MPT 1
February 2017

In re Ace Chemical **(February 2017, MPT-1)**

Examinees' law firm has been asked to represent Ace Chemical Inc., which is suing Roadsprinters Inc. for its alleged failure to deliver material to one of Ace's customers in a timely manner. The issues in the problem relate to three potential conflicts of interest that must be resolved before the firm can accept Ace Chemical as a client: 1) the firm's Columbia office represents the Columbia Chamber of Commerce, of which Roadsprinters is a member; 2) Samuel Dawes, who would be the litigation partner in charge of the Ace litigation, once represented Roadsprinters in a trademark registration; and 3) the firm's Olympia office would like to hire an attorney who is currently employed by the Franklin office of Adams Bailey, the law firm representing Roadsprinters. Examinees' task is to draft an objective memorandum analyzing the three potential conflicts of interest. If a conflict exists, the memorandum should provide a recommendation for how the firm should handle the conflict. The File contains the instructional memorandum, a file memorandum summarizing the potential conflicts, and a newspaper article spotlighting Samuel Dawes. The Library contains excerpts from the Franklin Rules of Professional Conduct (which are identical to the ABA Model Rules), a Franklin Ethics Opinion, and a Franklin Supreme Court case.

CONFIDENTIAL

INTERNAL OFFICE MEMORANDUM
MONTAGNE & PARKS, LLC
760 Main Street, Suite 100
Essex, Franklin 33702

TO: Lauren Scott, Managing Partner
FROM: Applicant
DATE: February 21, 2017
RE: Ace Chemical: Potential Conflicts of Interest Action Plan

INTRODUCTION

Our firm seeks to represent Ace Chemical Inc. in a breach of contract action against Roadsprinters Inc. Ace Chemical alleges that Roadsprinters failed to deliver goods pursuant to a contract between the two. There are three potential conflicts of interest that may arise if our firm undertakes representation.

CONFLICT 1

Our office is not prevented from representing Ace Chemical due to our office located in the State of Columbia that represents the Columbia Chamber of Commerce, which is a membership organization of local businesses.

Roadsprinters Inc. is a member of that association and its current President, Jim Pickens, was the Chair of the Board of the Chamber for one year during our representation of the Chamber. According to the Franklin Rules of Professional Conduct (hereinafter "FRPC") and the interpretation of those Rules by the Franklin Ethics Committee, there is a presumption that imputes a conflict of one member of a firm to the entire firm, regardless of office location wherein that attorney works and regardless of the number of offices the firm maintains. Franklin Ethics Opinion 2015-212. Therefore, if our attorneys in Columbia could not represent Ace Chambers, that will be a presumption that our office here in Franklin cannot represent Ace Chemical. Therefore, we first must determine whether our attorneys in Columbia would be prohibited from representing Ace.

Generally, a lawyer may not represent a client if there is a concurrent conflict of interest. FRPC 1.7. A concurrent conflict of interest exists if the representation of a client would be directly adverse to another client, or if there is a significant risk that the representation of a client will be materially limited by the responsibilities to a current client. Id. If a concurrent conflict exists, a law firm may undertake the conflicting representation only if the attorneys reasonably believe that they will be able to provide competent and diligent representation, the representation isn't prohibited by law, the representation doesn't involve a claim by one client against another client in the same litigation, and each affected client gives informed, written consent. Id.

In this case, Ace Chemical is directly suing Roadsprinters Inc. Therefore, the crux of the issue is whether our law firm in Columbia, in its representation of the Chamber of Commerce wherein Roadsprinters is a member, represents Roadsprinters. If our firm in Columbia is deemed to represent Roadsprinters, then our firm here in Franklin cannot undertake the representation of Ace.

The Columbia office of our firm represents the Columbia Chamber of Commerce in a lobbying capacity. The lobbying efforts are generally focused on Columbia tax reform that favor or benefit local businesses in Columbia. According to the Supreme Court of Franklin, lobbying constitutes representation by an attorney. Hooper v. Carlisle, Sup. Ct. Franklin 2002. When an attorney has represented a professional trade association that is distinct from its members, the attorney has not represented any specific member of that organization unless one of two situations has occurred. Id. First, if the member provided confidential information to the attorney, the attorney will be deemed to have represented the member. Id. Second, if the attorney advised the member that any and all information provided would be treated as confidential, then the attorney will have represented the member. Id.

In determining whether the first situation was present, the Court found that the member provided the association attorney with only publicly available information. The Court held in that case that a member's provision of publicly available information to counsel for the trade association would not, in and of itself, disqualify counsel for the trade association from representing a client who is adverse to the member. Id. In determining the second situation, the Court found that the association attorney informed all members of the trade association that no information would be kept confidential. The Court held this was a proper action and that, as a result, the representation of the trade association was not the

equivalent to representation of the member.

A law firm may not be allowed to represent a client if the representation poses a significant risk that representation will be materially limited by the lawyer's responsibilities to a current client. FRPC 1.7(a)(2). In Hooper v. Carlisle, the Court grappled with the situation where an employee of an adverse party had held an important position in the trade association that the law firm currently represented. Sup. Ct. Franklin 2002. In that case, the adverse party's CEO had worked as a trade association committee member. As such, the CEO had worked closely with the law firm's attorneys in their capacity as attorneys for the association. Id. The attorneys developed legislative strategy with the committee and the committee was able to direct the attorneys' actions. Id. The CEO had even met with attorneys in person and communicated with them via email every day during the legislative session, and on average about every two weeks during the rest of the year. Id. As a result of this close collaboration, the Court held that the law firm would be materially limited in its ability to represent the association and its current client against the company of the CEO. Id. The Court focused on the "personal interest of the lawyer" language of FRPC 1.7(a)(2), determining that the closer and more frequent the contact, the greater the risk of material limitation.

