp, and recommendations for specific amounts of each category.

Compensatory Damages

When a plaintiff prevails on a claim for battery, the plaintiff is entitled to compensatory damages. Compensatory damages are mandatory, and may include medical expenses, lost wages, and damages for pain and suffering. Pain and suffering includes physical pain and mental suffering due to insult and indignity, hurt feelings and fright. Here is a summary of recent awards:

Cook v. Matthews Garage
Plaintiff awarded medical expenses of $10,000 and pain and suffering of $50,000 when defendant pushed him to the floor, broke his arm, and screamed at him.

Alma v. Burgess
Medical expenses of $100,000 and pain and suffering of $400,000 awarded where defendant attacked plaintiff at night and stabbed her, causing her to spend four days in a hospital.

Little v. Franklin Chargers, Inc.
Medical expenses of $12,000 and pain and suffering of $40,000 awarded where defendant team's mascot dislocated plaintiff's shoulder while attempting to engage plaintiff in a halftime activity.

In light of the foregoing, we should demand $5000 to cover Ms. Miller's medical bills, as well as $100 for her lost wages and $500 to cover replacing her phone. Additionally, we should demand $50,000 in pain and suffering given the physical pain she experienced, as well as the fear, humiliation and anguish she suffered by being attacked by a person she admired and respected. Total: $55,600.00.

Punitive Damages

Punitive damages are awarded on a purely discretionary basis. Courts require that they should not be so unrelated to injury and the compensatory damages awarded as to indicate that "passion and prejudice" motivated their award over reason and justice. The Supreme Court has indicated that punitive damages must be in a "single digit ratio" to the compensatory damages awarded.

Cook v. Matthews Garage
$300,000 in punitive damages where defendant shouted at plaintiff, threw him down and broke his arm after a confrontation about how the plaintiff's wife had been treated.

Alma v. Burgess
$1,000,000 in punitive damages awarded where the defendant stabbed and serious injured the plaintiff.

Little v. Franklin Chargers, Inc.
Punitive damages denied.

Polk v. Eugene
Punitive damages of three times the amount of compensatory damages allowed upheld as reasonable.

In light of the foregoing, I recommend that we demand $400,000 in punitive damages, given the violence to which Ms. Miller was subjected, her actual physical harm suffered, and her young age. This amount would be within the guidelines set by the Supreme Court.

Secured Transactions Question

Two years ago, a retailer of home electronic equipment borrowed $5 million from a finance company. The loan agreement, signed by both parties, provided that the retailer granted the finance company a security interest in all of the retailer's present and future inventory to secure the retailer's obligation to repay the loan. On the same day that it made the loan, the finance company filed in the appropriate state filing office a properly completed financing statement reflecting this transaction.

Six months ago, a buyer purchased a home entertainment system from the retailer for a total price of $7,000. The buyer paid $1,000 as a down payment on the system and agreed to make 12 additional monthly payments of $500 each. The buyer signed a "credit purchase agreement" memorializing the financial arrangement with the retailer and providing that the retailer would "retain title" to the entertainment system until the buyer's obligation to the retailer was paid in full. The buyer then returned home with her new home entertainment system. The buyer had no knowledge of the retailer's agreement with the finance company and acted in good faith in acquiring the home entertainment system. The retailer did not file a financing statement with respect to this transaction.

Two months ago, the buyer decided that she could no longer afford her monthly $500 payments for the home entertainment system. She contacted her friend, who had often expressed interest in acquiring a home entertainment system. After a brief discussion, the friend agreed to buy the home entertainment system from the buyer for $4,000 if the friend could pay the price 90 days later, when he anticipated receiving a bonus at work. The buyer accepted the friend's proposal, and the friend gave the buyer a check for $4,000. The buyer promised to hold the $4,000 check for 90 days before depositing it. The friend took the entertainment system and began using it at his own home. The friend had no knowledge of the buyer's agreement with the retailer or of the retailer's agreement with the finance company.

The retailer is in financial distress and has missed a payment owed to the finance company. Meanwhile, since the friend bought the home entertainment system from the buyer, the buyer has not made any of her monthly payments to the retailer.

