



# February 2018 MEE Questions and Analyses



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## **Preface**

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The Multistate Essay Examination (MEE) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the questions and analyses from the February 2018 MEE. (In the actual test, the questions are simply numbered rather than being identified by area of law.) The instructions for the test appear on page iii.

The model analyses for the MEE are illustrative of the discussions that might appear in excellent answers to the questions. They are provided to the user jurisdictions to assist graders in grading the examination. They address all the legal and factual issues the drafters intended to raise in the questions.

The subjects covered by each question are listed on the first page of its accompanying analysis, identified by roman numerals that refer to the MEE subject matter outline for that subject. For example, the Civil Procedure question on the February 2018 MEE tested the following area from the Civil Procedure outline: III.C. Pretrial procedures—Rule 11.

For more information about the MEE, including subject matter outlines, visit the NCBE website at [www.ncbex.org](http://www.ncbex.org).

## **Description of the MEE**

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The MEE consists of six 30-minute questions and is a component of the Uniform Bar Examination (UBE). It is administered by user jurisdictions as part of the bar examination on the Tuesday before the last Wednesday in February and July of each year. Areas of law that may be covered on the MEE include the following: Business Associations (Agency and Partnership; Corporations and Limited Liability Companies), Civil Procedure, Conflict of Laws, Constitutional Law, Contracts (including Article 2 [Sales] of the Uniform Commercial Code), Criminal Law and Procedure, Evidence, Family Law, Real Property, Torts, Trusts and Estates (Decedents' Estates; Trusts and Future Interests), and Article 9 (Secured Transactions) of the Uniform Commercial Code. Some questions may include issues in more than one area of law. The particular areas covered vary from exam to exam.

The purpose of the MEE is to test the examinee's ability to (1) identify legal issues raised by a hypothetical factual situation; (2) separate material which is relevant from that which is not; (3) present a reasoned analysis of the relevant issues in a clear, concise, and well-organized composition; and (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation. The primary distinction between the MEE and the Multistate Bar Examination (MBE) is that the MEE requires the examinee to demonstrate an ability to communicate effectively in writing.

## Instructions

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The back cover of each test booklet contains the following instructions:

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin.

You may answer the questions in any order you wish. Do not answer more than one question in each answer booklet. If you make a mistake or wish to revise your answer, simply draw a line through the material you wish to delete.

If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions.

Read each fact situation very carefully and do not assume facts that are not given in the question. Do not assume that each question covers only a single area of the law; some of the questions may cover more than one of the areas you are responsible for knowing.

Demonstrate your ability to reason and analyze. Each of your answers should show an understanding of the facts, a recognition of the issues included, a knowledge of the applicable principles of law, and the reasoning by which you arrive at your conclusions. The value of your answer depends not as much upon your conclusions as upon the presence and quality of the elements mentioned above.

Clarity and conciseness are important, but make your answer complete. Do not volunteer irrelevant or immaterial information.

Examinees testing in UBE jurisdictions must answer questions according to generally accepted fundamental legal principles. Examinees in non-UBE jurisdictions should answer according to generally accepted fundamental legal principles unless your testing jurisdiction has instructed you to answer according to local case or statutory law.



# *February 2018 MEE Questions*

*Family Law*

*Criminal Law*

*Contracts*

*Real Property*

*Civil Procedure*

*Agency*





## FAMILY LAW QUESTION

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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.

## Family Law Question

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.

## CRIMINAL LAW QUESTION

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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.

## Criminal Law Question

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.

## CONTRACTS QUESTION

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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.

## Contracts Question

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.

## REAL PROPERTY QUESTION

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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.

## CIVIL PROCEDURE QUESTION

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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.

## AGENCY QUESTION

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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.

# *February 2018 MEE Analyses*

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# FAMILY LAW ANALYSIS

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FAMILY LAW I.F.; III.D.; IV.A., E.

## ANALYSIS

### Legal Problems:

- (1)(a) Under the state statute, when is a premarital agreement regarding property division and alimony enforceable?
- (1)(b) Under the state statute, when is a premarital agreement regarding child custody enforceable?
- (2) What assets are divisible at divorce?
- (3)(a) May a court deny a parent physical custody of a child based on adultery?
- (3)(b) What factors may be taken into account in determining child custody?

