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MPT 1

February 2018

State of Franklin v. Clegane **(February 2018, MPT-1)**

This performance test requires examinees to draft an argument in support of the reading of victim-impact statements and requests for restitution, as authorized under the Franklin Crime Victims' Rights Act (FCVRA), at the sentencing hearing for defendant Greg Clegane. The law firm's client is Sarah Karth, who wishes to make such statements on behalf of her sister, Valerie Karth, and on her own behalf. In the underlying criminal action, Clegane illegally sold dangerous fireworks to a minor who later ignited those fireworks at a party. The fireworks caused serious injuries to Valerie, as well as property damage. Clegane was convicted of a felony but has not yet been sentenced. Clegane has moved to exclude the sisters' victim-impact statements at the sentencing hearing and to deny their requests for restitution. Examinees' task is to draft the argument section of the brief opposing Clegane's motion and persuading the court that under the case law interpreting the FCVRA, Sarah and Valerie are both crime victims entitled to restitution and to make statements at the sentencing hearing. The File contains the instructional memorandum, the firm's guidelines for writing persuasive trial briefs, a newspaper article about the fireworks incident, excerpts from the client interview, and the defendant's motion. The Library contains excerpts from the FCVRA and three Franklin Court of Appeal cases.

I. Captions
[omitted]

II. Statement of Facts
[omitted]

III. Legal Arguments
(A) Victim Impact Statement

(i) Sarah Karth and Valerie Karth Are Entitled to Make Victim-Impact Statement Because They Are Crime Victims

Under Section 55(a)(4) of the Franklin Crime Victims Rights Act (FCVRA), a "crime victim" within the meaning of the FCVRA has a right to be "reasonably heard at any public proceeding in the district court involving... sentencing." The threshold question, then, is the meaning of "crime victim." Section 55(b) of the FCVRA provides that a "crime victim" is a person directly and proximately harmed as a result of a commission of a Franklin criminal offense. To demonstrate that one is a "crime victim," the victim must show that (1) the defendant's conduct was a cause in fact of the victim's injuries and (2) the purported victim was proximately harmed by that conduct. State v. Jones (2006). In addition, the legislative history of the FCVRA indicates that the term "crime victim" should be interpreted 'broadly.' State v. Berg (2012).

(ii) Clegane's Conduct Was the Cause-in-Fact of Sarah and Valerie's Injuries

Here, Clegane was convicted of the felony crime of unlawful sale of fireworks to a minor. Hence, to be considered a "crime victim" and be able to present victim-impact statement at Greg Clegane (Clegane)'s sentencing hearing, it must be demonstrated that Sarah Karth (Sarah) and Valerie Karth (Valerie)'s injuries were both factually and legally caused by Clegane's conduct. To address the first prong -- factual causation: this test can be evaluated using the "but for" test, as demonstrated by the court in State v. Berg.

In that case, the defendant gave alcohol to his girlfriend, who was 19 years old. The minor then drove while under the influence, leading to a crash that killed her and an additional passenger in the car. Using the but for test, the court concluded that but for the defendant's buying alcohol and furnishing it to his girlfriend, the passenger would still be alive. Hence,

factual causation can be established even if there are "multiple links in the causal chain." In a similar analysis, the court in State v. Hackett found the defendant's conduct -- merely procuring supplies for the manufacture of methamphetamines -- was still sufficient to meet the but for test, even though it was not the defendant himself, but a codefendant, who subsequently started a fire by placing a jar of chemicals provided by the defendant on a hot plate.

In this case, it is clear that Clegane is the but for cause of Sarah and Valerie's injuries. But for Clegane providing the fireworks to the teenager, Sarah and Valerie would not have suffered their injuries, which occurred when the exploding shells sprayed through the yard, and setting Valerie's garage on fire. Even though there are "multiple links in the causal chain" -- Clegane sold the fireworks to the teenager, who subsequently detonated them -- much like the defendant in Hackett, Clegane supplied the materials that eventually caused the harm. Clegane does not deny selling the fireworks to the teenager. As a result, Clegane is the factual cause of Sarah and Valerie's injuries.

(iii) Clegane's Conduct Was the Proximate Cause of Sarah and Valerie's Injuries

In addition to satisfying the factual cause prong of the "crime victim" test, Clegane's conduct satisfies the proximate cause prong. The key element of proximate cause is foreseeability -- the harm must be the foreseeable consequence of the defendant's conduct. State v. Jones. In determining whether a harm was "foreseeable," the courts look to whether the resulting harm was "within the zone of risks" resulting from the defendant's conduct for which the defendant should be found liable. State v. Berg. While the proximate cause analysis is a device used to limit the scope of a defendant's liability (State v. Berg), the court's main task is to examine the relationship between the conduct and the resulting harm -- the closer the relationship between the actions and the harmed sustained, the more likely the proximate cause. State v. Jones. As described by the court in State v. Berg, for a finding of proximate cause, there must be an "intuitive relationship" between the conduct and the harm. The defendant's actual presence when the harm is caused is irrelevant. See State v. Hackett. Referring again to State v. Berg, the court in that case found that the defendant's conduct satisfied the proximate cause prong when the defendant provided alcohol to his girlfriend while aware that she had a history of drunk driving, leading to his girlfriend driving drunk and eventually resulting in a car crash. Hence, the defendant's "knowledge and understanding of the scope and structure" of the activities he was participating in are important in the proximate cause determination.

In this case, Clegane does not deny selling the Little Devil Shards fireworks -- illegal and

professional grade fireworks -- to a teenager. Clegane is the proprietor of Starburst Fireworks, which sells fireworks and other party supplies from its storefront, making it clear that Clegane could appreciate "the scope" of the activities he was participating in -- the use of fireworks. While Clegane claims the sale to the teenager raised no red flags, the teenager did tell Clegane that he could not wait "to show these to my friends -- I'm going to give everyone a big surprise." The promise of a "big surprise" should have alerted Clegane, as it would any reasonable person, that the teenager was contemplating a potentially dangerous use of the fireworks. An "intuitive result" of misusing (or even regular use) of fireworks is damaging the persons and properties of those in the immediate vicinity of the explosion.

In this case, while Clegane was not present and did not personally know Sarah or Valerie, they were the teenager's neighbors and naturally implicated in the risks of the teenager's activities. As a result, since harming bystanders and neighbors by use (or misuse) of the fireworks was foreseeable consequence of the sale to the teenager, Clegane both factually and proximately caused Sarah and Valerie's damages. It is also highly foreseeable that an injured victim's family member would be harmed, and become a victim, as a result of the direct victim's injuries. As Clegane was convicted of an offense under Franklin law, and since both Sarah and Valerie are "crime victims," they are entitled to give victim impact statements. If Valerie is unable to do so because she has only recently come out of her coma and is still incapacitated, Sarah may give a statement for her. FCVRA(b)(2) allows family members to assume the victim's rights under the act if the victim is incapacitated.