1. Does the finance company have an interest in the home entertainment system? Explain.

2. Does the retailer have an interest in the home entertainment system? Explain.

3. Does the retailer have an interest in the $4,000 check? Explain.

MINNESOTA BAR EXAMINATION
FEBRUARY 2016
REPRESENTATIVE GOOD ANSWER
MEE 1

1. Does finance company have an interest in the home entertainment system?

A security interest arises when one party uses certain collateral in order to secure repayment of an obligation from another party. Attachment is the process by which a security agreement is created. Attachment occurs when the secured party gives value, the debtor has rights in the collateral, and a valid security agreement exists. A valid security agreement is (1) in writing, (2) authenticated by the debtor, (3) contains a granting clause indicating that a security agreement exists, and (4) contains a description of the collateral. A description of collateral in a security agreement is sufficient if it reasonably identifies what is being described. Perfection is the process by which a secured party gives notice to the entire world of its interest. Perfection is necessary for establishing priority. The most common method of perfections is filing a financing statement with an appropriate public office. Inventory is collateral that can be subject to a security interest. Inventory includes all goods that a company holds for sale to customers in its business. A buyer in the ordinary course of business takes the goods purchased free and clear of any interest the seller may have created. A buyer in the ordinary course of business is one that purchases consumer goods in good faith, without notice of any prior interest in the goods, and in the ordinary course of business from a seller that normally sells those types of goods.

Here, finance company loaned $5 million to Retailer. The loan agreement met all the necessary requirement for a valid security agreement: it (1) was in writing; (2) signed by the debtor; (3) contained a granting clause stating that retailer granted finance company a security interest; and (4) reasonably identified what was being described (all present and future inventory of Retailer). Retailer had rights in the collateral (all inventory) in that it was able to possess and sell the inventory. Finally, Finance company filed a financing statement with the appropriate office. Therefore, Finance Company had a perfected security interest in the home entertainment system at the time it was part of Retailer's inventory. However, Buyer purchased the home entertainment system from Retailer for use in his home. He had no knowledge of any prior interest in the system. Retailer was in the business of selling home electronic systems. Under these circumstances, Buyer took the system when he purchased it free and clear of any prior security interests since he was a buyer in the ordinary course of business.

Therefore, finance company no longer has an interest in the home entertainment system.

2. Does retailer have an interest in the home entertainment system.

The rules for creation and perfection of security interests have already been stated. Additionally, a purchase-money security interest (PMSI) is created when an interest in goods is incurred by the debtor in order to purchase the goods. In order to qualify as a PMSI the debtor must actually use the funds to purchase the goods. A PMSI for consumer-goods is perfected automatically upon the debtor taking possession of the goods. The "garage sale" exception applies when a person buys a consumer good face-to-face from another individual (such as when one buys from another person at a garage sale). Similarly to the buyer in the course of ordinary business, a "garage sale" buyer purchases free and clear from any previous interests in the item, so long as they buy in good-faith and without knowledge of the interest.

Here, Retailer sold buyer the home entertainment system for $7,000. Buyer paid $1,000 in cash and the rest of the payment was financed by Retailer. The buyer signed a financing agreement stating that Retailer would "retain title" to the system until his debt was fully paid. Thus, a PMSI was created when buyer purchased the system with funds that were loaned by Retailer in order for him to make the purchase. Buyer used the system for his own personal home use. Thus, the PMSI was perfected when he took possession of it. Buyer later sold to Friend, who purchased it from buyer face-to-face. Thus, Friend purchased the system free and clear of any prior security interests.

Therefore, Retailer no longer has an interest in the home entertainment system since Friend purchased it face-to-face from Buyer and did so in good faith.

3. Does retailer have an interest in the $4,000 check

A secured party's interest extends also to any proceeds from sale of the collateral. Proceeds include any payment or any goods the collateral might be exchanged or traded for.

Here, as already mentioned, Retailer had a perfected PMSI in the home entertainment system as to Buyer. Buyer sold it to Friend for $4,000. The $4,000 is considered as proceeds from sale of Retailer's collateral.

Therefore, retailer has a secured interest in the $4,000 check as it is proceeds from sale of the collateral in which it had a PMSI.

Evidence Question

A victim had just walked out of a jewelry store carrying a package containing a diamond bracelet when someone grabbed him from behind, put a gun to his back, and demanded the package. The victim handed the package over his shoulder to the robber. The robber said, "Close your eyes and count to 20. I'll be watching, and if you mess up, I'll shoot you." The victim did as he was told, and when he opened his eyes, the robber was gone. The victim immediately called 911 on his cell phone.

The victim did not see the robber. A witness on the other side of the street saw the entire encounter. While the victim was speaking to the 911 operator, the witness ran over to the victim and shouted, "Are you all right? I saw it all!"

A police officer arrived five minutes later and took a statement from the witness, who was wringing her hands and pacing. The police officer asked the witness, "What did you see?" The witness responded, "The robber is about six feet tall. He has brownish hair, almost buzzed to the scalp. He was wearing jeans and a blue jacket." The police officer called in the description to the police station.

