MPT 1
February 2020

Downey v. Achilles Medical Device Company **(February 2020, MPT-1)** The examinee's law firm, Betts & Flores, represents Achilles Medical Device Company (AMDC) in a products liability action alleging that AMDC negligently manufactured and sold defective walkers. There are currently five named plaintiffs; the trial court has yet to rule on the plaintiffs' motion for class certification. The examinee's task involves a professional responsibility issue regarding contacts with represented persons. An investigator employed by the plaintiffs' lawyers wants to question one former AMDC employee and four current employees about the facts surrounding the Downey litigation. The investigator has not asked for permission from AMDC's counsel to do so. The examinee must address whether this investigator can speak to AMDC's current and former employees without the advance permission or presence of Betts & Flores. Second, the examinee is to analyze whether Betts & Flores attorneys can speak to current or prospective members of the plaintiffs' proposed class without the prior permission of plaintiffs' counsel. The File contains the instructional memorandum from the supervising partner, a file memorandum describing the client's concerns, and a file memorandum that summarizes the interviews of the AMDC employees. The Library contains excerpts from the Franklin Rules of Professional Conduct (identical to the ABA Model Rules of Professional Conduct), an ethics opinion from the Franklin Board of Professional Conduct, and one Franklin Court of Appeal case.

MEMORANDUM

To: Hiram Betts

From: Examinee

Date: February 25, 2020

Re: *Downey v. Achilles Medical Device Company*: Professional Responsibility

Our firm represents Achilles Medical Device Company (AMDC), who is the defendant in a class action lawsuit concerning model 2852 walkers sold during the years 2010-2015 that were allegedly defective. The plaintiffs' lawyers have spoken with one former AMDC employee (Ron Adams) and four current AMDC employees (Gus Bartholomew, Agnes Corlew, Elise Dunham, and Penny Ellis) without our consent.

The Franklin Rules of Professional Conduct (FRPC) permit the plaintiffs' lawyers to communicate with Mr. Adams, Mr. Bartholomew, and Ms. Corlew without our firm's consent. The plaintiffs' lawyers may not speak with either Ms. Dunham or Ms. Ellis.

Our firm also wishes to communicate with the named plaintiffs and potential members of the class action. The FRPC permit us to speak with potential members without the consent of opposing counsel. However, we must obtain counsel's consent to speak with any named plaintiffs.

I. Communication between Plaintiffs' Lawyers and AMDC Employees

Rule 4.2 of the FRPC states that "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

A lawyer is also responsible for the conduct of nonlawyers who are "employed or retained by or associated with a lawyer" provided that the lawyer "orders or, with the knowledge of the specific conduct, ratifies the conduct involved." (Rule 5.3) The five AMDC employees have been contacted by a nonlawyer, Ashley Parks, who is an investigator. However, the plaintiffs' lawyers are responsible for the actions of Ms. Parks because she is employed by the plaintiffs' law firm and she is acting under the orders and knowledge of the plaintiffs' lawyers.

Our firm has not given Ms. Parks any consent to contact employees of AMDC. However, the scope of Rule 4.2 as it applies to the employees of a represented organization like AMDC depends on whether the employee in question is a former or current employee and on the employee's specific role in the organization.

The rule prohibits unauthorized communications only with current employees in three situations: 1) where the agent or employee "supervises, directs, or regularly consults with the organization's lawyer concerning the matter"; 2) where the agent or employee has "authority to obligate the organization with respect to the matter"; and 3) where the agent's or employee's "act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."

Ms. Parks has reached out to five AMDC employees.

A. Ron Adams

Mr. Adams is the former director of quality control. He has not worked for AMDC since 2017. Under Comment 7 to Rule 4.2, consent of an organization's lawyer "is not required for communication with a former constituent." The Franklin Board of Professional Conduct has confirmed that counsel "may communicate freely with former agents and employees of an organization without the consent of the organization's lawyer regardless of the role the agent or employee may have played in the matter." (Ethics Opinion 2016-12)

Therefore, the plaintiffs' lawyers may speak with Mr. Adams without our firm's consent.

B. Gus Bartholomew

Mr. Bartholomew is the executive assistant to AMDC's president, Ron Gilson. He is currently employed in that capacity. He acts as Mr. Gilson's administrative assistant and takes notes of meetings; he also reviews incoming mail from lawyers and types and proofreads Mr. Gilson's communications with counsel. Arguably, Mr. Bartholomew is a person who "supervises, directs or regularly consults with the organization's lawyer," which would fall under the first prong of Comment 7. However, this prong generally includes only the board of directors and top management officials: employees who "are giving and receiving information from the lawyer *and directing the lawyer's actions in the matter*." (Ethics Opinion 2016-12, emphasis added)

Mr. Bartholomew does not have the authority or power to direct a lawyer's action; instead, he acts as a conduit for that information. Therefore, he does not fall within the scope of Rule 4.2 and the plaintiffs' lawyers may speak with him without our firm's consent.

C. Agnes Corlew

Ms. Corlew is the head of AMDC's public relations department. She is currently employed in that capacity. She answers question from the press and the public about pending litigation but does not make any decisions concerning that litigation, nor has she ever met with AMDC's counsel. Therefore, she is not someone who is able to direct a lawyer's actions, nor does she have the actual or apparent authority to settle litigation on behalf of AMDC. Finally, the acts and omissions of a public relations spokesperson cannot be imputed to the organization for purposes of civil or criminal liability because a spokesperson would not be directly named as a party in the lawsuit (see Ethics Opinion 2016-12).

Therefore, the plaintiffs' lawyers may speak with Ms. Corlew without our firm's consent.

D. Elise Dunham

Ms. Dunham is AMDC's plant manager. She is currently employed in that capacity and oversees all of the manufacturing at the plant. She also oversees the actions of both the director

of quality control and the director of manufacturing and was employed in the same position during the time when AMDC manufactured the allegedly defective walkers. Her acts and omissions in that role are obviously relevant to the legal issues in the class action. Save for the separate legal character of the organizational form, Ms. Dunham would be directly named as a party in a lawsuit involving the matter. She is thus the type of employee described by the third prong of Comment [7].