(B) <u>Restitution</u>

Under Section 56(a) of the FCVRA, when sentencing a defendant convicted of an offense, the court must order that the defendant make restitution to pay the victims of such offense. The victim has the right to full and timely restitution. FCVRA Sec. 55(6). Indeed, the defendant must pay restitution to any "identifiable victims" of the crime. State v. Humphrey. If the defendant's conduct resulted in loss of property to the victim, the court may require the defendant to pay an amount equal to the repair or replacement value of the property. If the defendant's conduct results in physical, psychiatric or psychological injury -- the defendant may be liable for medical and professional expenses, including the cost of therapy and reimbursement for lost income. FCVRA 56(b)(2). The court in State v.
Humphrey has clarified that the term "harm" within the meaning of the FCVRA embraces physical, financial and psychological damage.

In addition, when a crime victim is harmed, a presumption is created that the defendant has the ability to pay restitution unless the defendant establishes the inability to pay by a preponderance of the evidence. The presumption is rebuttable by the defendant. State v. Humphrey. However, before restitution is finalized, a court must make "serious inquiry" into certain factor, including whether (1) public policy favors criminal compensating victims, (2) the financial burden on the victim and those who provided services to the victim and (3) the financial resources of the defendant and the nature of the burden of the payment of restitution will impose on dependents of the defendant. FVRA 56(d). Failure to consider these factors may be fatal to a finding of restitution. See State v. Humphrey.

As established in (A) above, Sarah and Valerie are crime victims of Clegane's sale of the illegal fireworks. The additional restitution factors fall in Sarah and Valerie's favor as well. First, as a matter of public policy, societal interest is advanced by punishing the sale of illegal, professional grade fireworks. As demonstrated in this very case, such fireworks can cause widespread harm -- physical and to property -- and the deterrence of such sales would be beneficial to the public. Second, both Sarah and Valerie's financial burden resulting from fireworks damage is substantial -- in the case of Valerie, resulting in $22,000 current out-of-pocket medical expenses, an expected $40,000 of additional expenses, and the loss of $120,000 in salary. Valerie's garage was also destroyed, at a value of $1,700. Sarah suffered psychological harm, and is seeing a therapist. On the third factor, Clegane has failed to demonstrate that imposition of restitution will burden his dependents, if any. As a result, the award of restitution is appropriate.

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MPT 2

February 2018

In re Hastings **(February 2018, MPT-2)** In this performance test, examinees' law firm represents Danielle Hastings, who serves on the board of directors for Municipal Utility District No. 12 (MUD 12), a local government entity that provides public water, sewer, drainage, and other services to her neighborhood. Hastings seeks legal advice as to whether she can hold an election-related position in her voting precinct while remaining on the MUD 12 board. The two positions Hastings is considering are county election judge and precinct chair; she doesn't want to pursue either position if doing so would jeopardize her ability to serve on the MUD 12 board. Examinees' task is to prepare an objective memorandum analyzing whether Hastings can apply for and hold the county election judge position or the precinct chair position, while simultaneously serving as a member of the board of directors for MUD 12. The File contains the instructional memorandum, a transcript of the client interview, and descriptions of the two new positions that Hastings is considering. The Library contains Franklin Constitution article XII, section 25; excerpts from the Franklin Election Code; and three Franklin Attorney General opinions.

MEMORANDUM

TO: Emily Swann
FROM: Examinee
RE: Danielle Hastings Inquiry

In order to determine if Danielle Hastings can continue to remain on the board of the Municipal Utility District and simultaneously hold another public office, it has to be shown that it is not barred by Article XII, Section 25 of the Franklin Constitution or by the common law doctrine of incompatibility.

I. The first issue is whether the positions qualify as "civil offices of emolument."

Article XII holds that "no person shall hold or exercise, at the same time, more than one civil office of emolument." This test is divided into determining that each position is both a "civil office," and provides "emolument." If the two desired positions both qualify under these tests, then Danielle will be barred from holding both offices.

A. To be considered a "civil office," the position must pass the Morris test.

In an advisory opinion 2003-9 from March 17, 2003, it was found that the test to determine if the position is a civil office is from Morris Indep. Sch. Dist. v. Lehigh, and that the determinative factor in distinguishing an officer from an employee is "whether any sovereign function of the government is conferred upon the individual to be exercised by the individual for the benefit of the general public largely independent of the control of others." The opinion then focused on the specific functions of each position to determine if independent authority is granted to the holders of that office. Determining these positions also includes looking at whether broad, independent authority is granted to the holders of that position.

i. The MUD Position is a civil office.

In Opinion No. 2008-12, issued on February 6, 2008, it was held that that MUD positions were civil officer positions. The Attorney General noted that MUDs provide water, sewer, drainage, and other services to local communities. They also noted that they are responsible for "the management of all the affairs of the district," and may levy and collect tax for operation and maintenance purposes, and exercise various other powers set out in the Franklin Water Code.

ii. The County Election Judge is a civil office.

The County Election Judge position includes management and conduct regulation at the polling place of the precinct, the appointment of election clerks, designating the working hours and assigning duties, preserving order and preventing breaches of the peace, and appointing persons to act as special peace officers. They also handle and secure election equipment and ballots, and certify the election polling results. County Election Judges have broad, independent authority to promote sovereign functions. This position grants the Judge control over various aspects of the election process, including who to hire and when they will work.

iii. The Precinct Chair is not a civil office.

The Precinct Chair is responsible for contacting, guiding, and organizing voters from their respective political parties in their precincts, organizing, mobilizing, going door-to-door, and is voted in for two-year terms. Although this position involves organizing voters, the actions for one political party are not independent enough to be considered a sovereign function.

B. To be considered a civil office of emolument, the position must include a pecuniary profit, gain or advantage.

In State v. Babcock, the Court held that "emolument" included offices that incur pecuniary profit, gain or advantage. This includes any position that entitles the holder to compensation. Compensation that is mere reimbursement of expenses is not considered, but any amount in excess of that will count as emolument.

Opinion No. 2008-12 noted that MUD directors were entitled to receive $150 per diem payment as compensation for serving on the board. So Danielle's position on MUD is a civil office of emolument. However, the state information regarding the other two positions both indicate that although there is some reimbursement for the County Election Judge position, neither position includes compensation.

Therefore, only the MUD position is a civil office of emolument, and holding the other two positions is not barred by Article XII. However, in order to be permissible, the positions must still be permitted under the common law doctrine of incompatibility.

II.