The defendant, who is over six feet tall and has buzzed brown hair, was picked up 30 minutes later. When the police officer stopped him, he was six blocks from the scene of the robbery. The defendant was wearing jeans and a blue jacket but did not have a gun or the bracelet in his possession. He was brought to the police station for questioning and was placed in a lineup.

The police officer brought the witness to the police station to view the lineup. The witness viewed the lineup and identified the defendant as the robber. The defendant was arrested and charged with robbery.

One week after the robbery, the witness moved overseas. One year later, at the time of the defendant's trial, the witness could not be found.

The victim and the police officer both testified at trial for the prosecution. The police officer testified as follows:

> Question: When you arrived at the scene of the robbery, did you obtain a description of the robber?
>
> Answer: Yes. The witness said that the robber was about six feet tall, with very short, brownish hair, almost buzzed to the scalp, and that he was wearing jeans and a blue jacket.
>
> Question: Did you gather any other evidence indicating that the defendant committed this robbery?

Answer: Yes. When I was walking into the police station with the victim, we overheard the defendant in an adjoining room. As soon as the victim heard the defendant's voice, the victim said, "That's the voice of the guy who robbed me."

Question: What do you know about the defendant?

Answer: He's a known drug dealer who had been hanging around in the area where the jewelry store is located for six months before the robbery, constantly causing trouble.

The trial was held in a jurisdiction that has rules identical to the Federal Rules of Evidence. Defense counsel made timely objections to the admission of the following evidence:

(a) The police officer's testimony recounting the witness's statement at the scene.

(b) The police officer's testimony recounting the victim's statement while walking into the police station.

(c) The police officer's testimony that the defendant is a "known drug dealer who had been hanging around in the area where the jewelry store is located for six months before the robbery, constantly causing trouble."

The trial judge overruled all of defense counsel's objections.

Was this evidence properly admitted? Explain.

MINNESOTA BAR EXAMINATION
FEBRUARY 2016
REPRESENTATIVE GOOD ANSWER
MEE 2

1. The police officer's testimony recounting the witness's statement at the scene was properly admitted because it was an excited utterance and was non-testimonial.

There were two issues with the officer's testimony of the witness's description of the defendant that the court needed to rule upon to determine whether to admit this statement: (1) Whether the statement was hearsay; and (2) whether the statement was testimonial, thus requiring that the defendant be granted an opportunity to cross-examine the witness. As to (1), a statement is inadmissible if the statement is made out of court and offered for the truth of the matter asserted, unless an exception applies. This statement was made out of court by a now unavailable witness and appears to be offered for truth of the matter asserted, that is, to show that someone at the scene described the robber in a way that matched the description of the defendant. However, here the court could have reasonably found that the witness's statement falls under the excited utterance exception to the hearsay rule. This exception applies where the declarant's statement is made in a reactionary way close in time to an event that caused the declarant to become "excited." In this case, the facts state that the police officer arrived on the scene only five minutes after the robbery took place and that the witness was wringing her hands and pacing when he arrived, suggesting she was still "excited." Therefore, this statement was admissible under the excited utterance hearsay exception.

In addition to falling under the excited utterance hearsay exception, this statement should be found not to violate the defendant's Sixth Amendment right to confrontation because it was not testimonial. In a criminal trial where a witness is unavailable, a witness's statement to a police officer is not admissible if it is testimonial in nature. A statement is testimonial when it is made for the purpose of aiding an investigation into a crime or for helping officers or prosecutors build a case. However, a statement made to a police officer based on an ongoing threat to the safety of the declarant or the safety of others is not testimonial. Here, the witness is unavailable based on the fact she moved overseas one week after the robbery and could not be found for trial. Therefore, her statement must be non-testimonial to be admitted. The facts here indicate that the statement is non-testimonial. The officer arrived five minutes after the robbery took place and the robber at that point was still at large. Therefore, the court could have reasonably determined that the statement made by the witness to the officer was made for the purposes of apprehending an at-large suspect who still threatened

public safety, as opposed to simply helping the police officer build a case. The statement was therefore properly admitted.

2. The police officer's testimony regarding the victim's statement was properly admitted.

The officer's testimony regarding the victim's statement was admissible under the present sense impression hearsay exception. As noted above, hearsay is inadmissible absent an exception. This statement is hearsay because it is being offered for its truth - that the victim identified the defendant as the robber. The present sense impression exception allows a statement to be admitted if it gives the declarant's observation of something at the time it occurred. In this case, the officer is relaying the victim's impression that he has just heard the voice of the person who robbed him. Therefore, this is admissible as a present sense impression.

Additionally, the victim is available to testify and therefore could be cross-examined regarding this statement, which would eliminate any Sixth Amendment concerns.