Therefore, the plaintiffs' lawyers cannot speak with Ms. Dunham without our firm's consent.

E. Penny Ellis

Ms. Ellis is AMDC's chief financial officer and serves as treasurer on the board of directors of AMDC. She is one of the company's top management officials for financial actions and has a vote on every issue that comes before the board, including issues related to the *Downey* litigation. While she was not employed in that capacity at the time when the allegedly defective walkers were manufactured, the relevant analysis for purposes of Rule 4.2 is based solely on her present position.

Ms. Ellis is the type of employee who falls under the first prong to Comment [7]. She is a member of AMDC's "control group" because she is a member of the board and a top management official (see Ethics Opinion 2016-12). And while she has stated that she tends not to make suggestions during discussions with the lawyers about the *Downey* litigation, she has the power to compromise or settle the matter in consultation with the lawyer and the rest of the board.

Ms. Ellis would also become involved in the financial aspects of litigation if there were a settlement or a judgment against the company. She therefore falls under the second prong to Comment [7] as well. Whether she has actual authority to enter AMDC into a binding contractual settlement, she has the apparent authority to do so. As chief financial officer and treasurer of the organization, she is the person that others dealing with the organization would reasonably assume had the power to settle litigation.

Therefore, the plaintiffs' lawyers cannot speak with Ms. Ellis without our firm's consent.

II. Communication between Our Lawyers and Named Plaintiffs or Potential Class Members

Our firm is also bound by Rule 4.2 from communicating with anyone that we "know" to be represented by an attorney in the matter. According to Rule 1.0(f) of the FRPC, knowing "denotes actual knowledge of the fact in question."

The Franklin Court of Appeal has held that actual knowledge must be held to a "high standard." (*Mahoney v. Tomco Manufacturing*, 2010). The court ruled that a firm has actual knowledge of a person's representation only for the named plaintiffs of a class and not other potential class members before the end of the opt-out period. Potential class members may or may not decide to opt out of a class action and therefore may or may not have a lawyer-client relationship with the named plaintiffs' lawyers.

Under this ruling, our firm is prohibited from contacting the named plaintiffs without first gaining the consent of the plaintiffs' lawyers. However, we are not prohibited from contacting other potential members of the class action until the end of the opt-out period.

MPT 2
February 2020

In re Eli Doran **(February 2020, MPT-2)** This performance test requires examinees to draft the written closing argument in support of two consolidated petitions: one to annul a marriage and one to set aside a will. The examinee's law firm represents Carol Richards, the niece and recently appointed legal guardian of Eli Doran, Carol's elderly uncle. For about two years, Eli, who has dementia, has been living in an assisted living facility operated by Paula Daws. A few months ago, Carol learned that Paula had secretly married Eli and then, almost nine months later, had prepared a will for Eli that left his entire estate to her. Although a court has determined that Eli is now legally incompetent, that determination does not address whether Eli had the capacity to consent to marry in January 2019 or whether he had testamentary capacity when he signed the will later that year. The examinee's task is to prepare a written closing argument persuading the court that the Doran-Daws marriage should be annulled based on Eli's lack of capacity to consent to marry and that the will should be set aside based on his lack of testamentary capacity at the time it was executed. The File contains the instructional memorandum, the office guidelines for drafting written closing arguments, and excerpts of the hearing testimony of Carol Richards, Paula Daws, and other witnesses. The Library contains two Franklin appellate cases, one discussing the legal capacity to consent to marry and one addressing the standard for testamentary capacity.

To: Robert Cook

From: Examinee

Date: February 25, 2020

Re: Eli Doran matter - Closing Arguments

I. The January 2019 Marriage Between Eli Doran and Paula Daws Should Be Annulled Because Mr. Doran Lacked Capacity to Consent to Marriage.

Although a marriage that complies with the licensing and officiating requirements of the Franklin Uniform Marriage and Dissolution Act (FUMDA) is presumptively valid, this presumption can be overcome with clear and convincing evidence. *In re the Estate of Carla Mason Green* (Fr. Ct. App. 2014). Evidence is clear and convincing in a case such as this if it establishes that it is substantially more likely than not that a party lacked capacity to consent to marriage. *Id.*

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

In *In re Marriage of Simon* (Fr. Ct. App. 2005), the court annulled the marriage of Henry and Nancy Simon after Henry married Nancy while she lived in a residential facility. Critical to the court's decision was the fact that three weeks prior to the marriage, Nancy suffered the fourth of a series of strokes. Her doctors determined that the strokes were disabling and that she was incapable of receiving or evaluating information and should not make any decisions for herself or others. Henry was also a medical technician employed at the facility where Nancy lived and the two had no prior romantic or other relationship. Henry arranged for them to marry after Nancy's fourth stroke and just two weeks before Nancy's death. The court found that not only was Nancy incapable of consenting to marriage, but that at the time of the marriage she had no understanding of what marriage was.

Here, Mr. Doran was examined on two separate occasions by Dr. Anita Bush, a clinical psychologist who specializes in cognitive and mental disorders. Dr. Bush found that Mr. Doran has a "permanent, progressive condition" that "only gets worse." Dr. Bush stated that she "doubts" that Mr.

Doran has any moments of lucidity, and even if he did he would "not have the ability to exercise judgment." Dr. Bush stated that Mr. Doran "did not possess the mental capacity to consent to marriage" in January of 2019 and that "he did not" have the capacity to execute a will in October of 2019.

In *Green*, Mason had also been engaged two years. The evidence supported that Mason understood what marriage was and what it involved. The petitioner in *Green* failed to present clear and convincing evidence that Mason lacked the capacity to consent to marriage and therefore the presumption that the marriage is valid was not rebutted. Here, the case is distinct in that it has been established that Mr. Doran has been found incompetent as a matter of law and Carol Richards, his niece, has been appointed his legal guardian since December 2019. Dr. Bush's testimony supports that Mr. Doran's "permanent, progressive condition" prevented him from having the capacity to make decisions or exercise judgment. Ms. Daws "called her minister and got a license... the next day" after a patient she was caring for, and knew "that he could not live on his own" as a result of progressive dementia, supposedly stated that "You take good care of me. We should get married."