III. Common law doctrine of incompatibility.

Even if they are not civil officers of emolument, the common law doctrine of incompatibility may prevent dual service. Attorney General of Franklin, Opinion 2008-12. This opinion noted that compensation is not relevant when determining whether offices are incompatible. Spencer v. Lafayette Indep. School District. This doctrine includes three aspects: 1) self-appointment, 2) self-employment, and 3) conflicting loyalties. Aspects 1 and 2 are only implicated if the responsibilities of one of the positions includes appointing or employing the second position. Since none of the positions in question here include appointing the others, we need only concern ourselves with the aspect of conflicting loyalties.

The Conflicting Loyalties doctrine bars the holding of simultaneous civil offices that would prevent a person from exercising independent and disinterested judgment in either or both positions. Opinion No. 2010-7. Spencer held that a school trustee and city council member were incompatible because the boundaries of the school district and city jurisdiction overlapped, and the city council had authority over health, quarantine, sanitary, and fire prevention regulations applicable to school property. The Court focused on the fact that the school policies could be influenced or even controlled by the city council instead of school trustees.

The first threshold issue in this doctrine, is that both offices must be constituted as "civil offices" in order for this to apply. Because the position of Precinct Chair is not a civil office, it is not barred and the analysis will focus solely on whether Danielle can also be a County Election Judge. As noted above, the County Election Judge is a civil office, so the doctrine of conflicting loyalties needs to be satisfied. The analysis is fact specific, and requires asking whether someone could control one office with the opposing position.

As noted above, the MUD director position allows Danielle to be in charge of the ownership, operation, and maintenance of the facilities necessary to supply water to all residents. It is a non-partisan position, and the votes are held on a separate election from the main elections, so there is no conflict arising from Statue 480. The position of the County Election Judge includes hiring and staffing, organizing the basic activities of elections, and ensuring that the voting process is smooth for the residents. In Opinion 2010-7, it was noted that purely ministerial duties that happen to relate to the opposing position were not sufficient to show that there were conflicting loyalties. There are no facts that indicate that any of the management of the water facilities would in any way interfere or

overlap with the position of the County Judge. Additionally, like in Opinion 2010-7, the MUD is a distinct governmental entity, with separate authority to manage these facilities, and is not tied to any political party. Additionally, Danielle does not have exclusive control as MUD director.

IV. Conclusion

As a matter of law, a MUD Director is not barred by either Article XII, section 25, or by the common law doctrine of incompatibility from simultaneously holding the position of County Election Judge or Precinct Chair.

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MEE Question 1

In 2012, David and Meg had a baby girl, Anna. At the time of Anna's birth, David and Meg were both 21 years old. For the next four years, they lived separately. David and Anna lived with David's mother (Anna's grandmother). The grandmother cared for Anna while David worked. David cared for Anna most evenings and weekends. During this period, Meg attended college in a distant city; she called weekly but visited Anna only during school breaks and for one month each summer.

In 2013, David bought an auto repair business with money he had saved. The grandmother continued to care for Anna while David was working in his auto repair business.

In 2016, David and Meg were married in a small wedding held at the grandmother's house. One week before their wedding, David surprised Meg by asking her to sign a premarital agreement prepared by his attorney. The agreement provided that, in the event of a divorce,

1. all assets owned by each spouse at the time of the marriage would remain the sole property of that spouse;
2. neither spouse would be entitled to alimony; and
3. the spouses would have joint physical custody of Anna.

Attached to the proposed agreement was an accurate list of David's net assets (his personal possessions, the auto repair business, a used car, and a small bank account), a list of his liabilities, and his tax returns for the past three years.

David told Meg that he would not proceed with the marriage unless she signed the agreement. Meg believed that the marriage would be successful, and she did not want to cancel or postpone the wedding. She therefore signed the agreement and appended a list of her own debts (student loans); she correctly indicated that she had no assets other than her personal possessions.

Since the wedding, David, Meg, and Anna have lived together and the grandmother has continued to provide child care while David and Meg are at work. Meg has worked full-time as a computer engineer, and David has continued to work full-time in his auto repair business. Their incomes are relatively equal.

They have the following assets: (a) the auto repair business (owned by David); (b) stocks (owned by Meg, which she inherited last year); and (c) the marital home (purchased by David in his name alone shortly after the wedding). The down payment and all mortgage payments for the marital home have come from the couple's employment income.

Last month, David discovered that Meg had been having an affair with a coworker for the past year.

David wants a divorce. He also wants to obtain sole physical custody of Anna; he believes that Meg's adultery should disqualify her as a custodial parent. His plan is to live with the grandmother, who would provide child care when he is unavailable.

This jurisdiction has adopted a statute modeled after the Uniform Premarital Agreement Act.

1. May either spouse successfully enforce the premarital agreement in whole or in part? Explain.

2. Assuming that the premarital agreement is not enforceable, what assets are divisible at divorce? Explain.

3. Assuming that the premarital agreement is not enforceable, may David obtain sole physical custody of Anna based on (a) Meg's adultery or (b) other factors? Explain.

I. Premarital Agreement

The issue is whether Meg voluntarily entered into the premarital agreement. A premarital agreement is an agreement entered into in anticipation of marriage, not after marriage. Under the Uniform Premarital Agreement Act, premarital agreements are valid if they meet certain requirements. There must be a full disclosure of assets, the agreement must be signed by both parties, if one party is represented by an attorney the other party must have an opportunity to seek independent counsel, and the agreement must be entered into voluntarily. Circumstances that indicate an agreement is not voluntary include where only one party is represented by counsel and the other party is not given an opportunity to seek counsel or where the agreement is a surprise to one spouse. The agreement can contain provisions where one or both spouses waive their rights to spousal support. Any provisions regarding custody of children are not enforceable. The court must make an independent determination of custody.

In this case, David and Meg both fully disclosed all of their assets. The agreement was signed by both parties. The agreement was prepared by David's attorney. This indicates that David was represented by counsel and the agreement was likely written in a manner that would protect David's interests, not necessarily Meg's interests. The agreement was proposed to Meg one week before the wedding. Meg could have sought an attorney in that next week, but was not given much time or a specific opportunity to seek an attorney. Additionally, David surprised Meg with the premarital agreement just one week before their marriage. After four years together, David surprised Meg with minimal notice. Courts have ruled premarital agreements proposed on the night before the wedding to be invalid. One week before the marriage is longer but still seems somewhat coercive. Meg signed the agreement because David told Meg he would not proceed with the marriage unless she signed the agreement and she did not want to cancel or postpone the wedding. Based on the totality of the circumstances surrounding the premarital agreement, it is possible a court would find the agreement was not entered into voluntarily.

If the court finds the agreement was voluntary, the court will not enforce the provisions regarding the spouses having joint physical custody of Anna unless the court deems such an arrangement is in the best interests of Anna. While the agreement may be evidence of the parents' intentions and desire, the court is not bound by the agreement. Therefore, the entire agreement may be unenforceable if Meg's signature was involuntary, but if the agreement is enforceable, the provision regarding child custody is not enforceable.