In applying this analysis to our Columbia office's representation of the Chamber, it seems that office did not undertake the representation of Roadsprinters. The Columbia attorneys did not receive any confidential information from or about any Chamber members. The attorneys only received confidential information regarding legislative strategies and tactics of tax issues. The attorneys further clarified that they represented the Chamber, and not the members, in the lobbying efforts. The attorneys expressly states that the content of the communications with members was not confidential. Additionally, the Chamber and its members acknowledged in writing that the representation was limited to the Chamber only. The attorneys did not work closely with any officers of the Board of the Chamber, including Jim Pickens while he sat on the Board for one year. The attorneys worked primarily only with the Chamber's executive director.

On these facts, and in light of the Franklin Supreme Court's opinion in 2002, our Columbia office did not represent Roadsprinters, nor would our undertaking of the representation of Ace be materially limited. We need not take any actions in regards to this.

CONFLICT 2

Our firm is not prevented from representing Ace Chemical because Sam Dawes previously represented Roadsprinters Inc. in a matter that is not “substantially related” to this action.

If an attorney of a law firm is prohibited from representing a client as a result of his obligations to a former client, the attorney's current law firm cannot represent the client unless the prohibition is based upon the personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. FRPC 1.10(a)(1). If Dawes were prohibited from representing Roadsprinters, that conflict would be imputed to our firm.

Rule 1.9 states that a lawyer that has formerly represented a client in a matter shall not represent another client in the same or substantially related matter in which the person's interests are materially adverse to the interests of the former client, unless the former client gives informed, written consent.

On the plain reading of this rule, Dawes would not be prohibited from representing Ace Chemical, because his former client, Roadsprinters is not being directly sued by Ace in the same or a substantially related matter. Dawes represented Roadsprinters Inc. while he was in solo private practice. Dawes' representation was related to an uncontested trademark registration. The action between Ace and Roadsprinters is a breach of contract action. There are not facts that indicate that an uncontested trademark registration action would be relevant to this breach of contract.

However, in its Ethics Opinion 2015-212, the Franklin Ethics Committee held that a substantial relationship between actions exists when the lawyer *could* have obtained confidential information in the prior representation that would be relevant; it is immaterial that the lawyer actually did obtain such information. So there is an additional hurdle that must be overcome before Dawes could represent Ace - whether or not Dawes could have learned information that would be relevant to this breach of contract action. However, through our internal interview that was consistent with FRPC 1.6(b)(7), it was confirmed that there is no information Dawes learned or could have learned through the uncontested trademark representation that could possibly be relevant in this contract litigation between Ace Chemical and Roadsprinters. Thus, Dawes could represent Ace.

We also know that Dawes had a personal relationship with Jim Pickens, the president of Roadsprinters. Pickens gave Dawes advice regarding developing client relationships and introduced Dawes to business leaders. In this personal relationship Dawes did not obtain any confidential information and received general business information that was "not at all necessary" to the trademark work. Given that any information received is not related to his representation of the former client and that Dawes has not even had contact with Pickens for the last five years, this does not appear to create a conflict.

CONFLICT 3

We must properly screen Ashely Kaplan if she is hired by our firm. Montagne & Parks has an office located in the State of Olympia. That office wishes to hire attorney Ashley Kaplan who currently works in the law firm of Adams Bailey; Adams Bailey is the outside counsel for Roadsprinters Inc.

According to the FRPC, while lawyers are associated in a firm, none of them may knowingly represent a client when any one of those attorneys could not do so under Rule 1.7 or 1.9 unless the prohibition is based upon the disqualified lawyer's duty to a former client and the lawyer is timely and properly screened from any participation in the matter, is not apportioned any fee from the matter, there is written notice given to the former client, and certification of compliance with the Rules and screening procedure is given to the former client. In this case, Kaplan currently works for the law firm that represents Roadsprinters and has actually had Roadsprinters as a client. If our firm hires Kaplan, our firm would be prevented from representing Ace Chemical against Roadsprinters due to Kaplan's duty to her former client. That is, unless we properly screen Kaplan.

In order to properly screen a lawyer, the lawyer must be denied access to all files, digital and physical, relating to the client and/or the matter. The digital files must be password protected and Kaplan may not have the password. Physical files must be under lock and Kaplan cannot have the key. Additionally, all lawyers in the firm must be admonished that they cannot speak with or communicate in any way with Kaplan about the case. Finally, Kaplan cannot receive any compensation resulting from this representation of Ace. We must screen Kaplan as soon as possible after hiring her. Franklin Ethics Opinion 2015-212.

Additionally, we are under an FRPC 1.10 obligation to provide prompt written notice to Roadsprinters Inc. in order to enable it to ascertain compliance with these Rules. The notice must include a description of the screening procedures, a statement of the firm's and Kaplan's compliance with the Rules, a statement that review may be available before a tribunal, and an agreement by our firm to respond promptly to any written inquiries or objections by Roadsprinters about the screening procedures.

CONCLUSION

We may undertake the representation of Ace Chemicals notwithstanding our Columbia office's activities or Mr. Dawes' prior activities, so long as Ashley Kaplan - if hired - is properly screened.

MPT 2
February 2017

In re Guardianship of King **(February 2017, MPT-2)**
Examinees are associates at a law firm representing Ruth King Maxwell, who is petitioning to be named guardian for her elderly father. Ruth's brother, Noah King, currently has their father's health-care and financial powers of attorney; he opposes the petition and has requested that the court appoint him as guardian instead of Ruth. Examinees' task is to draft proposed findings of fact and conclusions of law in the guardianship of Ruth's father, with the goal of preventing Ruth's brother from being named guardian. As part of completing the task, examinees must address two legal issues: whether and in what circumstances the trial court has the legal authority to override a prior nomination of a proposed guardian, and whether Noah King's conduct as health-care agent and holder of the financial power establishes "good cause" to override the nomination. The File contains the instructional memorandum, office guidelines on how to draft findings of fact and conclusions of law, and excerpts from the hearing transcript containing relevant testimony by Ruth and Noah. The Library contains excerpts from the Franklin Guardianship Code. It also contains two cases: *Matter of Selena J.*, concerning the statutory priorities for appointment as guardian; and *In re Guardianship of Martinez,* concerning whether "good cause" exists to remove a guardian.