3. The police officer's testimony regarding his knowledge of the defendant is admissible in part.

The police officer's testimony is admissible to the extent it does not introduce character evidence or prejudice the defendant. Applying this standard, only the officer's statement that the defendant "had been hanging around in the area where the jewelry store is located for six months before the robbery" would be admitted. Under the Federal Rules of Evidence, the general rule is evidence is admissible if it is relevant.
Evidence is relevant if it tends to prove or disprove any fact at issue in the case. However, this rule is subject to certain limitations. First, relevant evidence will not be admitted if its probative value (i.e. how helpful it is to prove or disprove a fact) is outweighed by the prejudice it causes to the defendant.

Under these rules, the officer's statement that the defendant "had been hanging around in the area where the jewelry store is located for six months before the robbery" is plainly admissible because it is relevant to show that the defendant had been frequently present in the area where the robbery occurred for six months before the robbery. On the other hand, the testimony that the defendant is a "known drug dealer" and was "constantly causing trouble," would be unduly prejudicial despite being marginally relevant. These latter two descriptions are also inadmissible character evidence. In a criminal case, the prosecution cannot attack a defendant's character unless the defendant brings his character into dispute. As the facts do not indicate that the

defendant had brought his character into issue, these statements would be inadmissible.

Agency & Partnership Question

Four years ago, a man and a woman properly formed a partnership to own and manage a multi-million-dollar apartment complex. They qualified the partnership as a limited liability partnership (LLP). The complex required a good deal of maintenance, and they anticipated regular borrowings of up to $25,000 to cover maintenance expenses as is customary in this industry.

While the partnership agreement contained no limitations on the authority of the partners to act for LLP, two months after LLP was formed the man and the woman agreed that neither partner would have authority to incur indebtedness on behalf of LLP in excess of $10,000 without the consent of the other partner. They then signed a statement of partnership authority describing this limitation, but this statement was never filed.

Over the next two years, the man regularly borrowed amounts from LLP's bank to cover the complex's ordinary maintenance expenses. The amounts borrowed ranged from $5,000 to $9,000, and the man did not ask for the woman's consent when he entered into these loans on behalf of LLP.

Earlier this year, the man, without the woman's knowledge, asked the bank to loan $25,000 to LLP. The man told the bank's loan officer that the funds would be used for ordinary maintenance of the apartment complex. This amount, though greater than LLP's previous borrowings from the bank for maintenance, was in line with loans made by the bank for maintenance to other similar apartment complexes.

When the loan officer asked the man if he had authority to borrow the money on behalf of LLP, the man handed the loan officer a copy of the partnership agreement. The man, however, did not give the officer a copy of the statement of partnership authority, nor did he tell the loan officer that it existed. The bank had no actual knowledge of the limitation on the man's authority to obtain the loan on behalf of LLP.

Without contacting the woman, the bank loaned $25,000 to LLP. The loan agreement was signed only by the man and the bank's loan officer. The woman, though she had knowledge of the earlier borrowings from the bank, had no knowledge of this loan.

The man then used the $25,000 to pay his personal gambling debts. LLP has not made any payments to the bank on the loan.

1. Is LLP liable to the bank on the loan? Explain.

2. Is the woman personally liable to the bank on the loan? Explain.

3. Is the man liable for breaching his fiduciary duties and, if so, to whom is he liable? Explain.

MINNESOTA BAR EXAMINATION
FEBRUARY 2016
REPRESENTATIVE GOOD ANSWER
MEE 3

1. The LLP is liable to the bank for the $25,000 loan.

The first issue is whether the entity is liability for debts incurred by partners. Partners are agents of the partnership, and therefore have the power to bind the partnership. In particular, partners can bind the partnership to debts incurred when the partners were acting pursuant to the partnership's authority. Authority can be actual or apparent. Actual authority exists where the principal (in this case, the partnership itself) directly authorizes the agent (the partner) to engage in a particular course of conduct. Apparent authority exists where the principal makes manifestations to a third party that the agent is authorized to act on its behalf. Additionally, where an agent acts beyond the scope of his authority, the principal may be estopped from disclaiming liability where the third party has reasonably relied upon the information and the reliance is detrimental.

Here, the man clearly exceeded the scope of his authority, because he violated the agreement he had with his other partner, the woman, not to borrow any sum in excess of $10,000 without securing her consent (even if the writing supporting this aspect of their agreement was never filed). The bank had no reason to know of this limitation, and the man actively withheld mentioning it to the bank. The man's omission is especially egregious given that the bank asked him directly if he had the authority to make the loan and he submitted the partnership agreement, which he knew to be incomplete, thus representing that the agreement constituted the basis of his valid authority. There were no surrounding facts that made the bank's acceptance of the man's response unreasonable - he had borrowed money before, and the sum borrowed here was not unusual when compared to other apartment complexes, even if it was much more than the parties had borrowed previously. Therefore the man presented sufficient evidence of his apparent authority such that the bank was justified in accepting and relying on it. Therefore the partnership is liable for the loan, or will be estopped from disclaiming liability.