II. Asset Division

The issue is which property passes to the individual spouse as separate property and which property is divided between spouses as marital property. There are three prevailing views of property distribution: 1. community property, 2. equitable distribution of all assets, or 3. equitable distribution of marital assets. The majority of jurisdictions divide property based on the equitable distribution of marital assets. Division of property upon divorce requires an analysis of marital property versus separate property. Separate property is property the spouse entered the marriage with. Marital property is property obtained during the marriage, unless meant as a gift for one specific spouse. Marital property includes stocks, bonds, investments, cars, homes, etc., anything purchased with marital property during the marriage or that gains value through a spouse's efforts during the marriage.

The auto repair business is owned by David. David purchased the business before the marriage in 2013 with money he had saved. The business was not purchased with marital funds, but with David's own personal funds. Therefore, the business is separate property of David's, unless it gained value due to his work during the marriage and it is partially marital property.

The stocks are owned by Meg and were inherited last year. Stocks obtained during the marriage can be considered marital property but inheritance is not marital property. With inheritance, the person obtaining the property is the specific beneficiary, not the marriage. Therefore, the stocks are separate property of Meg's.

The marital home was purchased by David in his name alone after entering into the marriage. While the home is solely in David's name, the home was purchased during the marriage and is marital property. The down payment and all mortgage payments for the home came from the couple's employment income. Therefore, the home is divisible between David and Meg.

III. Custody of Anna

Two types of custody are physical and legal. Legal custody is the determination of important decisions related to the child. Physical custody is physically having the child in your care. Courts will grant full or partial custody of either legal or physical type to either or both parents.

The issue is whether marital fault (adultery) is relevant to custody of a child. Most courts do not consider marital fault when determining custody of a child unless the fault has a direct impact on the individual's ability to raise the child. The overarching policy and rule for custody is the best interests of the child. The judge has wide discretion in determining custody as long as it is based on the best interests of the child. In this case, adultery has no impact on Meg's ability to raise Anna and therefore the court will not award David sole physical custody of Anna based on the adultery.

The next issue is whether David may obtain sole physical custody of Anna based on other factors. When determining the best interests of the child, the court looks at the child's relationship with the parents, siblings, and other individuals, the parents' ability to raise the child, the wishes of the parents, mental and physical health of all parties, stability, primary caretaker functions, etc. Here, David and Meg have lived together with Anna since their marriage. They both work full-time and David's mother consistently takes care of Anna. The court will look at who will be most stable in continuing those relationships. The court may look at the time Meg spent at school, only seeing Anna on breaks and for one month during the summer and only calling once per week. The court may consider that David will move in with his mother to continue the stability for Anna. However, sole custody is not often granted absent extreme circumstances. This is because parents are entitled to the care, custody, and control of their children as a protected fundamental right. Based on the known facts, sole physical custody is not warranted in this situation and David will not obtain sole physical custody.

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MEE Question 2

A defendant, age 25, is charged in State A with armed robbery. According to the indictment, on June 1, the defendant went into a store, pulled out a gun, and said to a cashier, "Give me all your money or I'll shoot you!" The cashier gave the defendant $5,000. The police arrived as the defendant was driving away. The police car followed the defendant, who was driving over 80 mph. The defendant crashed his car into a tree and suffered a serious head injury, losing consciousness. He was taken by ambulance to a hospital, where he regained consciousness on June 8. On June 15, he was discharged from the hospital. On July 1, he was arraigned on the armed robbery charge and released on bail. Over the next few months, the defendant recovered full physical mobility, but he continued to show symptoms of cognitive impairment resulting from brain trauma suffered during the car crash.

Police interviews with the defendant's family and friends have revealed that, in the months preceding the robbery, the defendant had experienced financial and emotional difficulties. According to the defendant's best friend, the defendant had recently started a new business, which was struggling. A month before the robbery, the defendant told his best friend, "I cannot attract customers because the United Nations has organized a secret boycott of my new business." On the day before the robbery, the defendant texted his best friend: "I've been a victim for too long. I've decided to start making up for my losses. If you read about me in the papers tomorrow, I'll already be far away, so delete this text and tell the police you never knew me."

In December, as the state began preparing for trial, two court-appointed psychiatrists evaluated the defendant and prepared the following joint report to the court:

> Before the robbery, the defendant had a slightly above-average IQ. The defendant had completed a community college program in business administration and had recently opened his own business, which he owned and managed at the time of the robbery. A few months before the robbery, the defendant's business was struggling, and he began experiencing some mental health difficulties. His mental health difficulties apparently did not impair his relationships with his family and friends or his ability to manage his everyday life and operate his business. The defendant never sought mental health treatment.
>
> On the day of the robbery, during the crash, the defendant sustained brain trauma that has impaired his cognitive functioning. The defendant has not returned to work, and there has been no cognitive improvement to date. When questioned about the pending criminal charge, the defendant typically responds, "My mother told me I did something bad, but I can't remember what." He is unable to remember anything about the robbery. When asked about his appointed counsel, the defendant usually says, "She's nice" or "She comes to see me and helps me." He describes the judge as "the guy in charge," but when asked to explain what happens in court he responds, "I don't know what they are talking about." During repeated interviews, we have seen no evidence that the defendant currently understands abstract language and concepts. We have also seen no evidence that he is feigning or exaggerating his cognitive impairment.

State A uses the *M'Naghten* not guilty by reason of insanity (NGRI) test and requires that the affirmative defense of NGRI be proved by a preponderance of the evidence.

Defense counsel has requested a hearing to determine whether the defendant is competent to stand trial (in some jurisdictions, this is called "fitness to stand trial") and has informed the court that, if the trial proceeds, the defendant will argue that he is NGRI.

Based on all the information presented above, including the information in the psychiatrists' report:

1. Should the prosecution be suspended because the defendant is currently incompetent to stand trial? Explain.

2. If the defendant is found competent to stand trial and the prosecution proceeds, will the jury likely find that, with respect to each element of the *M'Naghten* test, the defendant has met his burden of proof? Explain.

I. Defendant is Not Competent to Stand Trial

The issue is whether the defendant can appropriately participate in his own defense and whether he can understand the nature of the proceedings. When determining competency of a defendant, there are two relevant time periods. The relevant time for analyzing the defendant's competence is at trial. A defendant is not competent to stand trial if he is unable to appropriately participate in his own defense or understand the nature of the proceedings. If a defendant is deemed incompetent to stand trial, the charges are suspended and the defendant is reevaluated at a later date to see if he has obtained sufficient capacity to participate in the proceedings.