## DISCUSSION

### Summary

Under this state statute (modeled on the Uniform Premarital Agreement Act (UPAA)), a premarital agreement regarding property division and alimony is binding if entered into voluntarily and with reasonable disclosure of assets and obligations. Here, David accurately disclosed his assets, and it is unlikely that a court will find that Meg entered into the agreement involuntarily because David presented the agreement to her a week before the wedding. The wedding was small and thus would not likely have been difficult or expensive to cancel. Meg also had time to confer with independent counsel. However, whether or not the property-division and alimony provisions of the agreement are upheld, the provisions regarding child custody are unenforceable.

In most states, assets acquired before marriage or by inheritance are “separate” property; neither a separate asset nor appreciation in its value is subject to division at divorce. However, substantial postmarital effort by the owner of a separate asset that enhances the value of that asset creates marital property; so does the use of marital funds to add value or obtain equity in separate property. Thus, Meg’s inheritance is a separate asset. David’s auto repair business is partly separate because it was acquired before the marriage, but may be partly marital if its value increased because he worked full-time in the business after the marriage. The home is marital, despite the fact that David took title in his name only, because marital funds were used to pay for it.

Custody decisions are based on the “best interests of the child.” David cannot obtain sole physical custody based on Meg’s adultery; this behavior is irrelevant unless he can show that it has caused or will cause significant harm to Anna. In evaluating a child’s best interests, courts look at a range of factors, including the child’s wishes, the parents’ physical and mental health, and the interaction and interrelationship of the child with both parents and any other person who

may significantly affect the child's best interests. Here, it is possible that David might obtain sole physical custody based on one or more of these factors, but case outcome cannot be predicted with the information at hand.

***Point One(a) (30%)***

Under the state statute, an agreement regarding property division and alimony that is made voluntarily and with fair and reasonable disclosure of assets and obligations is binding. Here, it is highly unlikely that Meg can avoid enforcement of the premarital agreement; David fully disclosed his assets, and the evidence does not support a claim of involuntariness.

Although courts were once hostile to premarital agreements, today all states permit spouses to contract premaritally with respect to rights and obligations in property. In all states, the enforceability of such an agreement turns on three factors: voluntariness, fairness, and disclosure. How courts apply these factors varies significantly from one state to the next. In many states, an agreement is unenforceable if the party against whom enforcement is sought succeeds in showing involuntariness, unfairness, or lack of adequate disclosure. However, under the UPAA, which has been adopted in 26 states and this jurisdiction, the party against whom enforcement is sought must prove (1) involuntariness or (2) that "the agreement was unconscionable when it was executed" *and* that he or she did not receive or waive "fair and reasonable" disclosure and "did not have, or reasonably could not have had, an adequate knowledge" of the other's assets and obligations. UPAA § 6(a). Thus, under the state statute, a court may not refuse to enforce a premarital agreement based on unconscionability unless it also finds lack of adequate disclosure or knowledge.

Here, Meg cannot establish inadequate disclosure and knowledge. David gave her copies of his tax returns for three years and an accurate list of his assets. Under the UPAA, Meg would thus be required to show that the execution of the agreement was involuntary in order to avoid its enforcement.

In considering whether a premarital agreement was voluntarily executed, courts look to whether there was fraud, duress, or coercion. They agree that one party's insistence on signing the agreement as a condition of the marriage does not, of itself, render the agreement involuntary, but there is no consensus on what additional facts are sufficient to establish involuntariness. *See Principles of the Law of Family Dissolution* § 7.04 cmt. c (2002).

Many of the reported cases, like this one, involve a claim of involuntariness based on presentation of an agreement very close to the wedding. In analyzing whether an agreement signed under these circumstances is voluntary, courts have looked at a wide range of factors, including the difficulty of conferring with independent counsel, other reasons for proceeding with the marriage (for example, a preexisting pregnancy), and financial losses and embarrassment arising from cancellation of the wedding. A number of courts have held that an agreement signed without the opportunity to consult with independent counsel will be scrutinized more closely. *See, e.g., Sogg v. Nevada State Bank*, 832 P.2d 781 (Nev. 1992). *See also Ruzic v.*

*Ruzic*, 549 So. 2d 72, 75 (Ala. 1989) (premarital agreements to be upheld only when each party had independent counsel).