FINDINGS OF FACT

1. In 2013, Henry King ("Henry") was diagnosed with early signs of dementia.

2. On May 20, 2013, Henry executed an advance health-care directive naming his son, Noah King ("Noah"), as his health-care agent because he lived closer and could respond more quickly than his daughter, Ruth King Maxwell ("Ruth").

3. In the health-care directive, Henry executed a durable power of attorney giving Noah the power to make financial decisions for him.

4. In the health-care directive, Henry nominated Noah to become Henry's guardian if that later proved necessary.

5. In 2015, Henry's condition started to get worse.

6. In 2015, Henry confided in Ruth that he had fallen in the shower and badly bruised his arm.

7. Ruth confronted Noah about the bruised arm and Noah stated that he did not take Henry to the doctor for it because "he didn't think it was much of a problem."

8. Noah agreed to take Henry to the doctor at her urging.

9. In August 2016, Ruth moved closer to her father.

10. Around the same time, Henry told Ruth that he had broken his wrist in June 2016.

11. Noah did not seek medical attention for Henry’s broken wrist until the second day, after receiving a concerned phone call from Henry’s neighbor. Noah had visited Henry the prior evening, learned the wrist was stiff, but did not believe it to be very painful for Henry.

12. Noah did not disclose the wrist break to Ruth until after Ruth confronted him about it.

13. Upon discovery that Henry's fridge was always nearly empty, Ruth began buying food and cooking for him when she could.

14. Eventually, Ruth hired someone to shop and cook for Henry.

15. Ruth found an overdue notice from the electric company at Henry's home.

16. Noah stated that he had missed a few months' payments of the electric bill.

17. Henry had received multiple threatening letters regarding unpaid bills and had an overdue doctor's bill that was nearly sent to collections.

18. Henry has made numerous online gift purchases for his friends, spending roughly $2,200.00 over the course of two months and about $9,000 over the prior year.

19. Noah was aware of Henry's online shopping habits and failed to prevent it. Noah testified, "I didn't think it was my place to keep him from spending his money the way he wanted."

20. Henry receives $2,515.00 per month between his Social Security and pension.

Based upon the foregoing Findings of Facts, the Court makes the following:

CONCLUSIONS OF LAW

1. A guardian is an individual appointed by a court to "manage the income and assets and provide for the essential requirements for health and safety and personal needs of someone found incompetent." Fran. Guard. Code § 400.

2. The court shall appoint an individual who will best serve the interest of the adult, considering the order of preferences set forth in Fran. Guard. Code § 401(b). Id. § 401(a).

3. The court may appoint a person with lower or no preference to the adult as guardian by disregarding the adult's preference only upon good cause shown. Id. § 401(a).

4. "A court may refuse to appoint a proposed guardian when that person's previous actions would have constituted a breach of fiduciary duty had the person been serving as a guardian." Matter of Selena J., 1 (Fran. Ct. App. 2011).

5. A guardian can breach his or her fiduciary duty through mismanagement of finances or neglect of the ward's physical well-being. In re Guardianship of Martinez, 4 (Fran. Ct. App. 2009).

6. In his health-care directive, Henry expressly identified Noah as the individual to become his guardian. Fran. Guard. Code. § 401(c)(1).

7. Noah has first preference as an eligible individual to serve as Henry's guardian as he is the individual last nominated by Henry. Id. § 401(b)(1).

8. Ruth has second preference as an eligible individual to serve as Henry's guardian as she is an adult child of the adult. Id. § 401(b)(2).

9. Proposed guardian Noah's conduct as a fiduciary for Henry under the health-care

directive and/or power of attorney is of special concern. Matter of Selena J., at 3.

10. Had Noah been serving as a guardian, Noah's conduct of mismanaging Henry's bills, not seeking medical attention for Henry, and not buying Henry food would have constituted a breach of fiduciary duty. In re Guardianship of Martinez, at 4.

11. Noah's breach of his fiduciary duty constitutes good cause to disregard Henry's preference to have Noah serve as Henry's guardian. Id.

12. If Henry's preference is disregarded, the Court has authority to appoint Ruth as Henry's guardian because she is second preference. Fran. Guard. Code § 401(a).

13. Ruth has not breached any fiduciary duties that would constitute good cause to refuse her appointment. Matter of Selena J., at 1.

14. Ruth should be appointed as guardian of her father, Henry King.

MEE Question 1

On June 15, a professional cook had a conversation with her neighbor, an amateur gardener with no business experience who grew tomatoes for home use and to give to relatives. During the conversation, the cook mentioned that she might be interested in "branching out into making salsa" and that, if she did branch out, she would need to buy large quantities of tomatoes. Although the gardener had never sold tomatoes before, he told the cook that, if she wanted to buy tomatoes for salsa, he would be willing to sell her all the tomatoes he grew in his half-acre home garden that summer for $25 per bushel.

Later on June 15, shortly after this conversation, the cook said to the gardener, "I'm very interested in the possibility of buying tomatoes from you." She then handed a document to the gardener and asked him to sign it. The document stated, "I offer to sell to [the cook] all the tomatoes I grow in my home garden this summer for $25 per bushel. I will hold this offer open for 14 days."

The gardener signed the document and handed it back to the cook.

On June 19, the proprietor of a farmers' market offered to buy all the tomatoes that the gardener grew in his home garden that summer for $35 per bushel. The gardener, happy about the chance to make more money, agreed, and the parties entered into a contract for the gardener to sell his tomatoes to the proprietor.

On June 24, the cook, who had not communicated with the gardener since the June 15 conversation, called the gardener. As soon as the cook identified herself, the gardener said, "I hope you are not calling to say that you want my tomatoes. I can't sell them to you because I have sold them to someone else." The cook replied, "You can't do that. I called to accept your offer to sell me all your tomatoes for $25 per bushel. You promised to hold that offer open for 14 days. I accept your offer!"

Is the gardener bound to sell the cook all the tomatoes he grows that summer for $25 per bushel? Explain.