First, the defendant must be able to participate in his own defense. This means the defendant can communicate with his attorney, make decisions, and provide information relevant to the case. This does not mean that the defendant is knowledgeable in the law and can help craft case theories or evidentiary arguments. The court-appointed psychiatrists evaluating the defendant indicated that the defendant had had no cognitive improvement to date. He suffered brain trauma from the car crash and has not returned to work. The defendant says he does not remember anything about the robbery, and the experts believe the defendant is telling the truth. His inability to remember the armed robbery is a significant hindrance on his defense, but is not sufficient to make the defendant incompetent to stand trial, if the defendant can still communicate information to participate in the defense.

The second issue is whether the defendant can understand the nature of the proceedings. This requirement does not mean that the defendant must understand the intricacies of the law or be able to make legal arguments. This simply means that the defendant understands he is in a court of law for participating in a criminal action, that the court or jury will make a determination of guilt, and that the defendant understands his rights.

Typical areas the defendant is questioned about to determine competence is whether the defendant understands the roles of the parties in the courtroom or understands the act he committed and why such an act would be criminal. In this case, the defendant is unable to remember anything about the robbery and only understands that his mother told him he did something bad. The defendant's interpretation of his attorney is that she is nice and she helps him. This shows the defendant may be able to understand part of the role of his attorney, but it is not a strong understanding. The defendant describes the judge as being

in charge, which is the basic role of the judge. The defendant has a grasp on the general roles of the defense attorney and the judge, but not a strong grasp. This is indicative of the defendant not understanding the nature of the proceedings. That the defendant does not understand what the parties are talking about is also indicative, unless he is referring to the legal terms used in the courtroom. There are two experts stating they both agree the defendant is not feigning or exaggerating his cognitive impairment and that the defendant does not understand abstract language or concepts. It is unlikely that the defendant can understand the nature of the proceedings and is therefore not competent to stand trial.

Because the defendant cannot participate in his defense and cannot understand the nature of the proceedings, the defendant is not competent to stand trial.

II. The Defendant Failed to Meet His Burden To Show He Is Not Guilty By Reason of Insanity

The issue is whether the defendant met his burden to prove he is not guilty by reason of insanity. The M'Naughten test for insanity requires that the defendant suffers from a disease of the mind that caused a defect in reason so that the defendant was be unable to appreciate the nature of his actions or unable to conform his conduct. The M'Naighten test must apply at the moment the defendant commits the act. Whether a defendant previously or subsequently suffered from a disease of the mind that caused a defect in reason is not what the law requires. Instead, at the moment the defendant robbed the cashier, he must have been suffering from a condition that qualifies under M'Naughten. The fact that the defendant suffered cognitive impairment resulting from brain trauma after the armed robbery is irrelevant.

First, we must determine whether the defendant had a disease of the mind. The defendant's family and friends said the defendant had financial and emotional difficulties. Mere financial or emotional difficulties do not cause a disease of the mind or even a mental defect. One friend said the defendant discussed a secret boycott organized by the United Nations of his store. This is indicative of a problem with the mind. Thinking the United Nations is out to get you is a reason to believe someone may be insane. However, that was in the months leading up to the robbery and no disease of the mind was ever diagnosed. The defendant had a slightly above-average IQ and completed college. Defendant opened his own business, which he continued to own and manage. While he had mental health difficulties, his relationships with his family and friends was not impaired

and the defendant never sought mental health treatment. The defendant did not have a disease of the mind that created a defect in reason.

If the defendant did have a defect in reason due to a mental disease, we must determine whether it caused the defendant an inability to appreciate the wrongfulness of his actions or conform his conduct. The day before the armed robbery, the defendant texted his friend "I've been a victim for too long. I've decided to start making up for my losses. If you read about me in the papers tomorrow, I'll already be far away, so delete this text and tell the police you never knew me." This statement shows an aspect of intent on the defendant's part to commit a crime on the day he committed the crime. Premeditation to commit the crime shows that any mental defect he may have had did not cause the activities. Additionally, the defendant drove away from the scene as the police arrived and was speeding away at over 80 miles per hour. This shows an appreciation of the nature of his actions. Furthermore, the defendant's statement to his friend that the police may be involved and the friend should delete the number show the defendant appreciated the nature of his actions and had the ability to conform his actions. The defendant's actions do not meet the M'Naughten test.

The defendant has the burden to prove the requirements of the M'Naughten test by a preponderance of the evidence (more likely than not). The defendant has failed to show it is more likely than not that he had a disease of the mind that created a defect in reason, and his actions the day before the robbery and on the day of the robbery indicate his appreciated the nature of his actions and could have conformed his actions. Therefore, if the defendant is found competent to stand trial, the jury is not likely to find that the defendant met his burden of proof on the insanity defense.

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MEE Question 3

A woman whose hobby was making pottery wanted to improve her pottery skills both for her own enjoyment and to enable her to create some pottery items that she could sell. Accordingly, she entered into negotiations with an experienced professional potter about the possibility of an apprenticeship at his pottery studio.

The negotiations went well, and after some discussion, the woman and the professional potter orally agreed to the following on May 1:

- The woman would be the potter's apprentice for three months beginning May 15. During the apprenticeship, the potter would provide education and guidance about the artistry and business of pottery. The woman would pay the potter $4,000 for the right to serve as the potter's apprentice, payable on the first day of the apprenticeship.
- The potter would supply the woman with equipment and tools that she would use during the apprenticeship and would be entitled to take with her at the conclusion of the apprenticeship. On or before May 8, the woman would pay the potter $5,000 for the equipment and tools.
- The woman would be provided with a private room in the potter's studio in which to stay during the apprenticeship.

On May 2, the woman and the potter signed a document titled "Memorandum of Agreement." It contained the terms orally agreed to the day before, except that it did not refer to the woman's living in a private room in the potter's studio. The last sentence of the document stated, "This is our complete agreement."

On May 8, the woman went to the potter's studio and paid him the $5,000 called for in the agreement for the equipment and tools. While she was there, the potter said that he had decided that the $4,000 price was too high for the right to serve as his apprentice and proposed lowering it to $3,500. The woman happily agreed, and they shook hands on this new arrangement.

On May 15, the woman arrived at the potter's studio to begin the apprenticeship and move into the room she would occupy during that time. The potter refused to let her move in, however, and said that their deal did not require him to provide lodging for the woman. When the woman protested that they had agreed to the lodging arrangement, the potter took the signed Memorandum of Agreement out of his pocket and pointed out to her that it contained no reference to the woman's living in his studio. He then said, "If it's not in here, it's not part of the deal."

The woman then said, "At least you were reasonable in agreeing to change the price for the apprenticeship to $3,500. Saving that extra five hundred dollars means a lot to me." In response, the potter pointed to the Memorandum of Agreement again and said to the woman, "That's not what this says. This says that you'll pay me $4,000 today. Even if I agreed to lower the price, I didn't get anything for that, so why should I be bound by it?"

The woman is quite angry about this turn of events and is considering suing the potter.