2. Is the woman personally liable to the bank on the loan?

In general, partners in a limited liability partnership enjoy limited liability, and are not personally liable for debts incurred by the partnership. However, a court may "pierce the

veil" of limited liability when the partners abuse the entity's status in bad faith, for example by self-dealing or deliberately committing fraud.

Here, the woman would not be held personally liable for the $25,000 loan. The woman can argue that she did not know and had no reason to know of the man's actions, and this should serve as a valid defense. Additionally the woman can argue that she did not gain in any way from the man's loan, because all the money went to pay off his personal gambling debts, rather than benefitting the partnership. There is no indication of any conduct by the woman that would result in the veil being pierced.

3. a. The man has breached his fiduciary duty to the LLP.

Partners are fiduciaries of their partnerships, and owe their partnerships a duty of loyalty. The duty of loyalty includes a prohibition against self-dealing. A self-dealing transaction is one in which the partner gains personally to the detriment of the partnership. This duty also includes a general duty of good faith.

The $25,000 loan was a self-dealing transaction that violated the man's duty of loyalty to the partnership. As explained above, the man obtained the loan on behalf of the corporation by using false, if not fraudulent pretenses, because he seriously misrepresented his authority to borrow that much money. Additionally, the transaction was a self-dealing one because the man used the money to pay off his personal gambling debts, not to benefit the business of the partnership in any way. Finally, the man made the loan in violation of his understanding with his partner and in violation of their normal business practice, which violated the duty of good faith.

3.b.Because the man violated his duty of loyalty to the partnership, he is liable to the partnership and to the woman.

By violating the duties of loyalty and good faith, the man breached his fiduciary duties to the partnership. As explained above, he incurred a significant debt in the partnership's name, for which the partnership is now liable; furthermore, he has potentially exposed his partner to personal liability as well by engaging in a fraudulent transaction that may provoke a court to pierce the veil of limited liability. Therefore, he is liable to both the partnership as an entity and the woman as his partner.

Constitutional Law Question

State A, a leader in wind energy, recently enacted the "Green Energy Act" ("the Act").

Section 1 of the Act requires that 50% of the electricity sold by utilities in the state come from "environmentally friendly energy sources." Wind energy, which is produced in State A, is classified by the Act as an "environmentally friendly energy source." Natural gas, which is not produced in State A, is not classified by the Act as environmentally friendly. The preamble of the Act contains express findings that the burning of natural gas releases significant quantities of greenhouse gases into the atmosphere and requires the diversion of scarce water resources for use in gas-burning thermoelectric plants.

Section 2 of the Act prohibits the Public Service Commission of State A from approving any new coal-burning power plants in the state, unless it finds that "the construction of the plant is necessary to meet urgent energy needs of this state." A public utility in neighboring State B has applied for a permit to build a coal-burning power plant on property it owns across the border in State A. The Commission has denied the utility's application based on its finding that there is no evidence of any urgent energy needs in State A. The State B utility presented undisputed evidence of severe energy shortages in State B, but the Commission rejected this evidence as irrelevant to the statutory exception.

Section 3 of the Act requires State A, whenever possible, to buy goods and services only from "environmentally friendly vendors located within the state." To qualify as an "environmentally friendly vendor," a firm must meet specified standards concerning energy efficiency, chemical use, and use of recycled materials. A vendor located outside of State A meets all the standards to qualify as an environmentally friendly vendor. The vendor has sought to sell goods and services to State A. The relevant State A agencies have refused to purchase from this vendor, pointing out that the Act requires them to purchase, if possible, only from "environmentally friendly vendors located within the state," of which there are several.

There is no federal statute or regulation relevant to this problem.

Which provisions, if any, of the Green Energy Act unconstitutionally burden or discriminate against interstate commerce? Explain.

MINNESOTA BAR EXAMINATION
FEBRUARY 2016
REPRESENTATIVE GOOD ANSWER
MEE 4

In order to determine which provisions of the Act unconstitutionally burden or discriminate against interstate commerce, let us look at each provision individually.