I. Did the gardener and professional cook enter into an option contract under the UCC?

A merchant of goods, under the UCC, can keep an offer open to a buyer if the merchant puts the option into writing and then signs the document. The offer will then be open for not more than 3 months. A merchant is described as an individual who engages in the trade or business of selling a particular good. If there is a proper option contract under the UCC, the offeror cannot revoke the offer in the time period listed.

The conversation between the gardener and the professional cook was put into writing and the document was signed by the gardener. However, the gardener was not a merchant as he has never sold tomatoes before and thus is not in the trade or business of selling tomatoes. In fact, the gardener has no business experience. Although the professional cook might suggest that the gardener is acting as a merchant in this capacity, there is nothing to suggest the gardener is actively trying to become a merchant in tomatoes.

As such, the gardener and the professional cook did not enter into an option contract, and the gardener is not bound to the agreement under this principle.

II. Under the common law, did the gardener and profession cook enter into an option contract?

Under the common law, an offeror and offeree can keep an offer open for a specific period of time if the offeree gives consideration to the offeror in exchange for the option contract. Because the gardener did not receive consideration from the professional cook, the gardener was under no obligation to keep the offer open for the two weeks. As such, under the common law, the gardener and the profession cook did not enter into an option contract, and the gardener is not bound to keep the offer open.

III. Did the gardener properly revoke the offer to sell the cook her tomatoes?

If there is no option contract, an offeror has the power to revoke his or her offer before the offeree has accepted or rejected the offer. The offeror can either explicitly or implicitly revoke the offer but this revocation must be communicated to the offeree in order to create a proper revocation. The communication also must occur before the offeree accepts the offer. Otherwise, an offer and acceptance has occurred and the offer is non-revocable.

The gardener offered to sell the cook his tomatoes on June 15. Before the cook communicated her acceptance to the gardener, however, the gardener told the cook that he would be unable to sell her the tomatoes. Although the cook had been calling to accept the offer, the gardener still revoked the offer before the cook accepted it.

As such, the gardener properly revoked the offer to sell the cook his tomatoes before the cook accepted the offer and is thus not bound to sell the cook all of the tomatoes he grows that summer for $25 per bushel.

MEE Question 2

Forty years ago, Settlor, a successful businesswoman, married a less-than-successful writer. Settlor and her husband had two children, a son and a daughter.

Two years ago, Settlor transferred most of her wealth into a revocable trust. Under the terms of the trust instrument, a local bank was designated as trustee, and the trustee was directed to distribute all trust income to Settlor during her lifetime. The trust instrument further provided that "upon Settlor's death, the trustee will distribute trust principal to one or more of Settlor's children as Settlor shall appoint by her duly probated last will or, in the absence of such appointment, to Charity." The trust instrument also stated that Settlor's power of revocation was exercisable only "during Settlor's lifetime and by a written instrument."

Following the creation of the trust, Settlor gave written direction to the trustee to accumulate trust income instead of distributing the income to Settlor as specified in the trust instrument. The trustee did so.

Six months ago, Settlor executed a valid will. The will, exercising the power of appointment created under Settlor's revocable trust, directed the trustee of Settlor's trust, upon Settlor's death,

> (1) to distribute half of the trust assets to Settlor's daughter,
> (2) to hold the other half of the trust assets in continuing trust and pay income to Settlor's son during the son's lifetime, and
> (3) upon the son's death, to distribute the trust principal in equal shares to the son's surviving children (grandchildren of Settlor).

Settlor also bequeathed $50,000 "to my descendants, other than my children, in equal shares," and she left the residue of her estate to her husband, whom she also named as the executor of her estate.

Two months ago, Settlor died. At Settlor's death, the trust assets were worth $500,000 and Settlor's probate assets were worth $100,000. Settlor was survived by her husband, her daughter, her son, and her son's child (Settlor's grandchild, age 18).

A statute in this jurisdiction provides that a decedent's surviving spouse is entitled to a "one-third elective share of the decedent's probate estate." There are no other relevant statutes.

1. Was it proper for the trustee to accumulate trust income during Settlor's lifetime? Explain.

2. Under Settlor's will and the trust instrument, what, if any, is Charity's interest in the trust assets? Explain.

3. Does Settlor's husband have a valid claim to any trust or probate assets? Explain.

Issue 1: was it proper for the trustee to accumulate trust income during Settlor's lifetime?

At issue here is whether it was proper for the trustee, at the direction of Settlor, to accumulate the trust income during Settlor's life. As a general rule, the trustee of an irrevocable trust owes her fiduciary responsibilities to the beneficiaries. Where the trust instrument is a revocable trust, most courts view the fiduciary duty as being owed to the Settlor as the Settlor could revoke and amend the trust at her discretion. Therefore, the trustee of a revocable trust is generally considered to owe her duties to the Settlor.

In the present matter, Settlor expressly created a revocable trust. Depending on the jurisdiction, a trust is presumed to be irrevocable unless it expressly provides that it is revocable. In the other jurisdictions, the inverse is true (presumption of revocable unless it expressly provides that it is irrevocable). Here, the facts state that "Settlor transferred most of her assets into a revocable trust." Therefore, Settlor retained the authority to revoke the trust and trustee's duties effectively flowed to her.

Following the creation of the trust, Settlor provided written direction to the trustee to accumulate trust income instead of distributing the income to Settlor. It was proper for trustee to follow this direction as Settler was the beneficiary and retained the power to revoke by written instrument.

Issue 2: Under Settlor's will and the trust instrument, what, if any, is Charity's interest in the trust assets?

At issue here is whether Charity has any interest in the assets from the will and trust. As a general rule, a settlor/testator can provide for the power of appointment. A general power of appointment exists where an individual has the authority to appoint or designate who will take the property. A general power of appointment is broad and the holder could even designate themselves. A specific power of appointment limits the takers under the instrument to a specific group of people. Exercising the power of appointment depends on whether any limitations are placed on it, such as a requirement that the power and trust be expressly mentioned.

In the present matter, the trust includes a specific power of appointment as it limits who

can be appointed to take under the trust. The specific power of appointment limits the takers to Settlor's children. Settlor was survived by two children, Son and Daughter, so the specific power of appointment can only be executed in their favor.