1. If the woman sues the potter about the disputes relating to the apprenticeship, will those disputes be governed by the common law of contracts or by Article 2 of the Uniform Commercial Code? Explain.

2. Assuming that the common law of contracts governs, is the oral agreement concerning the woman's lodging binding on the parties? Explain.

3. Assuming that the common law of contracts governs, is the oral agreement lowering the price for the apprenticeship binding on the parties? Explain.

1. Choice of law for dispute over apprenticeship

<u>Common Law vs. UCC</u>

Common law governs contracts regarding service and real property. The UCC governs contracts regarding consumer goods.

Here the 3 month apprenticeship is a service, because the potter is agreeing to educate and guide the woman. This will be governed by common law. Also the terms regarding the rental of the space above the shop deal with real property and would governed by common law. The terms about the tools may be considered UCC because pottery tools used by a potter would be a consumer good. The parties are not required to be merchants for this to be a UCC contract.

<u>Predominant factor test</u>

If a contract includes both service and sale of goods then the courts will consider the predominant purpose of the contract. Here the purpose of the contract is for Woman to learn to become a potter. The room and tools are part of the deal that will make the apprenticeship more convenient but it is not about the buying of the tools or the apartment. Therefore this service will be the predominant purpose and common law will likely be the governing law.

<u>Divisible contracts</u>

If a contract is clearly divisible meaning that the service contract and real estate aspect are clearly separate from the sale of goods then the court can consider both and split the contract. Here contract clearly divides the apprenticeship with a fee of $4k (and the room as part of the apprentice ship) from purchase of the pottery tools for the apprenticeship that Woman can keep after for a price of $5k. Given that the contract can be divided the court could consider each part with its respective laws. In this case the issues are regarding the apprenticeship price and the apartment so common law would still be the governing law.

2. Is the oral agreement of lodging binding?

<u>Statute of frauds</u>

Certain contracts must be in writing because there is a high risk that parties will later dispute the terms. Contracts regarding the sale of real property and leases over a year must be in writing. Here the agreement concerning the lodging is about a 3 month lease during the period of the apprenticeship. This is not the sale of real property and the lease can be complete in less than a year so this agreement does not fall under the statute of frauds requirements. This agreement does not need to be in writing.

<u>Parol evidence</u>

The parol evidence rule prevents a party from adding oral agreements made before or

concurrently with the written agreement. Under the parol evidence rule it is presumed the parties to a written and completely (fully integrated) agreement will include all necessary terms.

Therefore the additional terms before the written agreement will not be considered. Here the oral agreement about lodging was made on May 1. The Memorandum of agreement was written and signed on May 2. The terms of the Memo state "this is our complete agreement." There is a presumption in common law that contracts that include this provision, signed by both parties, is a representation that it is the fully integrated agreement. Therefore any other terms, oral or written, made before that were not included in the contract will not be presented to the court as evidence. Since the oral agreement was before the Memo and the Memo suggests it is the final contract, the court will not hear evidence of the oral agreement. It will not be enforceable in court.

Exceptions

The exceptions to the parol evidence rule, when the court will consider extrinsic evidence of a prior agreement, are only if there is a separate agreement that would not have reasonably been included in the written agreement, is evidence to show fraud or another contract defense, or if there are ambiguous terms that need to be clarified. Woman will argue that the rental agreement would not naturally be part of the apprenticeship contract, however, they agreed to all of the terms on May 1 so it is unlikely they would need to split the terms into separate contracts on May 2 when they put it in writing. Woman may also argue the potter misrepresented the terms of the contract. However, there is no indication the lodging was the determining factor in creating the contract. Therefore it would be hard to show it was used to fraudulently entice Woman to enter the contract. Finally there is no ambiguous term at issue. The exceptions to the parol evidence rule will not apply. The oral contract as a prior agreement to the fully integrated contract will not be enforceable.

3. Modification of contracts

Consideration

Under common law, a contract modification requires separate consideration. A party's obligations cannot be changed without new consideration because there is already a preexisting duty to complete this obligation. Here the terms of the apprenticeship were that Woman would pay $4k on May 15 for the right to serve as the potter's apprentice and the potter as part of the apprenticeship would provide education and guidance about the business starting on May 15. The modification made by the potter on May 8 lowering the apprenticeship fee from $4k to $3,500 does not provide new consideration. There are not facts that the potter will teach Woman less or spend less time with her than the 3 months in

the contract. The potter said that it was too high to serve as his apprentice and proposed lowering it for the same apprentice. Therefore there is no consideration for lowering a payment Woman was already obligated to pay. Since there is no new consideration, the modification is unenforceable under common law. The modification will not be binding.

Parol evidence

If it is determined that there was new consideration for the reduction in the fee, the evidence of this oral agreement can come in. The parol evidence rule only prevents prior and contemporaneous agreements to the written contract. This is a subsequent agreement made on May 8.

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MEE Question 4

A developer acquired a 30-acre tract of land zoned for residential use. The developer thereafter marked out 60 building lots. The developer granted various utility providers appropriate easements to install underground sewer and utility lines. These utility easements were promptly and properly recorded.

Subsequently, the developer contracted with a man to build a home for the man on one of the 60 lots. The contract provided that, at closing, the developer would convey the home and lot to the man by a warranty deed excepting all easements and covenants of record. The home was completed nine months later.

At the closing, the developer conveyed the home and lot to the man by a valid warranty deed containing the six title covenants. Notwithstanding the language in the contract, the deed contained no exceptions to these six covenants. The deed was promptly and properly recorded.

Two months later, following a heavy storm, the man discovered rainwater in the basement level of his home. Three bedrooms were located on this level, and the influx of rainwater made all of them unusable. An expert determined that the cause of the rainwater influx was a defect in the construction of the home's foundation.

The man contacted the developer, who denied any responsibility for the influx. Rather than argue with the developer, the man contacted a plumber, who concluded that the problem could be solved by installing a sump pump in the basement. The plumber accurately told the man that the usual cost of installing a sump pump was $750, but that the location of the sewer lines coming into the home created more work, raising the installation cost to $1,500. The man told the plumber to install the pump.

Thereafter, the man sued the developer for $5,000 in damages for the cost of the sump pump, its installation, and damage to the floors and carpeting in the basement. He also sought additional damages for breach of one or more title covenants.

1. Which present title covenants, if any, did the developer breach with respect to the utility easements? Explain.

2. Assuming that there was a breach of one or more of the present title covenants, can the man recover damages from the developer for the breach? Explain.

3. May the man force the utility company that installed the underground sewer lines to remove them from the land? Explain.