The January 15, 2019 marriage between Eli Doran and Paula Daws should be annulled because it is substantially more likely than not that Mr. Doran lacked the requisite capacity to consent to marriage. Mr. Doran did not have the ability to understand the nature, effect, and consequences of marriage and its duties and responsibilities at the time of his marriage to Ms. Daws. This annulment would be a fair and just application of the law to the facts at hand and would prevent Mr. Doran from being manipulated and taken advantage of by Ms. Daws.

II. Eli Doran's October 2019 Will Should Be Set Aside Because Mr. Doran Lacked Testamentary Capacity at the Time of Execution.

A party who seeks to prove the lack of testamentary capacity must do so by a preponderance of the evidence. *In re the Estate of Dade* (Fr. Ct. App. 2015). Claimants have the burden of proving that testator lacked testamentary capacity at the time he executed a will or codicil. That means that the testator must be capable of knowing the nature of the act he is about to perform, the nature and extent of his property, the natural objects of his bounty, and his relation to them. A will executed by a testator who lacks testamentary capacity is void. The time for measuring testamentary capacity is

the time when the instrument is executed. *Id. In re the Estate of Tarr* (Fr. Sup. Ct. 2011) states that a determination of legal incompetence alone is insufficient to find that the testator lacked testamentary capacity.

Assessments of credibility are critical to determinations of testamentary capacity. In *Dade*, the court made a credibility determination that because the Dades were interested in protecting the original gift to them, their testimony about their father's ability when he drafted the codicil was colored by their interest.

Here, the party opposing the new will is not doing so out of self-interest, but rather to protect the true intentions of the testator. Carol Richards, Mr. Doran's niece and legal guardian, testified that in 2016 "Eli saw his attorney and executed a will leaving his estate to his church. He loved that church. And I knew that now, having sold his house, he had some savings that could benefit the church." On the other hand, Ms. Daws, the new beneficiary of the October 2019 will and opponent of this motion to set the will aside, stands to inherit these substantial savings. Ms. Daws will likely use the savings to pay off her $15,000 of credit card debt. Furthermore, the two witnesses to the October 2019 will are Ms. Daws's children and eventual beneficiaries.

In considering Ms. Daws credibility, it is also important to note that she did not go to Mr. Doran's minister for the wedding as she "did not know who his minister was" and she did not invite Mr. Doran's niece, Carol Richards, to the wedding. Ms. Daws did not tell anyone about the marriage for several months. Ms. Daws also did not go to Mr. Doran's lawyer to have a new will drafted, but rather retained her own attorney, because again she "did not know he had a lawyer."

Dr. Bush, a credible psychologist, testified that Mr. Doran "did not know who his niece was" and that he did not know "the nature and extent of his property, his estate."

Eli Doran's October 2019 will should be set aside because a preponderance of the evidence shows that Mr. Doran lacked testamentary capacity at the time of the will's execution. Mr. Doran was not capable of knowing the nature of the act he was about to perform, the nature and extent of his property, the natural objects of his bounty, and his relation to them. Therefore the October 2019 will should be void. The setting aside of the October 2019 will would be a fair and just application of the

law because it would prevent the unjust enrichment of Ms. Daws and ensure that Mr. Doran's church would be the beneficiary of his estate, as he so desired at a time when he retained testamentary capacity.

MEE Question 1

A homeowner entered into two separate contracts with a contractor for the renovation of her kitchen and the remodeling of her bathroom. The homeowner has refused to pay the contractor on both contracts because of dissatisfaction with his work.

Under the kitchen contract, the contractor had agreed to renovate the homeowner's kitchen for $50,000, payable in installments. The final installment of $8,000 was due 10 days after completion of the project. The kitchen contract called for repainting the cabinets, installing new appliances bought by the homeowner from a third party, and replacing the flooring in the kitchen with linoleum, which is a floor covering made from natural materials. When the contract was negotiated, the contractor had asked the homeowner why she wanted "such old-fashioned flooring instead of more modern resilient flooring like vinyl." The homeowner had responded, "We are a green household, and it is very important to us to use linoleum, which is a green product, unlike vinyl. Moreover, I grew up in a house with a linoleum floor in the kitchen, and I really want to be reminded of my youth when I walk into the kitchen."

Despite the clear contract language, the contractor installed vinyl flooring in the kitchen. The vinyl flooring looks similar to the contractually required linoleum but is not as durable. Before the final payment was due, the homeowner discovered that the flooring was vinyl rather than linoleum and confronted the contractor. The contractor stated, "I knew that you wanted linoleum, but that's a crazy idea. Vinyl was a lot easier for my workers to install, and it looks as good as linoleum. So I made an executive decision to go with vinyl." The homeowner announced that she would not make the last installment payment unless the contractor removed the vinyl flooring and replaced it with linoleum. Removing the vinyl flooring and replacing it with linoleum would be labor-intensive and would cost the contractor approximately $10,000. The market value of the house, however, would be the same whether the kitchen had vinyl flooring such as that installed by the contractor or linoleum flooring as called for in the contract.

Under the bathroom contract, the contractor had agreed to remodel the homeowner's bathroom for $25,000. The contract called for the existing bathtub to remain along one wall and a new vanity (cabinet and sink) to be installed along the opposite wall. The contract called for a 30-inch space between the vanity and the bathtub (so that a person could easily walk between them).

After the contractor said he was finished, the homeowner measured the space between the vanity and the bathtub and discovered that it was only 29 inches. The homeowner then announced that she would not pay the last installment of the contract price ($10,000), which was due upon completion of the remodeling, unless the contractor "did something" to make the space at least 30 inches wide. The only way to make the space at least 30 inches wide would be to remove either the vanity or the bathtub and to obtain and install a smaller custom-made model. This would cost the contractor about $7,500. The market value of the house with only a 29-inch space between the vanity and the bathtub, however, would be $500 less than with a 30-inch space.