The will provides that Son will take 1/2 of the trust income during his life, and upon his death, the principal will be distributed to the Son's surviving children. A court may find that this is a violation of the specific power of appointment as it distributes the principal of the trust to one other than Son or Daughter. Son will be entitled to income for life, but because the Settlor included a specific power of appointment limiting who can take under the trust, the principal will be distributed to Charity at Son's death.

Issue 3: Does Settlor's husband have a valid claim to any trust or probate assets?

At issue here is whether Husband has a valid claim to any trust or probate assets. As a rule in this jurisdiction, under the elective share statute, a surviving spouse is entitled to a "one-third elective share of the decedent's probate estate." Some jurisdictions provide that the elective share should include both revocable trust assets as well as probate assets. The policy goal is to avoid spouses disinheriting the other spouse through the use of a revocable trust - if the assets passed through probate, the husband would have a 1/3 elective share to $600,000.

If the jurisdiction strictly follows the statutory language and does not include the trust assets, husband's elective share would be 1/3 of $100,000 ($33,333). Under Settlor's will, of her $100,000 probate, she leaves $50k to descendants, other than her children, in equal shares. Under this provision, Grandchild would take $50,000 and husband will take $50,000, so he would not want to take under the elective share statute.

In other jurisdictions that may include the revocable trust assets in the elective share, husband would be entitled to 1/3 of the entire estate, or $200,000. Under the general rules of abatement, the gifts to the other parties would have to be reduced. The first $50,000 would come from the gift that Husband is entitled to under the will, and the remaining $150,000 would be abated first from general legacies, then demonstrative legacies, and finally from specific bequests.

MEE Question 3

In 2005, Andrew and Brenda began living together in State A while both were attending college there. Andrew proposed marriage to Brenda, but she refused. However, after learning that she was pregnant, Brenda told Andrew that she wanted to marry him before the baby was born. Andrew was thrilled and told her that they were already married "in the eyes of God." Brenda agreed.

Andrew and Brenda did not obtain a marriage license or have a formal wedding. Nonetheless, Brenda started using Andrew's last name even before their daughter, Chloe, was born. After Andrew graduated from college and started a new job, he listed Brenda as his spouse so that she could qualify for benefits through Andrew's employer. They also filed joint income tax returns.

In March 2007, just after Chloe's first birthday, Andrew and Brenda decided to separate. They had little property to divide and readily agreed to its disposition. Andrew agreed that Brenda should have sole custody of Chloe, and Brenda, desiring the cleanest break possible, agreed that Andrew would not be responsible for any child support. Andrew told Brenda that no formal divorce was necessary because they had never formally married.

In June 2007, Brenda and Chloe moved to start a new life in State B. Andrew sent Chloe an occasional card or birthday gift, but otherwise maintained no contact with Chloe or Brenda. Not long after settling in State B, Brenda met and fell in love with Daniel.

In 2008, Brenda and Daniel obtained a State B marriage license and wed. Thereafter, Daniel formed a close and loving bond with Chloe. Indeed, with only very infrequent contact from Andrew, Chloe regarded Daniel as her father and called him "Dad."

In January 2017, Brenda purchased a lottery ticket. The ticket won a jackpot of $5 million, which was paid that month. Shortly thereafter, Brenda informed Daniel that she wanted a divorce and that she intended to use her lottery winnings to launch a new life with Chloe in a distant state and break off all contact with Daniel. When Chloe learned about this, she became very upset because she continues to regard Daniel as her father.

State A recognizes common law marriage. State B formerly allowed common law marriage until a statute, enacted in 2001, prospectively barred the creation of new common law marriages within the state. Neither State A nor State B is a community-property state.

1. On what basis, if any, would Andrew have a claim to a share of Brenda's lottery winnings? Explain.

2. Assuming that Andrew and Brenda have a valid marriage, on what basis, if any, would Daniel have a claim to a share of Brenda's lottery winnings? Explain.

3. If Brenda cuts off all contact between Chloe and Daniel, can Daniel obtain court-ordered visitation with Chloe? Explain.

1)

The first issue is whether Andrew and Brenda have a valid common law marriage under the laws of State A. Generally, a common law marriage is created where two parties intend to create such a relationship, they cohabitate, and they hold themselves out publicly as a married couple. Here, Andrew proposed marriage to Brenda, and although she initially refused, after learning that she was pregnant, Brenda agreed that they should be married before the baby was born. Andrew believed they were married in the eyes of God. This is likely sufficient to satisfy the requisite intent required. Andrew and Brenda also lived together starting in 2005, which satisfies the cohabitation requirement. During their time together, Brenda began using Andrew's last name, even before their daughter was born, and Andrew listed Brenda as his spouse so that she could qualify for benefits through Andrew's employer. The couple also filed joint income tax returns. This conduct is likely to be considered sufficient as holding out to the public that they are acting as a married couple.

The next issue is whether the couple's separation in March 2007 constitutes an "end" to their common law marriage. The couple had very little property to divide and agreed to its disposition, including the custody of their child, Chloe. Since that time, Andrew has not paid any child support, nor has he seen Chloe since that time, though he has sent a birthday card. Andrew told Brenda that there didn't need to be a formal divorce because they had never been formally married.

However, State A recognizes common law marriages. Given that Brenda and Andrew had a valid common law marriage, as considered in the facts above, it would require a divorce to legally separate. As Brenda's husband, and without a valid divorce, Andrew would likely have at least some claim to a share of Brenda's lottery winnings in a divorce action.

2)

The second issue is whether Daniel has a claim to any of Brenda's lottery winnings. In other words, the question is whether Daniel and Brenda's marriage is void and whether he has any recourse in a void marriage. A void marriage is one with a legal impediment (i.e.

close relationships between the parties, one party already being married, lack of capacity, etc.).