4. May the man recover the $5,000 in damages from the developer? Explain.

I. Title Covenants

A warranty deed includes six covenants: 1. covenant of seisin, 2. covenant against encumbrances, 3. covenant that the developer has not conveyed the land to someone else 4. covenant of quiet enjoyment, 5. covenant for further assurances, 6. covenant for warranty of title. The first three covenants are present covenants that are breached, if at any time, at the time of the closing. The second three covenants are future covenants that are only breached in the future. The covenant against encumbrances promises that the land is free from easements. An easement is a nonpossessory interest in land. An easement runs with the land so long as the buyer of the land is not a bona fide purchaser. An easement can either be in gross or appurtenant. An easement appurtenant had a dominant parcel and a servient parcel. The servient parcel carries the burdens of the easement and the dominant parcel carries the benefits of the easement. An easement in gross involves only one parcel of land, the servient parcel.

The man took the land with record notice, because the easements were recorded. He also took the land with inquiry notice, because inquiry would reveal that there was electricity and sewer running to his home in some manner. Therefore, the man is not a bona fide purchaser. In this case, the developer allowed various utility providers to install underground sewer and utility lines. These are easements and therefore breach the builder's covenant against encumbrances. The covenant of seisin provides that the developer has the ability to convey the land. This was not breached because the developer did indeed have the ability to convey the land. The developer also warranted that he did not previously convey the land to anyone else. Here, the developer did not convey the land to anyone except the man. Additionally, all land transactions include a warranty of merchantability. This means the title is free from reasonable doubts. The warranty of merchantability is a present title covenant that is breached, if ever, at the conveyance of the land. Developer did not breach the warranty of merchantability. Therefore, the only present title covenant developer breached was the covenant against encumbrances.

II. Recovery for Breach of Covenant

The issue is whether a breach of a present title covenant is recoverable after the conveyance of land. A present title covenant is breached immediately upon conveyance of the land. A buyer who learns of the breach after the conveyance may sue the seller for damages resulting from the breach. However, a buyer who should be aware of the

easements is deemed to have accepted the land subject to the easement, no matter what type of deed is executed. The warranty deed conveyed was a warranty deed excepting all easements and covenants of record. In this case, the warranty against encumbrances was breached. However, buyer was aware, or at least had notice through record notice or inquiry notice, of the easements. Therefore, buyer waived his right to demand damages for the breach and cannot recover damages from the developer.

III. Removal of Sewer Lines

IV.

The issue is whether the easement follows the land or ended when developer sold the land to buyer. An easement is a nonpossessory interest in land. An easement in gross does not run with the land unless it is a commercial easement. If it is a commercial easement in gross, the easement runs with the burdened land so long as the buyer had notice of the easement. Notice can be actual notice, inquiry notice, or record notice. Inquiry notice and record notice are considered constructive notice. Actual notice does not exist here because the buyer did not actually know of the easements. Record notice exists because the easements were properly recorded prior to the buyer purchasing the land. Inquiry notice is present because the buyer is charged with making a proper inspection of the land and being aware of what such an inspection would reveal. In this case, the utility company has an easement in gross because there is only one parcel, the servient parcel, that the utility company is benefited from. The utility company's interests are commercial, therefore the easement in gross will run with the land so long as the buyer had notice of the easement. Here, buyer should have been aware from the land and use of the home that there were sewer and electrical utilities running on the land. Therefore, buyer had both record and inquiry notice. A bona fide purchaser is a purchaser for value without notice. A bona fide purchaser takes the land free from the easements. Because the buyer had notice, he is not a bona fide purchaser and does not take free from the easement. Therefore, the utility company's easements are valid and stay with the land and buyer cannot force the utility company to remove the lines form the land.

V. $5,000 Damages

The issue is whether the developer is responsible for a faulty construction on the home after the buyer took possession of the home. Typically, a seller of a home does not warrant that the home will be free from defect or have any warranty of habitability. However, when the seller is also the manufacturer of the home, the seller promises that the home was

constructed in a proper manner, is fit for ordinary use, and is free of unreasonable defect.

In this case, the developer contracted with the man to build the home for the man. The developer conveyed the home and lot to the man. The developer was the constructor of the home. Two months later, there was a heavy storm and rainwater was in the basement. An expert found the case of the rainwater influx was a defect in the construction of the home's foundation. The construction flaw caused the injury. Therefore, seller is liable for violating the warranty that the house would be free from unreasonable defects. Man can recover the $5,000 in damages from the developer.

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MEE Question 5

While speeding down a rural highway in State A, the driver of a moving van lost control of the van and struck a car. A passenger in the car was seriously injured.

The passenger filed suit in the federal district court for the district in State A where the accident had taken place. She sought damages for her injuries from the driver of the van and the moving company that employed him. Among other allegations, the complaint alleged that

- the driver and the moving company are citizens of State A;
- the driver resides in the federal judicial district where the suit was brought;
- the accident occurred in the federal judicial district where the suit was brought;
- the passenger is a citizen of State B;
- the amount in controversy exceeds $75,000;
- venue is proper in the federal judicial district where the suit was brought;
- the driver was employed by the moving company and was acting in the course of his employment at the time of the accident;
- the driver of the moving van was negligent; and
- the passenger suffered serious injuries as a result of that negligence.

The defendant driver and the defendant moving company were both represented by an attorney who was a partner in a 30-lawyer law firm. The attorney was retained and received a copy of the complaint only four days before an answer was due. The attorney was conducting another trial at the time. Rather than ask another lawyer in the firm to answer the complaint, the attorney personally prepared and filed a timely answer to the complaint on behalf of the defendants.

The answer to the complaint, which was signed by the attorney, read simply: “General Denial: Defendants Hereby Deny Each and Every Allegation in the Complaint.”

Two months later, the plaintiff (the passenger) properly served Requests for Admission on the defendants, requesting admission of each allegation in the complaint. Responding to the Requests for Admission, the defendants (still represented by the attorney) denied the allegations concerning the driver’s negligence and the plaintiff’s injuries, but admitted all other alleged facts.

The plaintiff then served on the defendants’ attorney a motion for sanctions on the ground that the general denial in the answer was inappropriate. The plaintiff requested that the defendants withdraw their original answer and file an amended answer admitting the allegations that the defendants had admitted in their response to the Requests for Admission.

One month later, after the defendants had failed to withdraw or amend their answer, the plaintiff filed the motion for sanctions in court. The plaintiff’s lawyer submitted evidence that his customary billing rate is $300 per hour and that he had spent seven hours preparing the motion and corresponding with the defendants’ attorney about the answer, for a total of $2,100.

1. May the court properly grant the plaintiff’s motion for sanctions? Explain.

2. If the court grants the plaintiff’s motion for sanctions, (a) what sanctions are appropriate and (b) against whom should the sanctions be ordered? Explain.