The first provision requires half of the energy in the state to come from environmentally friendly energy sources. This provision is valid in the sense that the state is not facially discriminating against out of state companies in this provision. Since there is no preemption from Congress in this scenario, the state is allowed to require its own utility companies to produce 50% of the electricity sold in the state from environmentally friendly sources. The fact that the state produces wind energy, which is classified as enviro friendly, and not natural gas, which is not enviro friendly, is not dispositive of an intent to discriminate against out of state energy producers. The state is allowed to specifically classify natural gas as not enviro friendly, in the sense that states are allowed to enact more stringent environmental protection regulations than the federal government has instituted, if they see fit. Also, the state is still allowing the utilities to produce electricity from these non-friendly sources, they are just putting a cap on the amount they can produce from these sources, which does not close the marketplace. Also, the state has provided a legitimate interest in discriminating against natural gas plants, in that they have been found to divert scarce water resources, which the state has a strong interest in protecting.

The second provision prohibits the Public Service Commission from approving any new coal-burning plants, unless there is a finding that the construction is necessary to meet urgent energy needs of the state. Here, we see that the statute is being challenged as applied, by a utility in State B, seeking to build a coal-plant in State A to provide for an energy shortage in State B. Again, the general rule is that states may enact more stringent pollution requirements than the federal government, and this potentially falls under that allowance, if the restriction is sought to reduce air emissions from the coal-plants. A court may find, however, that this is an invalid restraint on interstate commerce, in that State B has shown an extreme energy shortage. Generally, states may not discriminate against out of state actors, unless the state is acting as a market participant. Here, the state is not a market participant, and thus cannot discriminate against the State B plant. Further, states are generally restricted in how they can restrict a neighboring state's important duties, including removing nuclear waste, and providing energy resources.

The third provision requires State A to buy, when possible, goods and services only form enviro friendly vendors located within the state. Here, the state refuses to buy from an out of state vendor who meets the requirements under the provision as enviro friendly. The state is acting as a market participant in this scenario, since they are buying goods and services from vendors, and since there is a "state as a market participant exception" to rules against states discriminating against out of state actors, the state may validly refuse to purchase from this particular vendor, especially since there are several similar vendors within the state meeting the requirements.

Decedents' Estates Question

Last year, a patient, age 80, was diagnosed with cancer. Shortly after receiving the cancer diagnosis, the patient signed a durable health-care power of attorney (POA) designating her son as her "agent to make all health-care decisions on my behalf when I lack capacity to make them myself." The POA contained no other provisions relevant to the commencement or duration of the agent's authority. The patient thereafter underwent several cancer therapies which were so successful that, two months ago, the patient's doctor said that, in his opinion, the patient's cancer was in "complete remission."

Last week, the patient was struck by an automobile, suffered serious injuries to her head and neck, and underwent emergency surgery for those injuries. Following surgery, the patient's doctor explained to her son that there was a more than 50% risk that the patient would not regain consciousness and would need to be maintained on life-support systems to provide her with food, hydration, and respiration. The doctor also noted that, during the next few days, there was a large risk of a stroke or cardiac arrest, which would substantially increase the risk that the patient would never regain consciousness, and which could be fatal.

The patient's son was confident that his mother would not want to be kept on life support if she were permanently unconscious but believed that she would want to be maintained on life support until her status was clear. He thus instructed the doctor to put the patient on life support but not to resuscitate her if she were to experience a stroke or cardiac arrest. The son issued these instructions after conferring with the doctor and with his two sisters. The sisters disagreed with their brother's decision and told the doctor to ignore the instructions "because we have as much right to say what happens to Mom as he does, and we want her resuscitated in all events." Nonetheless, the doctor thereafter placed a "do not resuscitate" (DNR) order in the patient's chart.

Four days ago, the patient, who had not regained consciousness, suffered a cardiac arrest. Following the DNR order, the nursing staff did not attempt to resuscitate the patient, and she died.

The patient's valid will devised her estate to her three children in equal shares. All three children survived the patient.

This jurisdiction has a typical statute authorizing durable health-care powers of attorney. This jurisdiction also has a statute providing that "[n]o person shall share in the estate of a decedent when he or she intentionally caused the decedent's death."

The patient's two daughters have consulted an attorney, who has advised them that (1) the patient's son had no authority to instruct the doctor to write the DNR order; (2) in a wrongful death action, the son would be liable for the patient's death; and (3) the son is barred from taking under the patient's will because his actions intentionally caused her death.

Is the attorney correct? Explain.

MINNESOTA BAR EXAMINATION
FEBRUARY 2016
REPRESENTATIVE GOOD ANSWER
MEE 5

The attorney is incorrect on all three issues.

First, the son's durable health-care power of attorney (POA) remained in effect even after she recovered from her cancer treatment and gave her son the power to act in the way that he did. Without being revoked, it remains in effect until the principal's death. A POA gives the designated agent the power to act on behalf of the principal. The agent is required to act in good faith, meaning act as he or she believes the principal would want him or her to act (essentially try to make the same decision the principal would make) and to make decisions based on the principal's will and not out of any self-interest. To be valid, the POA must be made when the principal is competent and there must not be indicia of fraud, duress, etc.