Here, if Brenda and Andrew's marriage were considered valid under the common law of State A (noting, of course, that generally states like State B that do not recognize common law marriage will recognize the common law marriage of another state if valid in the state where it was created), Brenda and Daniel's subsequent marriage would be void. As a general rule, a void marriage may be voided by anyone, from the couple to a third party trying to enforce certain rights. There is a split of authority as to whether continued co-habitation affects ratification issues. Where a marriage is void, a spouse may still be entitled to an equitable division of the property obtained during the void marriage.

Here, Brenda met Daniel shortly after moving to State B in 2007. In 2008, the couple got married and Daniel fostered a close and loving relationship with Chloe, who called Daniel "Dad." In 2017, Brenda won a jackpot of $5 million in the lottery and shortly thereafter told Daniel she wanted a divorce. Generally lottery winnings are included in the marital estate, along with pensions, employment benefits, property acquired during the marriage, etc. Since Brenda and Daniel’s marriage is void there is no proper marital estate, but Daniel could likely go to court to obtain an equitable division of the lottery winnings acquired during their void marriage, especially given the length of the marriage.

3)

The third issue is whether Daniel can obtain court-ordered visitation with Chloe. Generally a court may order third party visitation when it is in the best interest of the child, after carefully considering the wishes of the parents. Third party visitation is often granted where the grandparent of a child's deceased parent wishes to continue to be able to see the child. Here, Andrew would be presumed to be Chloe's father; he was married to Brenda at the time of Chloe's birth (assuming that their common law marriage is valid) and he is likely on the birth certificate. However, shortly after Andrew's and Brenda broke up, Andrew cut off all contact with Chloe.

Since that time, Daniel has fostered a relationship with Chloe and she calls him Dad.

Daniel may be able to petition the court to allow visitation on the grounds that he provided care and support for Chloe during the first decade of her life and wants to continue to see her. Third parties may be granted visitation when it is in the best interest of the child. There are constitutional issues to be taken into account – parents generally have a right to raise their children as they like and presumably act in their best interests – but the court will likely take into account what Chloe wants (she is 11, so her voice will be given weight by the court) in addition to the wishes of Brenda.

The court will conduct a balancing test among these factors and others to determine what is in Chloe's best interest. If the court finds that is in Chloe's best interest to spend time with Daniel after carefully considering Brenda’s wishes, then the court may order visitation. Given that Daniel is not Chloe's father and Brenda does not wish Daniel to have contact with Chloe, he will have to present a strong case about his relationship with Chloe and her best interests.

MEE Question 4

A shareholder owns 100 shares of MEGA Inc., a publicly traded corporation. MEGA is incorporated in State A, which has adopted the Model Business Corporation Act (MBCA).

The shareholder read a news story in a leading financial newspaper reporting that MEGA had entered into agreements to open new factories in Country X. According to the story, MEGA had paid large bribes to Country X government officials to seal the deals. If made, these bribes would be illegal under U.S. law, exposing MEGA to significant civil and criminal penalties.

On May 1, the shareholder sent a letter to MEGA asking to inspect the minutes of meetings of MEGA's board of directors relating to the Country X factories mentioned in the news story, along with any accounting records not publicly available relevant to the alleged foreign bribes. The shareholder explained that she was seeking the information to decide whether to sue MEGA's directors for permitting such possible illegal conduct.

In her letter, the shareholder also demanded that the MEGA board investigate the possible illegal bribes described in the news story and take corrective measures if any illegality had occurred.

On June 1, MEGA responded to the shareholder in a letter, which stated in relevant part:

> The corporation will not give you access to any corporate documents or take any action regarding the matters raised in your letter. We cannot satisfy the whim of every MEGA shareholder based on unsubstantiated news stories. Furthermore, given our continuing operations in Country X, the board of directors will not investigate or take any other action regarding the matters raised in your letter because doing so would not be in the best interest of the corporation.

On October 1, the shareholder filed a lawsuit in a State A court. Her petition includes (1) a claim against MEGA seeking inspection of the documents previously requested and (2) a derivative claim against all of the MEGA directors alleging a breach of their fiduciary duties for failing to investigate and take action concerning the alleged foreign bribes.

MEGA's board has asked the corporation's general counsel the following questions:

> (1) Is the shareholder entitled to inspect the documents she requested?
>
> (2) May the board obtain dismissal of the shareholder's derivative claim if the board concludes that it is not in the corporation's best interest to continue the lawsuit, even though the board has not investigated the allegations of illegal foreign bribes?
>
> (3) Is the board's decision not to investigate or take further action with respect to alleged illegal foreign bribes consistent with the directors' duty to act in good faith, and is that decision protected by the business judgment rule?

How should the general counsel answer these questions? Explain.

I. Is the shareholder entitled to inspect the documents she requested?

A shareholder has the right to inspect the bylaws, articles of incorporation and the minutes from shareholder meetings. A shareholder also has a qualified right to see financial documents of a corporation and the meeting minutes from board meetings. If a shareholder would like to see these records, she or he must have a proper purpose for doing so. She or he also must state that purpose with particularity to the board when making the demand.

The shareholder of MEGA has a right to inspect the requested records because she has a proper purpose for wanting to see the records and stated her purpose in her request. Although MEGA might argue that wanting to sue MEGA is not a proper purpose, it is within the shareholder's right as part owner of the corporation to create a derivative law suit. The story in a leading financial newspaper is a basis to investigate whether the corporation has engaged in illegal activity and created risks to the corporation and her interest in it.

Because the shareholder had a proper purpose for requesting the records, she is entitled to inspect the documents she requested.

II. May the board obtain dismissal of the shareholder's derivative claim if the board concludes that it is not in the corporation's best interest to continue the lawsuit, even though the board has not investigated the allegation of illegal foreign bribes?

When a shareholder begins a derivative law suit, he or she is doing so on behalf of the corporation. In this capacity, the shareholder is acting as a representative of the corporation and is not suing on his or her own behalf directly. If the board of directors, after a reasonable inquiry into the claims that arise in a derivative claim, finds that it is not within the corporation’s interest to pursue the lawsuit, they may move for dismissal. However, if there is good reason to believe that it is the board's actions that have led to the derivative suit and that they have not attempted to resolve the issues laid out in the suit, the court will not dismiss the lawsuit as being against the corporation's best interests.