The homeowner had selected the contractor because of the contractor's reputation for high-quality installation. In both contracts, the price was based mostly on labor costs because the cost of materials and fixtures was relatively small.

Assuming that the contractor will do nothing to address the homeowner's concerns:

1. How much more, if anything, is the homeowner required to pay the contractor under the kitchen contract? Explain.

2. How much more, if anything, is the homeowner required to pay the contractor under the bathroom contract? Explain.

Applicable law

A contract is a legally enforceable agreement. Whether a contract is governed by the UCC as a sale of goods or by the common law as a services contract is determined based upon the predominant purpose of the contract. Here, the primary purpose of the contract was for the labor to renovate the kitchen and bathroom of the homeowner's home. Thus, the common law will apply to the dispute in order to determine the homeowner's liability.

1. How much more, if anything, is the homeowner required to pay the contractor under the kitchen contract?

Under the common law, substantial performance is required. Perfect performance is not. In order to determine the homeowner's liability, we must look at the purpose and wording of the contract as well as the contractor's knowledge of the homeowner's purpose for the contract in order to determine whether the contractor has substantially performed the material terms of the contract and is entitled to payment of the full contract price.

Here, the contract specifically called for vinyl flooring and the contractor was aware that this was a material term in the contract because of the homeowner's goal to have a green household that reminded her of the house in which she grew up. Despite the clear language, the contractor "made the executive decision" to install the linoleum flooring instead because it was easier for his workers to install. Thus, the contractor breached a material term in the installment contract.

In order to determine damages for a breach of a material term in a common law contract, you must identify the cost of performance as if the contract had been fulfilled as written and subtract the cost to remedy. In construction contracts, you must also take into account the difference in value of the property had the contract been performed as written and the value of the property with the breach.

Here, the total contract price was $50,000, of which, $42,000 had been paid to date. The

market value of the house is the same regardless of whether the kitchen had vinyl flooring or linoleum flooring. The cost to remove and replace the vinyl flooring with the correct linoleum flooring would cost the contractor approximately $10,000. Assuming the contractor will do nothing to address the homeowner's concerns, she will likely have to pay $10,000 to some other contractor to fix the issue caused by the contractors non-compliance with the contract and she will end up with no change in the value of her home as a result, but she will have an additional $2,000 in costs above what she would have paid had the contractor performed as required.

Thus, the homeowner would not be required to pay anything more to the contractor under the kitchen contract because she will incur costs in excess of the amount she owes to the contractor in order to remedy the contractor's breach of the contract. The contractor may be required to pay her $2,000 in order to make up for the shortfall between the contract price and the cost for her to obtain a remedy and be in the position she would have been had the contractor performed per the contract.

2. How much more, if anything, is the homeowner required to pay the contractor under the bathroom contract?

The issue here is whether the contractor's failure to provide the additional inch of space between the vanity and the bathtub constituted a material breach and thus entitles the homeowner to avoid liability for the final contract price. In order to avoid liability for a breach of contract, a breach must be material. If the contractor has substantially performed his duties under the contract, then the homeowner will be liable for the remainder of the contract under the bathroom contract.

Here, the contractor agreed to remodel the bathroom and install a new vanity 30 inches away from the bathtub. When the contractor finished the project, the homeowner discovered that the vanity was only 29 inches away from the bathtub. As a result of the discrepancy, the home is worth $500 less than it would have been with the 30-inch space. The remaining amount on the

contract to be paid is $10,000. Here, the failure to put the vanity 29 inches away from the tub instead of 30 inches likely is not a material breach of the contract because people will still be able to easily walk between the two. While the cost to remedy the breach would cost $7,500, the loss to the homeowner is only $500. To allow the homeowner to escape liability for the full $10,000 final installment would be an unjust enrichment as she would reap the benefit of the contractor's substantial performance with minimal diminution in value to her home. Thus, she would be required to pay the contractor the remaining installment less the diminution in value to her home, or $9,500.

MEE Question 2

Ten years ago, a woman and her husband purchased a one-story commercial building in a city in State A "as joint tenants with right of survivorship and not as tenants in common." They had a "commuter marriage." The husband lived in an apartment in State A. The woman, who worked for an international corporation, lived in a rented apartment overseas. They met one weekend each month.

Three years ago, the husband borrowed $150,000 from a friend and granted the friend a mortgage on the commercial building to secure repayment of the loan. The husband used the $150,000 to purchase a yacht. The certificate of title for the yacht was issued in his name alone.

Two years ago, the husband leased the building to a commercial tenant for a 10-year period at an annual rent of $9,000, "payable in equal monthly installments solely to" the husband.

The woman did not know about either of these transactions, and she did not join in the mortgage or the lease.

Last year, following the husband's unexpected death, the woman first learned of the mortgage and the lease.

State A applies the title theory of mortgages, and its courts strictly apply the common law four-unities test. State A does not recognize tenancies by the entirety.

1. Did the husband's execution of the mortgage sever the joint tenancy? Explain.

2. Assuming that the execution of the mortgage did not sever the joint tenancy:

    (a) Did the husband's execution of the lease sever the joint tenancy? Explain.

    (b) Assuming further that the lease severed the joint tenancy, then upon the husband's death, what rights, if any, does the tenant have in the building? Explain.

3. Assuming that neither the mortgage nor the lease severed the joint tenancy:

    (a) During the spouses' lifetimes, was the woman entitled to half of the rental income payable to her husband under the lease? Explain.

    (b) At the husband's death, what rights, if any, do the woman and the tenant have in the building? Explain.

The initial issue is whether the husband and wife originally had a valid joint tenancy with right of survivorship. A joint tenancy with right of survivorship requires the four unities of time (joint interested created at same time), title (created under the same instrument), interest (each JT has equal interest in the property), and possession (each JT has a right to undivided possession of the property). The right of survivorship just be unambiguous. Here there is a joint tenancy since they purchased the property at the same time, with the same instrument, with clear survivorship language, and each had an undivided interest of the property and were entitled to possession. Thus, there was a joint tenancy.