Here, David presented the proposed agreement one week before the wedding. There is no evidence that Meg did not have time to confer with counsel. Nor is there evidence that canceling the wedding would have entailed any significant expense; the wedding was small and took place at the grandmother's house. Cancellation of the wedding at this late date might have been embarrassing, but it probably would not have been costly. Thus, it is unlikely that Meg can establish involuntariness and void the premarital agreement.

[NOTE: Although only about half the states have adopted the UPAA, voluntariness, fairness, and asset disclosure are relevant to enforceability in all jurisdictions. In non-UPAA jurisdictions, however, a court may refuse to enforce a premarital agreement on any of these grounds. Thus, in a non-UPAA state, a court's analysis of voluntariness will likely track the analysis here. But in a non-UPAA jurisdiction, a court could also refuse to enforce on fairness grounds even though disclosure was adequate.]

***Point One(b) (10%)***

A premarital agreement regarding child custody is unenforceable.

Because of the strong public policy in favor of protecting the best interests of children, courts have invariably found that provisions in a premarital contract relating to children, including provisions relating to child custody and visitation, are unenforceable. *See* Harry D. Krause et al., *Family Law: Cases, Comments and Questions* 216 (7th ed. 2012). Although the UPAA does not explicitly bar an agreement respecting child custody, “[l]ong tradition . . . would seem to ensure . . . that courts would not consider themselves bound by custody provisions they believe injurious to the child's interest. The law of separation agreements in every state is explicit on that point, and there is no reason why premarital agreements would be treated differently.” Ira Ellman et al., *Family Law: Cases, Text, Problems* 856 (5th ed. 2010).

Thus, the provisions of the premarital agreement requiring joint custody will not be enforced even if the alimony and support provisions of the agreement are upheld.

***Point Two (35%)***

In most states, assets acquired before marriage or by inheritance are “separate” property; neither a separate asset nor appreciation in its value is subject to division at divorce. However, substantial postmarital effort of an owner spouse or the use of marital funds to add value or obtain equity in separate property creates marital property. Thus, Meg's inheritance is separate property. David's auto repair business may be partly marital property. The home is marital property.

In all states, a divorce court may divide assets without regard to title. However, in most states, only marital property—assets acquired during the marriage except by gift, devise, or

inheritance—is subject to division at divorce. In a minority of “hotchpot” jurisdictions, the court may divide all assets, whenever or however acquired. A few states permit the division of separate property in special circumstances, such as hardship. *See* Harry D. Krause et al., *Family Law: Cases, Questions, and Comments* 752–53 (6th ed. 2007).

Although the mere fact that a separate asset appreciates in value during the marriage does not create marital property, an asset that is initially separate property may be partially transformed into marital property if marital funds or significant postmarital effort by the owner spouse enhance its value or build equity. *See id.* at 764–65. Thus, if a spouse spends a substantial amount of time working in a separate business, that effort typically creates marital property. And if marital funds are used to reduce mortgage indebtedness, such equity-building payments typically create marital property. *See* J. Thomas Oldham, *Divorce, Separation and the Distribution of Property* § 7.05 (2002) (describing apportionment principles and noting that, in a few states, installment payments create only a marital lien against the value of the separate asset).

Here, Meg’s stocks are separate property because she inherited them, and there is no indication that she has expended substantial effort that has contributed to their current value. David’s auto repair business was initially separate property; he acquired the asset before the marriage. But he has worked full-time in the business during the marriage; this would represent substantial effort, and any postmarital increase in the value of the business is thus likely to be characterized as at least partly marital. The home is marital property despite the fact that it is titled solely in David’s name, as marital funds (employment income) were used for the down payment and all mortgage payments.

In a hotchpot state, all assets owned by David and Meg would be subject to division at divorce.

[NOTE: The above analysis applies in both common law and community-property states. Although the rules governing asset *management* and *division at death* vary depending on whether the jurisdiction is a common law or community-property state, today, all states disregard title in defining the pool of assets available for division at divorce. Indeed, the marital property rules applicable in common law states are sometimes referred to as “deferred community property.”]

***Point Three(a) (10%)***

Child custody decisions are based on the best interests of the child, and a parent’s misconduct may not be taken into account unless it causes significant harm to the child. Thus, David cannot obtain sole physical custody of Anna based on Meg’s adultery.