In this situation, the shareholder has filed a lawsuit based on the malfeasance of the board of directors. The court, under these circumstances, will not dismiss the suit simply because the board of directors insists it’s not within the best interest of the corporation. This is even more the case because the board did not even investigate the allegations of illegal foreign bribes. Their alleged actions could severely harm the shareholders of the corporation and the

corporation's future potential.

As such, the board should not be able to obtain dismissal of the shareholder's derivative claim, as the board has not demonstrated that they have diligently looked into the claim nor have they established that they are in a disinterested position to make determinations of the corporation’s best interests.

III. Is the board's decision not to investigate or take further action with respect to alleged illegal foreign bribes consistent with the directors' duty to act in good faith?

The board of directors have the duty to act in good faith in their capacity on behalf of the corporation. This duty includes acting diligently when making business decisions, carefully screening potential business partners, and handling the property, funds, and business of the corporation with diligence and care. When a board of directors votes not to investigate the potential illegal actions of corporate agents or business partners, they are putting the corporation at risk for criminal and civil penalties. When MEGA refused to investigate the potential illegal bribes being paid to Country X government officials, they have violated their duty to act in good faith. Their failure to investigate puts at risk the corporation and the shareholders along with the property and business future of MEGA.

Because of this, the board of directors have failed to act in good faith in their duties toward MEGA.

IV. Is the board's decision not to investigate or take further action regarding the alleged illegal foreign bribes protected by the business judgment rule?

When an executive or a member of the board of directors makes a decision on behalf of a corporation, their decision will be analyzed under the business judgment rule. This rule creates a presumption that when a corporate director or executive makes a decision, they do after examining the facts, data, and circumstances behind the decision and making a good faith effort to do what is in the best interests of the corporation. However, this is just a presumption and it is rebuttable. If it is shown that the director or executive did not act with good faith, it will rebut the presumption that the decision is made with good business judgment.

The board's decision not to investigate will be analyzed under the business judgment rule. However, given the circumstances and analysis above, the shareholder and others most

likely will be able to show that the directors were not acting in good faith with respect to the decision about allegations of illegal activity. As such, the business judgment rule will no longer apply to or protect the decision by the board of directors.

MEE Question 5

An inventor retained a woman to act as his agent to purchase 25 computer chips, 25 blue lenses, and 25 lawn mower shutoff switches. The inventor told her to purchase only:

- Series A computer chips,
- blue lenses that cost no more than $300 each, and
- shutoff switches that could shut down a lawn mower in less than one second after the mower hits a foreign object.

The woman contacted a chip manufacturer to purchase the Series A computer chips. She told the manufacturer that she was the inventor's agent and that she wanted to purchase 25 Series A computer chips on his behalf. The manufacturer told her that the Series A chips cost $800 each but that she could buy Series B chips, with functionality similar to that of the Series A chips, for only $90 each. Without discussing this with the inventor, the woman agreed to purchase 25 Series B chips, signing the contract with the chip manufacturer "as agent" of the inventor. The Series B chips were shipped to her, but when she then took them to the inventor and explained what a great deal she had gotten, the inventor refused to accept them. He has also refused to pay the manufacturer for them.

The woman also contacted a lens manufacturer for the purchase of the blue lenses. She signed a contract in her name alone for the purchase of 25 blue lenses at $295 per lens. She did not tell the lens manufacturer that she was acting as anyone's agent. The lenses were shipped to her, but when she took them to the inventor, he refused to accept them because he had decided that it would be better to use red lenses. The inventor has refused to pay for the blue lenses.

The woman also contacted a switch manufacturer to purchase shutoff switches. She signed a contract in her name alone for switches that would shut down a lawn mower in less than five seconds, a substantially slower reaction time than the inventor had specified to her. When she signed the contract, she told the manufacturer that she was acting as someone's agent but did not disclose the identity of her principal. The switches were shipped to her. Although the inventor recognized that the switches were not what the woman had been told to buy, he nonetheless used them to build lawn mowers, but now refuses to pay the manufacturer for them.

All elements of contract formation and enforceability are satisfied with respect to each contract.

1. Who is liable to the chip manufacturer: the inventor, the woman, or both? Explain.

2. Who is liable to the blue-lens manufacturer: the inventor, the woman, or both? Explain.

3. Who is liable to the shutoff-switch manufacturer: the inventor, the woman, or both? Explain.

1)

Only the woman is liable to the chip manufacturer. At issue is whether the woman had authority to enter into the chips contract. A principal is only liable on its agents' authorized contracts. Authorization may be express, implied, apparent, or done through ratification. An agent has authority to act on behalf of her principal if the principal gave actual express authority, implied authority, apparent authority, or through ratification. Here, the inventor, the principal, gave the woman, the agent, express authority to purchase only Series A computer chips, blue lenses that cost no more than $300 each, and shutoff switches that could shut down a lawn mower in less than one second after the mower hits a foreign object. Here, the woman purchased a series of B chips rather than A chips, violating her express authority. The inventor also did nothing to make the manufacturer believe that the woman had authority to buy B chips.

Furthermore, the inventor did not ratify the contract. Ratification is when after the contract/purchase the principal ratifies the contract by knowing of the material terms in the contract and accepting its benefit without any alteration. Here, the inventor, the principal, refused to accept the chips. Thus, the woman will be liable to the chips manufacturer for acting without authority to create the contract on behalf of the inventor.

2)

Both the woman and the inventor will be liable to the blue-lens manufacturer. At issue is whether an undisclosed principal is liable on an authorized contract. A principal is liable only on its authorized contracts entered into by his agent. When the principal is undisclosed such that the principal's identity is concealed or partially concealed, the third party may elect to hold the agent or the principal liable. Here, the woman, agent, did have express authority to purchase the 25 blue lenses at $295. However, the agent did not tell the lens manufacturer that she was acting as anyone's agent. Even though the inventor refused to accept the blue lenses because he decided that it would be better to use red lenses, the inventor, as principal granting authority, is nonetheless liable on the contract at the election of the third party. Thus, the lens manufacturer may elect to sue the woman or the inventor on the authorized contract.