In this case, the POA appears to have been made validly. The woman appears to have been competent when assigning her son as the POA and there is no indicia of fraud. Since the POA did not contain any provisions saying that the POA was revoked if she recovered from her cancer treatments, the POA remains valid until revoked. There is nothing in the facts suggesting that the POA was revoked; thus, it is still in effect and valid. It appears that the son executed his powers under the POA in good faith and attempted to adhere to the wishes of the principal. He discussed his mother's situation with the doctor and discussed the situation with his siblings. He also made sure that his mother was given a chance for a full recovery. The facts suggest that the son was confident of his mother's wishes, and the facts do not give any indicia that his confidence was based on negligently or recklessly based conclusions or that there was any improper motive. Thus, because a DNR order falls under the powers of a properly designated POA and there is nothing to indicate that the son's powers were exercised improperly, the son had the authority. If the state was a state that did not allow DNR orders to be made by the POA but instead required them to be made while the principal was still alive, then the sisters may have an argument that the son exceeded the scope of his powers under the POA. In that case, the attorney would have been correct in saying the son had no authority because then he would have done something that the POA was not allowed to do. But because the facts do not indicate that this is the case, the son had the authority.

Thus, the attorney was incorrect when providing advice to the sisters regarding the son's authority on the matter.

The attorney is also incorrect in his second conclusion. If the son's sister's brought a wrongful death action against the brother, they would not be successful. The son would not be liable in a wrongful death action. In a wrongful death action, the surviving issues or parent may bring action against a party whose actions ended up causing the death of the person the wrongful death action is brought on behalf. The suing parties may sue for damages that result from the wrongful death.

However, in order to bring about a wrongful death action, the death must have been caused by something wrong. In this case, nothing wrong happened. The son properly executed the powers his mother gave him under the POA and there was no sign of any wrong doing. A DNR order is a valid order to have in many jurisdictions, and thus, because nothing in the facts suggest that the jurisdiction doesn't allow DNRs the son's act of placing the DNR did not lead to a wrongful death.

Finally, the son is not barred from taking under his mother's will. At issue is whether the son intentionally caused the decedent's death, as defined under the applicable state statute, in a way that would preclude taking under the will. Statutes preventing will beneficiaries from receiving the benefits provided for them are passed to prevent will beneficiaries from killing beneficiaries to take under the will sooner than they should. Generally, these statutes are enforced against people who murder their parents to get at their inheritances. These laws are not applied to situations where the will beneficiary was given the power of attorney and made the difficult decision of placing a DNR on his mother. Additionally, laws allowing DNRs do not make those who order the DNR or follow the DNR liable for murder or intentionally causing a decedent's death even if the DNR was improperly invoked or authorized as long as the person authorizing the DNR or following the DNR did so in good faith. Here the son believed (and rightly so) that he had the authority to make the decision to place a DNR based on the POA. The doctor reasonably relied on the son's authority and allowed the DNR to be placed and the nurses, believing in good faith that everything was right with the DNR followed its instructions. Thus, there is no way for the son to be disinherited because of the state's disinheritance statute, making the attorney incorrect, again.

Family Law Question

Eight years ago, a woman and a man began living together. The woman worked as an investment banker, and the man worked part-time as a bartender while he struggled to write his first novel. The couple lived in a condominium that the woman had purchased shortly before the man moved in. The woman had purchased the condominium for $300,000 using her own money and had taken title in her own name.

Four years ago, the woman and the man were married at City Hall. One week before the wedding, the woman presented the man with a proposed premarital agreement and an asset list. The asset list correctly stated that the woman owned the condominium, then worth $350,000, and a brokerage account, then worth $500,000. The agreement specified that, in the event of divorce, each spouse would be entitled to retain "all assets which he or she then owns, whether or not those assets are acquired during the marriage." The man was surprised when the woman gave him the agreement to sign, and he contacted a lawyer friend for advice. The lawyer urged the man not to sign the agreement. Nonetheless, the man signed the agreement, telling the woman, "I'm a little hurt, but I guess I understand that you want to keep what you earn." The woman signed the agreement as well.

After their wedding, the woman and the man continued to live in the woman's condominium and to work at the jobs each held before the marriage. The man also continued to work on his novel.

Six months ago, the man's novel was accepted by a publisher. The novel will be released next spring. The publisher has estimated that the royalties may total as much as $200,000 over the next five years.