Another issue is which state's law should be applied in this case. The rule is that the law of the situs (where real property is located) is the law that should be used for property disputes. Here, the law of state A should be applied.

1. The issue is whether the Husband's execution of a mortgage severed the joint tenancy when he granted the mortgage to his friend.

The rule is that in a lien theory state, a mortgage does not sever a joint tenancy (JT); however, in a title approach theory jurisdiction, a mortgage does sever a JT. If severed the two joint tenants now each possess a tenancy in common.

Here, because they're in a title theory state, the mortgage did sever the joint tenancy because the unity of interest no longer existed upon mortgaging the property. At that point, the husband and wife now each possessed their interest as tenants in common.

2(a). Assuming the mortgage did not sever the JT, did the husband's execution of a lease sever the JT?

The rule is that it depends on the jurisdiction. The common law approach is that creating a lease would sever the joint tenancy, whereas the modern approach is that it would not.

Here, if the jurisdiction of state A applies the common law, then the lease did sever the JT, but if

it follows the modern approach, it did not. Since the facts state that the courts "strictly apply the common law four-unities test", it's likely that the lease would sever the joint tenancy, giving the husband and wife a tenancy in common for their respective interests.

2(b). The issue is that assuming that the lease severed the JT, then what rights did the tenant have in the building.

The rule is that lease grants a tenant a present possessory interest in the property. Because it's a contractual obligation, it can survive the death of lease grantor. Here, the tenant still has a present possessory interest in the building until the termination of the lease.

3(a). The issue is that assuming that neither the mortgage nor lease sever the JT, during the spouse's lifetimes, was the woman entitled to half of the rental income payable to her husband under the lease as a joint tenant owner of the property.

The rule is that when a joint tenancy exists and the property is rented to a third party, the rent received should be split evenly among joint tenants after repairs/operating expenses of the property are paid. Here, the wife was entitled to half of the annual $9K in rent, less her 1/2 share of the expenses associated with managing the property.

3(b) Assuming that the JT was not severed, the issue is at the husband's death, what rights, if any, do the woman and the tenant have in the building.

The rule is that when one Joint tenant dies, its share goes to the other joint tenant. When the husband dies, the wife will acquire her husband's interest in the property through her right of survivorship and she will own the property clear of any mortgages or other obligations she did not join. She will properly be allowed to eject the tenant as the tenant will no longer have any possessory rights in the building.

MEE Question 3

During a snowstorm, a woman and a man were driving in opposite directions on a state highway when their cars collided head-on in the middle of the road. At the moment of impact, the locking mechanism on the woman's seat belt malfunctioned, and the woman was thrown from her car and seriously injured.

The woman was transported from the scene of the accident in an ambulance owned and operated by AmCo, a private ambulance company. On the way to the hospital, the ambulance driver lost control of the ambulance, which skidded off the highway, causing further injury to the woman and exacerbating the injuries she had suffered in the original accident.

Six months later, the woman filed a tort action in federal district court against the man, AmCo, and CarCo, the manufacturer of the woman's car. The complaint alleges that each defendant is liable for all or part of the woman's injuries. In particular, the complaint alleges that the man caused the original accident by swerving across the median of the highway, that AmCo's driver was driving too fast for the weather and road conditions, and that CarCo is liable because the seat belt in the woman's car was defectively manufactured. The woman's complaint properly invoked the court's diversity jurisdiction, and each defendant was properly served with process. Each defendant filed an answer to the complaint and denied liability.

Seven days after it served its answer, CarCo served a summons and complaint on LockCo, the company that manufactured and supplied the seat belt locking mechanism that CarCo installed in the woman's car. CarCo seeks to join LockCo as a party to the woman's action, alleging that LockCo must indemnify CarCo if the seat belt locking mechanism is found to have been defective and CarCo is held liable to the woman.

1. Under the Federal Rules of Civil Procedure, did the woman properly join the man, AmCo, and CarCo as defendants in a single action? Explain.

2. Under the Federal Rules of Civil Procedure, did CarCo properly join LockCo as a party to the woman's action against CarCo? Explain.

1. Joinder of Defendants

The woman properly joined the three defendants in a single action.

The issue is whether the Federal Rules of Civil Procedure require a plaintiff to file separate actions if the actions involve different legal questions. There is no such limitation in the Federal Rules. A plaintiff has the discretion to assert claims against one or more defendants and it is proper to do so when those claims arise from the same transaction or events. Furthermore, the three defendants may be jointly and severally liable for at least part of the woman's damages (those suffered from the ambulance accident) and separate lawsuits could result in multiple or inconsistent judgments against the defendants.

The legal issues will be different for the three defendants. The woman's claim against the man is a negligence claim for his actions swerving across the median of the highway; her claim against AmCo also lies in negligence; her claim against CarCo is likely a products liability claim for a manufacturing defect. The liability for these different claims may require different facts and different legal arguments (especially for the products liability claim), but the court has discretion to try those causes of action separately if necessary. The plaintiff does not need to file separate actions.

By filing one action concerning the same transaction, there is a strong argument that judicial economy is well served. While only the man and/or CarCo may be liable for the damages suffered by the woman due to the original car accident, all three defendants may be liable for the damages suffered by the woman due to the ambulance accident. Negligent driving by emergency medical personnel is a foreseeable intervening cause; therefore, anyone liable to the woman for her initial injuries will also be liable to the additional injuries she sustained due to the ambulance crash. By hearing the three causes of action together, the court can save time and prevent inconsistent judgments against the various defendants by hearing together the evidence common to all three claims, such as the evidence of the woman's injuries sustained in the ambulance accident.

2. Joinder of LockCo

CarCo properly joined LockCo as a third-party defendant.

The issue is whether a defendant may implead a third-party defendant under the belief that the third-party defendant must indemnify the original defendant for liability.

Third-party defendants are allowed under the Federal Rules of Civil Procedure. A defendant may implead another party if the defendant believes that the other party should indemnify the defendant for all or part of any liability claim that a plaintiff successfully brings against them.