1. The court may grant the plaintiff's motion for sanctions.

The court may grant a motion for sanctions when the party against whom the motion is sought has violated court orders or some procedural rules. Federal Rule of Civil Procedure 11 provides that, by signing a document submitted to the court, a party certifies to the court that it has exercised reasonable efforts to determine that the information provided in such document is accurate. A violation of this rule empowers the court to impose sanction on the violating party. A document submitted in violation of Rule 11 may be withdrawn with 21 days of a request to withdraw to avoid court sanctions.

Here, the attorney for the defendants signed the Answer which contained inaccurate information to the court. As evidenced by the defendants' responses to the Requests for Admission, the defendants could not have denied "Each and Every Allegation in the Complaint" because some of those allegations were true, i.e., all of the allegations except those concerning negligence and injury issues.

When an attorney represents a fact to the court through pleadings, other signed documents, or statements in court, the attorney represents that the asserted facts are true and that the attorney has made a reasonable attempt to identify that the facts are true. In this case, the original general denial and the subsequent admissions show the defense attorney did not make reasonable efforts to ascertain the truth prior to making representations to the court. The facts the attorney denied were not hard to discover. Thus, the defendants' attorney violated Rule 11 by submitting the Answer.

In addition, the attorney was given a month (more than 21 days) to withdraw the Answer. His failure to do so renders his conduct sanctionable under Rule 11. The court, in its wide discretion, may grant the plaintiff's motion for sanctions.

2. If the court grants the plaintiff's motion for sanctions, the defendants' attorney should be ordered to pay the plaintiff's attorney's fees.

The court has a wide range of options when imposing sanctions, including: attorney's fees, adverse inference jury instruction, striking of pleadings, default judgment, etc. The sanctions imposed should reflect the severity of the violation and the need of the system to deter similar conduct in the future. Court sanctions can be imposed on both the relevant party and its attorney.

Here, the plaintiff has suffered some cost due to the defendants' attorney's failure to observe the rules. Thus, the plaintiff should be reimbursed for the attorney's fees she incurred. Based on the facts known, such sanction should be imposed on the defendants' attorney. Other sanctions may not be appropriate in this instance because the violation here is not serious and any impacts have been mitigated by the defendants' responses to

the Requests for Admissions.

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MEE Question 6

A man and a woman were equal partners in a neighborhood natural-foods store. The store had been at the same location for many years and had developed a loyal following. Under their informal arrangement, the man had managed the business and the woman had supplied capital to the business as needed.

They leased the building in which the store was located and had regularly sought to purchase the building for the partnership, but the landlord had always refused. Six months ago, however, the landlord called the man and said, "I thought you would want to know that I'm planning to sell the building." The next day, the man sent the woman an email: "I am leaving our partnership. I will wind up the business and send you a check for your half share." Without informing the woman, the man then contacted the landlord and offered to buy the building. The landlord accepted, and the two entered into a binding purchase agreement. One month later, the man took title to the building.

Three months ago, the man sent the woman a check for half of the store's inventory and other business assets. Instead of cashing the check, the woman sent the man an email stating that she regarded the partnership as still in existence and demanded that the man convey title to the building to the partnership. The man replied that their partnership was dissolved and that he had moved on. He then began to operate the store as a natural-foods store with a name different from that of the original store, but with the same product offerings and the same employees.

The woman has sued the man for withdrawing from the partnership and for breaching his duties by buying the building from the landlord.

1. Did the man properly withdraw from the partnership? Explain.

2. Assuming that the man's withdrawal was not wrongful, what was the legal effect of the man's withdrawal from the partnership? Explain.

3. What duties, if any, did the man breach by purchasing the building? Explain.

I. The Man Properly Withdrew From the Partnership

The issue is whether the man properly withdrew from the partnership at will. A general partnership requires no formalities to create. A partnership is two or more people acting as co-owners of a business for profit. A partnership created with no specific terms of time limit is considered a partnership at will. In a partnership at will, any of the partnerships may cease the relationship with the partnership at any time. The partner simply manifests an intent to leave the partnership and informs the other partners/partner of the intent to leave the partnership. A partner can do so at any time without breaching any agreements with the partnership.

Man and woman had a partnership at will. They were equal partners in a neighborhood natural-food store for years and had an informal arrangement where the man managed the business and the woman supplied capital as needed. Because this is a partnership at will, the man could withdraw from the partnership at any time. He properly did so when he told the woman "I am leaving our partnership. I will wind up the business and send you a check for your half share." The man's withdrawal was express and in writing.

II. The Man's Withdrawal From The Partnership Led To The Partnership Entering The Winding Up Phase

The issue is what effect one partner's dissociation from a partnership at will has on the partnership as a whole. Upon one or more partners of a partnership expressing intent to leave the partnership, the partner wishing to leave the partnership is dissociated from the partnership. In a partnership at will, dissociation of one partner also leads to the dissolution of the partnership. Upon dissolution of the partnership, the partnership enters the winding-up phase. The partnership must liquidate assets, pay off creditors, pay off capital accounts of partners, and distribute any profits or losses left over to the partners. Once the winding-up phase is complete, the partnership is terminated. The man and the woman were in a partnership at will. Upon the man's dissociation from the partnership, the partnership dissolved and entered the winding-up phase.

III. The Man Breached The Duty of Loyalty

The issue is what duties a partner has to the partnership and the other partners. A partner in a general partnership owes each partner and the partnership a duty of loyalty and a duty of care. The duty of care provides that the partner must use their best effort to act in the best interests of the partnership. The duty of loyalty provides that the partner cannot engage in activities that benefit himself to the detriment of the partnership. The duty of loyalty prohibits the partner from engaging in self-dealing, from usurping partnership opportunities, and from competing with the partnership. The prohibition against self-dealing provides that the partner cannot profit from activities of the partnership without the partnership being aware of the activity.

In this case, the partnership was interested in purchasing the building it had leased for many years. The partnership had sought to purchase the building regularly. The landlord told the man he was planning to sell the building. The man did not inform the woman of

this fact. The man did not inform the partnership of this fact. Instead, the man emailed the woman that he was dissociating from the partnership. The man then contacted the landlord and offered to buy the building, which he did just one month later.

Pursuant to the duty of loyalty, the man should have informed the partnership of the fact that the landlord was looking to sell the property in the future. This information was essential to the partnership's interests in the building and a possible partnership opportunity. The failure to inform the partnership of this fact is a breach of the duty of loyalty. The man then dissociated from the partnership. During the winding up phase of the partnership, the partner purchased the building. While the partner benefited from self-dealing, the man will likely argue that the partnership was winding up and unable to enter into new contracts except for the purpose of winding up. However, inability to enter into the contract for lack of money or other reasons is insufficient to forgive a breach of loyalty. The partnership may be able to disgorge the man of the profits he obtained from purchase of the building and distribute profits between the man, the woman, and any unpaid creditors. The man's actions were a breach of the duty of loyalty to the partnership and the woman, his partner.