Two months ago, the woman and the man separated. The woman remained in the condominium, now worth $400,000 as a result of market appreciation. The woman's brokerage account, worth $500,000 when she and the man married, is now worth $1,000,000 as a result of market appreciation and additional investments that the woman made with employment bonuses she received during the marriage. The woman has made no withdrawals from this account.

One month ago, the woman won, but has not yet received, a $5 million lottery jackpot.

One week ago, the man filed for divorce. In the man's divorce petition, he asks the court to invalidate the premarital agreement and seeks half of all assets owned by the woman, i.e., the woman's brokerage account, her condominium, and her right to the lottery payment. The man owns no assets except for personal effects and the book contract under which he will receive future royalties based on sales of his novel.

This jurisdiction has adopted the Uniform Premarital Agreement Act, which in relevant part provides that "the party against whom enforcement [of the premarital agreement] is sought must prove (1) involuntariness or (2) *both* that 'the agreement was unconscionable when it was executed' *and* that he or she did not receive or waive a 'fair and reasonable' disclosure and 'did not have or reasonably could not have had . . . an adequate knowledge' of the other's assets and obligations."

The jurisdiction's divorce law requires "equitable distribution" of all marital (community) assets and prohibits the division of separate assets.

1. Is the premarital agreement enforceable? Explain.

2. Assuming that the agreement is unenforceable, what assets are subject to division in the divorce action, and what factors should a court consider in distributing those assets? Explain.

MINNESOTA BAR EXAMINATION
FEBRUARY 2016
REPRESENTATIVE GOOD ANSWER
MEE 6

1. Ante-nuptial or pre-marital agreements must be procedurally and substantially fair at the time of the agreement. The substance of the agreement--the amount a party receives upon dissolution--must be fair and equitable at the time of the signing. The procedural requirements--that a party must be able to consult his or her own attorney, must have time to consider the agreement, and must not be subject to undue pressure--are also required. Normal contractual rules such as fraud, duress, mutual mistake, unconscionability, etc. still apply. A court may also strike provisions of a pre-marital agreement if it would cause substantial hardship upon one of the parties.

In this case, the man had the opportunity to consult with a lawyer. This helps the woman's case. He was only granted one week to think about and review the agreement in anticipation of the wedding, but he could have delayed the wedding. Based on the facts, he appears to have had adequate notice of the woman's assets. Thus, the premarital agreement is likely enforceable.

2. The woman will keep her condo (and all of its value), half of the lottery winnings, and most (but not likely all) of her brokerage account. She will also be entitled to half of the royalties from the man's book signing. The man will keep half of the book proceeds, half of the lottery winnings, and some (a small amount) of the brokerage account.
In an equitable division of property jurisdiction, the court measures the amount of property, the contribution of the parties, and whether any pre-marital property is owned by either party. Pre-marital property is any and all property acquired before marriage. Pre-marital property is not subject to division in equitable division. Fault is also not considered. The division is made when the dissolution is filed (and not at separation of the parties). Courts consider the contribution to the marriage of the parties, and though "equitable" is not "even", financial sums amounting to marital assets are often split evenly.

In some cases, pre-marital property may become marital property. One such way is by gift of one spouse to the other (or to the marriage). Another is by active accrual; i.e., where the parties active work toward the increasing of the value of the investment. Any property acquired or earned during the marriage is marital property, with few exceptions (by will, devise, or gift).

In this case, the woman owned the condominium prior to the marriage. The condominium increased in value. The facts do not show active accrual--neither party worked toward creating a higher value in the condominium, it simply increased on its own. Because the increased value was due to market forces and not due to action by the parties, the value belongs to the woman, all $500,000.

The brokerage account, which began at $500,000, and ended at $1,000,000 at the time of dissolution, is primarily the woman's. Yet because she added "employment bonuses" throughout the marriage, the value of the employment bonuses is marital in nature. In addition, no withdrawals were made. To show a right to this amount, however, the man must be able to "trace" the amounts. Tracing is a forensic record of assets--in this case, investment income--to show the amount placed into the account and the interest therefrom. The man is entitled to half of the amount of bonuses invested, and half the interest as marital property.

The lottery winnings should be split evenly. The woman won the lottery while the couple was still married. Because it was income received while the parties were still married, this should be split evenly as marital property.

The woman will receive approximately half of the book income. The man worked on the book prior to marriage, but received the future interest benefit of the book contract during the marriage. The royalties are therefore marital assets. The court, in dividing the property in an equitable division state, may consider the lack of resources the man has--personal effects and a future interest for the sale of the book. Yet the premarital interests are largely untouchable, and he will be able to provide for himself post-dissolution. Nothing suggests that he will only ever be able to write the book, nor is there any evidence that he would not be able to fend for himself.