Impleading a third-party defendant will not destroy diversity of citizenship jurisdiction and the court may exercise supplemental jurisdiction over any counterclaims of the third-party defendant against the original defendant or original plaintiff if the counterclaims arise out of the same transactions or events.

CarCo here believes that LockCo must indemnify CarCo against any judgment the woman successfully wins. CarCo pleads that LockCo manufactured and supplied the seat-belt locking mechanism that the woman alleges was defective. This type of indemnity claim against LockCo is proper under the Federal Rules.

MEE Question 4

On February 1, Construction Company borrowed $500,000 from Bank. Construction Company's president, on behalf of the company, contemporaneously signed and delivered to Bank a security agreement that included the following language:

> To secure the repayment obligation of Construction Company to Bank, Construction Company hereby grants Bank a security interest in all rights of Construction Company to be paid with respect to any contract for the construction or repair of bridges or roads, whether such right exists now or arises in the future.

On March 1, Construction Company entered into a contract with a developer to build roads for a housing development. The contract required the developer to pay $450,000 to Construction Company upon completion of the road-building project.

On September 1, Construction Company defaulted on its obligations to Bank under the loan and the security agreement. Bank immediately sent a letter to the developer. The letter, which was signed on behalf of Bank by its president, read as follows: "In accordance with a security interest granted to us by Construction Company, all payments under your contract with Construction Company should be made to us at [address of Bank]."

This letter was received by the developer on September 3.

On October 1, Construction Company completed its project for the developer and sent an invoice to the developer demanding payment. The developer's treasurer decided to pay Construction Company, and not Bank, because the developer had a contract with Construction Company but not with Bank. The developer's treasurer promptly sent a check for $450,000 to Construction Company, which deposited the check and used the proceeds to pay its employees and subcontractors.

A few days later, when Bank learned that Construction Company had completed the road-building project, Bank sent an email to the developer demanding that the developer pay Bank the $450,000 contract price. Attached to the email was a copy of the security agreement signed by Construction Company and a copy of Bank's September 1 letter to the developer directing it to make all contract payments to Bank. The developer responded that it had already paid Construction Company and was therefore discharged from its payment obligation under the road-building contract. The developer also stated that the security agreement executed on February 1 could not have encumbered Construction Company's right to be paid under the road-building contract because that contract did not exist until March 1.

1. Did Bank have a security interest in Construction Company's right to be paid $450,000 by the developer for the road-building project? Explain.

2. Was the developer discharged from its payment obligation under the road-building contract by virtue of its having paid Construction Company? Explain.

I. Whether Bank had a security interest in Construction Company's right to be paid $450,000 by developer for the road building project.

The first issue is whether Construction Company properly executed a security agreement to Bank in Construction Company's right to payment by Developer.

Article 9 of the UCC governs security interests. For a security interest to be created, the Debtor must have rights in the collateral, the secured party must give value to the debtor, and there must be a valid security agreement (or possession). Collateral may constitute goods, equipment, inventory, chattel paper, accounts receivable, and other classifications as illustrated under Article 9 of the UCC. A valid security agreement must be (1) in writing, (2) authenticated by the debtor, (3) sufficiently describe the collateral (it may use a UCC Art. 9 Classification), and (4) the security agreement must contain "granting" language. Security agreements may properly include an "after-acquired property" clause. For corporations, presidents of the corporation are officers of the corporation and are thus considered agents of the corporation. Agents of a corporation have the power to bind the corporation.

Here, the president, acting as an agent on behalf of the Construction Company, granted a security interest in Construction Company's accounts receivable to Bank. The construction company had rights to the road and bridge building contracts (and the money they would generate), Bank gave value to the Construction Company in the form of the $500,000 loan, and they issued a valid security agreement. The security agreement was valid because it was (1) in writing, (2) signed by the president, (3) it sufficiently described the collateral as "any contract for the construction of bridges or roads", and (4) the security agreement contained granting language in that it stated that "construction company hereby grants a security interest" in the rights of the company to be paid. The main issue that the developer, or any other party challenging the validity of the security agreement is whether the security agreement sufficiently described the collateral. Generally, any UCC article 9 classification will suffice, however this agreement did not use an Article 9 classification. Rather it described the collateral as "rights" to construction contracts. Still, the description would likely

be upheld as valid because it defined the rights as specifically applying to contracts related to the building of roads and bridges.

Therefore, Bank did have a security interest in construction company's right to be paid $450,000 by the developer for the road building project.

II. Whether Developer was discharged from its payment obligation under the road-building contract by virtue of it having paid Construction Company.

The issue is whether Developer was discharged from its payment obligation under the road-building contract by virtue of it having paid Construction Company.

Default occurs when a payment is missed or when another incident occurs that constitutes a default in accordance with the security agreement. If the security agreement contains an "acceleration clause," then any event that constitutes a default will require the entirety of the loan to be paid upon the occurrence of the agreement's default provisions. When the collateral constitutes an account receivable, upon default of the debtor, a secured party may collect the value of its interests by notifying other parties in privity with the debtor that the secured party has a security interest in the debtor's accounts. Additionally, security agreements may properly include an "after-acquired property" clause. An "after-acquired property" clause is a clause which grants the secured party in property interests acquired *after* the execution of the security agreement. Lastly, an interest in collateral stays attached to the collateral even after sale or transfer of thecollateral.

Here, upon the Construction Company's default to Bank on September first, Bank was entitled to collect the amount of Construction Company's default. If the agreement contained an acceleration clause, then the Bank could properly collect the entirety of the loan, however that is unclear based on the facts provided. Upon the default, Bank properly notified developer of its interest in the construction company's accounts by sending them a signed letter. Ideally, that letter would have also contained the security agreement as that would have given Developer better notice of Bank's interest; however, the notice alone still

would likely suffice.

Developer states that the security interest granted on February 1 does not allow bank to collect on the contract because it was executed after the security interest was granted. However, the Developer will likely be deemed liable due to the after acquired property clause.

Therefore, because Developer received timely notice of Bank's interest, it will likely not be discharged from its obligation under the contract by virtue of having paid Construction Company.