Child custody decision making is invariably governed by the “best interests of the child” standard. Today, courts agree that a court may not deprive a parent of custody based on a parent’s values or lifestyle unless the evidence shows that the parental conduct adversely affects the child. “[T]o deprive a parent of custody, the evidence must support a logical inference that some specific, identifiable behavior or conduct of the parent will probably cause significant



physical or emotional harm to the child. This link between parent's conduct and harm to the child, moreover, may not be based on evidence which raises a mere surmise or speculation of possible harm." *May v. May*, 829 S.W.2d 373, 377 (Tex. Ct. App. 1992). *See also Fulk v. Fulk*, 827 So. 2d 736 (Miss. 2002). Based on this child-centered approach, most courts have ruled that a parent's sexual behavior is not by itself sufficient to deny a parent custody. *See, e.g., T.C.H. v. K.M.H.*, 784 S.W.2d 281, 284 (Mo. App. 1989).

Thus, a court may not award David sole physical custody of Anna based on Meg's adultery because there is no evidence that Meg's adultery has caused Anna harm.

***Point Three(b) (15%)***

It is possible that a court would award David sole physical custody based, at least in part, on his greater role in providing child care and the grandmother's role as a primary caregiver during Anna's formative years, which an award of sole physical custody to David would preserve. But evidence on other relevant factors is lacking, making it impossible to predict what a court would do.

A custody decision is based on the best interests of the child. That determination is based on a range of factors, including "(1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved." Uniform Marriage and Divorce Act (UMDA) § 402.

Here, there are some facts that support an award of sole physical (i.e., residential) custody to David. Meg lived with Anna only for brief periods during the child's first four, formative years; David lived with Anna throughout this period and provided care for her when he was not working. During these four years, the grandmother acted as a primary caregiver to Anna, and she has continued to provide care; an award of sole physical custody to David would thus enable Anna to maintain an active relationship with a caregiver, her grandmother, who may have played an important parental role.

However, evidence is lacking on other relevant factors, including Anna's preference, each parent's mental and physical health, Anna's current relationships with both parents and with the grandmother, and Anna's current adjustment to her home, school, and community.

It is thus possible, but far from certain, that David could obtain sole physical custody of Anna, but without information on the other relevant factors, it is impossible to predict the outcome here.

# CRIMINAL LAW ANALYSIS

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CRIMINAL LAW IV.B.1., C.1.; V.E.

## ANALYSIS

### Legal Problems:

- (1) Should the prosecution be suspended due to the defendant's incompetence to stand trial (in some jurisdictions this is called "lack of fitness to stand trial") if, due to a cognitive impairment, he currently cannot consult with his lawyer with a reasonable degree of rational understanding and he lacks a rational and factual understanding of the proceedings against him?
- (2) If the defendant is found competent to stand trial and the prosecution proceeds, in a jurisdiction that uses the *M'Naghten* test, should the defendant be found not guilty by reason of insanity (NGRI)?

## DISCUSSION

### Summary

A defendant may not be prosecuted if he is incompetent to stand trial. Here, the defendant should be found incompetent because the evidence gathered by the police and the court-appointed psychiatrists demonstrates that he currently (1) lacks a rational and factual understanding of the proceedings against him and (2) cannot consult with his lawyer with a reasonable degree of rational understanding. The defendant does not understand the charge against him, the role of appointed counsel or the judge, what happens in court, or abstract language and concepts.

If the defendant is found competent to stand trial and the prosecution proceeds, a jury should not find that the defendant is NGRI because the defendant cannot prove by a preponderance of the evidence that the *M'Naghten* test is satisfied. Under that test, the defense must prove that, at the time of the offense, (1) the defendant suffered from a defect of reason, from disease of the mind; and (2) as a result of this mental disease or defect, the defendant at the time of the act did not know the nature and quality of the act, or that the act was wrong.

Under the first prong of the *M'Naghten* test, the defendant will probably be unable to prove that he was suffering from a defect of reason from a disease of the mind. Although at the time of the armed robbery the defendant was experiencing "mental health difficulties" and some cognitive impairment (which included blaming the United Nations for a secret boycott of his business), when balanced against the evidence of cognitive functioning gathered by the police and the court-appointed psychiatrists, the defendant's evidence is probably insufficient to meet his burden of proof on this point.