3)

Both the woman and the inventor will be liable to the switch manufacturer. At issue is whether the inventor, principal, ratified the contract. A principal is only liable on its authorized contracts. Authorization may be express, implied, apparent, or done through ratification.

Here, the woman, agent, entered into an unauthorized contract because she did not have the authority to purchase shut off switches that worked in less than five seconds instead of less than one second. Nonetheless, the principal ratified the contract when the inventor accepted its benefits by using the shut off switches to build lawn mowers. The inventor knew of the material terms and did not alter the terms of the contract. Here, although the agent did not initially have authority to purchase the shut off switches, the inventor then ratified the purchase making an authorized contract.

The agent disclosed the agency but did not disclose her principal's identity, making the inventor partially disclosed. An agent is liable on a partially disclosed principal's contract if acting with authority. Although the contract was at first unauthorized, the inventor then ratified it. Thus, shutoff-switch manufacturer may sue the agent or the inventor.

MEE Question 6

On January 1, 2015, a landlord who owned a multi-unit apartment building consisting only of one-bedroom apartments leased an apartment in the building to a tenant for a two-year term ending on December 31, 2016, at a monthly rent of $2,000. The tenant immediately took possession of the apartment.

The lease contained the following provision:

> Tenant shall not assign this lease without the Landlord's written consent. An assignment without such consent shall be void and, at the option of the Landlord, the Landlord may terminate the lease.

On May 1, 2015, the tenant learned that her employer was transferring her to a job overseas to begin on August 1, 2015. On May 2, the tenant emailed the landlord that she needed to vacate the apartment on August 1, but that she had found a well-to-do and well-respected lawyer in the community who was willing to take over the balance of the lease term at the same rent. The landlord immediately emailed the tenant that he would not consent to the lawyer taking over the lease. He wrote, "I don't rent to lawyers because I've learned from personal experiences with them as tenants that they argue about everything, make unreasonable demands, and make my life miserable. Find somebody else."

On July 25, 2015, the tenant vacated the apartment and removed all her personal property from it. She left the apartment keys in an envelope in the landlord's mail slot. The envelope also contained a note in which the tenant wrote, "As you know, I am moving overseas and won't be back before my lease ends. So here are the keys. I won't pay you any rent from August 1 on."

On July 26, 2015, the landlord sent the tenant an email acknowledging that he had found the keys and the note. In that email, the landlord wrote: "Although this is a problem you created, I want to be a nice guy and help you out. I feel pretty confident that I can find a suitable tenant who is not a lawyer to rent your apartment."

As of August 1, 2015, the landlord had four apartments, including the tenant's apartment, for rent in the building. The landlord put an "Apartments for Rent" sign in front of the apartment building and placed advertisements in the newspaper and on a website listing all the apartments for rent. However, because of a recent precipitous decline in the local residential rental property market, the landlord listed the apartments for a monthly rent of $1,000. The landlord showed all four vacant apartments, including the tenant's apartment, to each prospective tenant.

By September 1, 2015, the landlord was able to rent only two of the apartments at $1,000. The landlord was unable to rent the two remaining apartments, including the tenant's, at any price throughout the rest of 2015 and all of 2016, notwithstanding his continued efforts to rent them.

On January 2, 2017, the landlord sued the tenant to recover 17 months of unpaid rent, covering the period August 1, 2015, through December 31, 2016.

Identify and evaluate the arguments available to the landlord and the tenant regarding the landlord's claim to 17 months of unpaid rent.

(1) Assignment clause.

(a) Landlord argument: A non-assignment clause in a lease agreed to by the landlord and tenant is a valid clause that can be enforced. Here, the lease stated that the lease could only be assigned with the landlord's permission. The tenant found a person willing to take over the lease and sought the landlord's permission to assign the lease, per the lease requirement, and the landlord denied the request.

(b) Tenant argument. When there is a non-assignment clause in a lease, the landlord must be reasonable in denying an assignment. Here, the tenant found a lawyer capable of making the required monthly rent, and the landlord denied the request simply because the new tenant would be a lawyer. It can be argued that the landlord's denial of the assignment was not reasonable and therefore the tenant should not be held liable.

(2) Abandoning the lease.

(a) Landlord argument: A tenant who abandons a lease before it has reached the end term will still be liable for the rent stated in the lease. Here, the tenant had agreed to a two year lease with the landlord. The tenant took her property, left the keys for the landlord, and left the country with the intent to abandon the lease and not pay the rent.

(b) Tenant argument: The landlord accepted her surrender of the apartment so no further rent was owed. The landlord told the tenant that although she breached, he would help her out in finding a suitable replacement for renting her apartment. This can be construed as releasing her from the lease and waiving his rights for the breach against the tenant, which she then relied on.

(3) Full vs. Partial amount owed.

(a) Landlord argument: The tenant is responsible for the entire unpaid balance of the lease. Here, the tenant had 17 months remaining on the lease and is therefore liable for the entire balance owed for the 17 months.

(b) Tenant argument: A tenant may not be liable for the full balance if the landlord is covered by receiving the rent from another tenant. Here, the tenant would argue that the

landlord could have accepted rent from the Lawyer, but refused, so the landlord did not make a reasonable effort to mitigate the damages like a non-breaching party must.

(c) Landlord argument: The landlord must make a reasonable effort to mitigate the damages after a breach of the lease. Here, the landlord put up "apartment for rent" signs, advertised in newspapers, lowered the rent to try to attract tenants, and showed all of his available units equally. Thus, it can be argued that he acted with reasonable efforts in trying to mitigate the damages owed by the breaching tenant.

(d) Tenant argument: Although the landlord showed the four apartments equally, if the apartments were the same, he could have easily rented hers as the first one instead of allowing the tenants to fill the other vacant apartments first.

(e) Landlord argument. He is under no duty to ensure that the apartment get rented, only to make a reasonable effort in doing so to mitigate damages. Here, again, it will likely be held that the landlord acted reasonably in his attempt to relist the apartment and find a new tenant for the space.