MEE Question 5

Linda owned and operated a clothing store as a sole proprietorship. To increase sales, she decided to offer a same-day delivery service to local customers. Rather than hiring an employee to make deliveries, she decided to use a driver who was an independent contractor to make deliveries on an as-needed basis. Because she did not know anyone who could do this work, she searched a website that listed local delivery drivers.

The website included the drivers' names, their hourly rates, and customer reviews of their work. A driver on the list with the lowest hourly rate by a wide margin used his own delivery van for making deliveries. But 40 recent customer reviews of this driver on a scale of 1 (low) to 5 (high) rated him as 1.5, citing specific instances of misbehavior, untrustworthiness, and bad driving. The website also reported that in the last couple of years, the driver had been sued three times for negligent driving and had been found liable in each case. Nonetheless, Linda decided to use this driver to make deliveries because of his inexpensive hourly rate and because he had his own delivery van.

When she hired the driver, Linda told him that, when making deliveries for the store, he would have to place self-sticking, removable signs advertising the store on both sides of his delivery van. He agreed, but because such signs ranged in price from $100 to $500 per pair, he told Linda that she would have to purchase them for him to use. Because she was too busy to do that, Linda asked him to purchase the signs but not to spend more than $300 for the pair when doing so. Linda gave the driver one of the store's cards, and as a means of identifying the driver as acting for the store, she wrote on the back, "This is my agent to purchase signs for my store."

The driver then went to a local sign shop, showed the shop owner the business card that Linda had given him (including her handwritten note on the back), and purchased a pair of custom-made signs for $450 on credit. Because the signs were custom-made, they were not returnable or refundable. When the completed signs were delivered to Linda, she refused to take possession of them or pay the sign shop for them because their cost exceeded the amount she had told the driver to spend by $150. The driver then made two smaller signs with the store name on them and, with Linda's approval, put them on his van when making deliveries.

Three weeks ago, Linda called a customer and told her, "My driver is on his way to make a delivery to you in a van with the store's name on its side." The customer kept watch at her window, and when she saw the van with the store's signs on it, she went out to the driveway through her garage. As she started to walk toward the van, the driver negligently hit the accelerator pedal, causing the van to hit the customer, who sustained substantial injuries.

Assume that there was an enforceable contract to buy the signs from the sign shop, that the driver's negligence proximately caused the customer's injuries, and that the driver was acting as Linda's independent-contractor agent.

1. Is Linda liable to the sign shop for the purchase price of the signs? Explain.

2. Is the driver liable to the sign shop for the purchase price of the signs? Explain.

3. Even though the driver was an independent contractor, is Linda vicariously liable to the customer for the injuries resulting from the driver's negligence? Explain.

4. Is Linda directly liable to the customer for the injuries the customer sustained? Explain.

1) At issue is whether the Linda is liable, even though her agent exceeded his express actual authority.

A principal can create authority in her agent in one of three ways: express actual authority, implied actual authority, or apparent authority. Express actual authority is created by the principal's express limiting instructions to the agent. Implied actual authority is created by the principal's conduct towards the agent, which leads them to reasonably believe they have authority to do what's necessary on the principal's behalf. Apparent authority is created by the principal's manifestations to a third party that cause the third party to reasonably believe the agent has authority to act on the principal's behalf.

Here, the driver, the agent, had express actual authority from Linda, the principal, to purchase signs for his car to use during deliver; she asked him to not spend more than $300 for the pair when doing so. Thus, he only had express actual authority to spend up to $300 for the pair of signs.

However, the driver also had apparent authority to act on Linda's behalf. When an agent acts with apparent authority, the principal can be liable, even if the agent exceeds the limits of their express actual authority. Linda wrote a note to the sign shop owner on the back of her business card that stated, "This is my agent to purchase signs for my store." Thus, it was reasonable for the sign shop owner to rely on this manifestation and sell signs for $450/pair to the driver-agent on her behalf. Thus, the driver had apparent authority to bind Linda to the contract for the signs, even though he exceeded his express actual authority.

In addition, whether a principal is bound to a contract depends partly on whether she was disclosed, partially undisclosed, or undisclosed to the third party. When a principal is disclosed, meaning that the third party has knowledge of the principal-agent relationship and knows the principal's identity, the contract is between the principal and third party. When a principal is partially undisclosed, the contract is between the third party, agent, and principal. When a principal is undisclosed, only the third party and agent are bound by the contract. Here, Linda's identity was fully disclosed, thus she is liable to the sign shop for the purchase price of the signs.

2) At issue is whether the driver is liable when Linda was a disclosed principal to the contract.

As stated above, a disclosed principal will be bound to the contract with the third party. The business card with Linda's contact information and her note on the back to the third party sign shop not only created apparent authority, but also disclosed her identity and the existence of the principal-agent relationship with driver. Thus, only Linda and the sign shop are bound by the contract. The driver is not a party to the contract and is therefore not liable for the purchase price of the signs to the sign shop.

3) At issue is whether Linda is vicariously liable for an independent contractor's negligent act.

Employers are generally not liable for an independent contractor's (IC) torts, unless the employer had a nondelegable duty, the work was an inherently dangerous activity, or tort was within the scope of employment the IC was hired to do (such as a bouncer using violence to stop a fight). However, the driver likely had apparent authority that will allow Linda to be held vicariously liable for the driver's negligence.

Here, the driver was an independent contractor, as shown by the fact that he was only working for Linda as needed and the fact that he provided his own van to use. However, when Linda called the customer to tell her "my driver" is on his way with the store's names on the van, this created apparent authority in the driver. Thus, it's likely that Linda will be vicariously liable for the driver's negligence.

4) At issue is whether Linda was negligent in her hiring.

Even when a party cannot be held vicariously liable for an independent contractor's torts, they can be directly liable for negligent hiring. Negligent hiring is when a principal does not exercise reasonable care in the selection of their agents. If they have reason to know of a prospective agent's past negligence or other misconduct and disregard this information, they can be found liable for negligent hiring if the agent subsequently engages in similar, foreseeable conduct as an agent.

Here, Linda was aware of the driver's negligent driving from the website where she found him. Not only was she aware of his negative reviews citing misbehavior, untrustworthiness, and bad driving, but she also knew he'd been sued and found liable three times for negligent driving. Thus, Linda may be found directly liable for the customer's injuries due to her negligent hiring of the driver. Her injuries were a direct result of the driver negligently hitting the accelerator pedal.

MEE Question 6

A man and a woman were waiting in line at a public park for tickets to attend an outdoor performance of a play. They soon began arguing about sports, and as their conversation became more animated, the man began shouting at the woman and poking her shoulder with his finger. As the man poked harder and harder, the woman responded by punching the man in the nose.

The woman was arrested at the scene and charged with battery.

At trial, the prosecutor intends to elicit the following testimony from an eyewitness who was standing in the line:

> Before the man arrived, I saw the woman talking to a friend. The friend said to the woman, "You and I have waited so long for these tickets, if anyone annoys us today they will not be seeing this play—they'll be going to the hospital!" The woman nodded her head and gave the friend a thumbs-up signal.
>
> I recognized the woman. I live in her neighborhood, and I probably see her at least twice a week. Every time I see her, she is arguing with people, acting out, and generally causing problems.

Assuming that the eyewitness is permitted to testify for the prosecution, defense counsel plans to

> (1) cross-examine the eyewitness about her five-year-old conviction for shoplifting, a crime punishable by a maximum sentence of six months in jail; and
>
> (2) cross-examine the eyewitness about a letter recently written by the eyewitness to the man saying, "Thanks for 10 years of a great friendship."

The jurisdiction's rules governing crimes and affirmative defenses follow common law principles. The evidence rules of the jurisdiction are identical to the Federal Rules of Evidence.

The woman's friend is unavailable and will not testify at trial.

1. Assuming that the prosecution proves the elements of battery, can the woman establish a common law affirmative defense based on these facts? Explain.

2. What portions of the eyewitness's testimony, if any, would be admissible? Explain.

3. What portions, if any, of the defense counsel's cross-examination should the court permit? Explain.

Do not discuss any constitutional issues.

1. Affirmative Defense to Battery

The woman may mount an affirmative defense based on self-defense but she is unlikely to be successful.

Even if the prosecution proves the elements of battery, a defendant can establish that they were justified in committing the battery if they were acting in self-defense. The defendant must prove that they reasonably believed they were in danger of severe bodily harm or death and that they responded with an appropriate level of force.

Here, the defendant was in an altercation with a man that became quite heated. The man was shouting at the woman and began poking her shoulder harder and harder. The woman responded by punching the man in the face, which is a definite increase in the amount of force used and almost certainly unnecessary to respond to the provocation. However, there are some facts that remain unknown. It's possible that the man was physically quite large and muscular and that the woman was comparatively tiny, for instance, and that the man's aggressive shouting and poking gave the woman a reasonable and legitimate fear that he was about to attack her. If so, she may be able to show that the battery was justified. However, it is unlikely that the judge or jury would agree.

2. Admissibility of Eyewitness Testimony

The prosecutor may introduce evidence of the friend's statements made while the friend and woman were waiting in line, as well as evidence of the woman's response. The prosecutor may not, however, introduce the evidence about the neighborhood behavior of the woman.

A court will admit evidence if it is relevant, which means that the evidence has some tendency to make a material fact of the case more or less likely to be true. A court will not allow all relevant evidence however, especially if the probative value of that evidence is outweighed by its prejudicial impact or its tendency to mislead the jury or confuse issues. Hearsay testimony is especially suspect. A hearsay statement is an out-of-court statement offered to prove the truth of the matter asserted. Hearsay statements are generally inadmissible unless they fit into one of a number of exceptions listed by the Federal Rules of Evidence. An adoptive admission is a statement or action that follows a statement and indicates approval of it. An adoptive admission is non-hearsay.

Here, the eyewitness plans to testify about what the friend said to the woman. Specifically, the friend made a statement that the two had been waiting for a long time for tickets and that "if anyone annoys us today they will not be seeing this play--they'll be going to the hospital!" The eyewitness plans to testify that the woman nodded her head and gave her friend a thumbs up. This is relevant because it tends to establish the defendant's mental state and make it more likely that she may have had the requisite intent to commit battery. This is assertive conduct made by the defendant herself and statements of a party opponent are not hearsay. The nod of the head is an affirmative act showing agreement, but alone it means nothing, and therefore the statement before it must come in to show what the nod of the head assented to. It falls within the exemption of non-hearsay adoptive admission.

Finally, the eyewitness plans to testify that she lives in the woman's neighborhood and that she sees the woman arguing frequently with people. This is character evidence that is being introduced to show that the woman probably acted as she often had in the past. It is not reputation evidence, because the woman is not testifying to the woman's general reputation in the community, nor is it the eyewitness's direct opinion of the defendant. Instead, this is evidence of specific bad acts. This kind of propensity evidence is generally disallowed and it will not be admissible here because the defendant has not put her character at issue by testifying. The prosecution must prove its case using evidence other than that the woman probably acted in a way that she had in the past.

3. Admissibility of Cross-Examination

The defense counsel will not be able to introduce evidence of the shoplifting conviction but may introduce evidence of the letter written by the eyewitness.

There are a number of ways to impeach eyewitness testimony. Defense counsel may cast doubt on the eyewitness's truthfulness or show that the eyewitness is biased or has a motive to lie. Evidence of past convictions are generally admissible if they are for crimes that involve lying. Otherwise, courts will allow convictions for felonies that are less than 10 years old provided that the probative value is not substantially outweighed by the prejudicial impact. Here, the shoplifting conviction is for a misdemeanor (maximum sentence of six months) and shoplifting

arguably does not have anything to do with truthfulness even though it is a theft crime. Thus, the court will likely exclude the evidence of the shoplifting conviction.

The letter, however, tends to show that the eyewitness may be biased because she knows the man and has been friends with him for a period of at 10 years. This evidence is proper impeachment evidence because it demonstrates a possible bias the witness may have to testify favorably for the man and against the defendant.