Under the bifurcated second prong of the *M'Naghten* test, the defense must also prove that, at the time of the robbery, (1) the defendant did not know the nature and quality of the act

or (2) did not know that the act was wrong. Although states' laws differ on the definition of "wrongfulness" for NGRI purposes, here the facts suggest that the defendant knew the nature and quality of his act of armed robbery and that it was legally and morally wrong.

***Point One (40%)***

The defendant should be found incompetent to stand trial because he currently (1) cannot consult with his lawyer with a reasonable degree of rational understanding and (2) lacks a rational and factual understanding of the proceedings against him.

Competence to stand trial is a legal requirement that refers to a defendant's ability to participate in criminal proceedings. In some jurisdictions, competence is called "fitness to stand trial." To be competent, it is not enough that the defendant be "oriented to time and place and [have] some recollection of events." *Dusky v. U.S.*, 362 U.S. 402 (1960). The *Dusky* test has two prongs: the defendant must have (1) "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and (2) "a rational as well as factual understanding of the proceedings against him." *Id.* In *Drope v. Missouri*, 420 U.S. 162 (1975), the Supreme Court elaborated on the *Dusky* standard, clarifying that the defendant must be able "to assist in preparing his defense." 420 U.S. at 171. Assisting counsel also requires that a defendant be able to make decisions, including whether to go to trial or plead guilty. Model Rules of Professional Responsibility R. 1.2(a). Whenever the defense can establish a "bona fide doubt" regarding the defendant's decision-making abilities, the court must hold a hearing to determine competence to stand trial. *See Pate v. Robinson*, 383 U.S. 375, 385 (1966). Once the defendant has made this preliminary showing, the burden of evaluating competency is placed on the courts and court-appointed experts. *See Godinez v. Moran*, 509 U.S. 389 (1993).

Here, the defense has raised bona fide doubt regarding the defendant's decision-making abilities, and the court has gathered evidence to determine his competence to stand trial. The evidence obtained by the police and the findings of the two psychiatrists demonstrate that the defendant cannot currently meet either of the two prongs of the *Dusky* competence test.

The defendant does not meet the first prong of *Dusky* because he lacks the "present ability to consult with his lawyer with a reasonable degree of rational understanding." *Dusky*, 362 U.S. at 402. The defendant currently cannot (1) provide any information about the armed robbery; (2) understand the charge against him ("My mother told me I did something bad, but I can't remember what."); (3) understand the role of his appointed counsel ("She's nice" and "She comes to see me and helps me"); or (4) comprehend abstract language and concepts. There is also no evidence that the defendant is feigning or exaggerating this impairment for the purpose of avoiding trial. Together, these facts show that the defendant currently lacks the ability to assist counsel in any fashion. *See United States v. Andrews*, 469 F.3d 1113, 1118–19 (7th Cir. 2006). Here, the defendant cannot currently assist counsel because he lacks knowledge of his case and the myriad consequences of his decisions. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *see also Lafler v. Cooper*, 132 S. Ct. 1376, 1383–84 (2012).

The defendant also does not meet the second prong of *Dusky* because he does not possess “a rational as well as factual understanding of the proceedings against him.” As to what is happening in the courtroom, the defendant admits, “I don’t know what they are talking about,” and he understands only that the judge is “the guy in charge.” If the defendant cannot understand the crime, charges, role of his appointed counsel, courtroom proceedings, and the role of the judge, the court should find that he is not currently competent to stand trial and the case should not proceed.

If the defendant’s mental abilities improve, his competence can be reassessed in the future.

***Point Two (60% total)***

If the defendant is ever found competent to stand trial and the prosecution proceeds, a jury should not find that he is NGRI under the *M’Naghten* test because the defense cannot prove by a preponderance of the evidence that, at the time of the armed robbery, (1) the defendant was suffering from a defect of reason from a disease of the mind; and (2) as a result of this mental disease or defect, he did not know the nature and quality of the act, or that the act was wrong.

**I. The *M’Naghten* test (15%)**

Under the *M’Naghten* test for NGRI used by State A (and a majority of states), the defense must prove that, at the time of the offense, (1) the defendant suffered from a defect of reason, from disease of the mind; and (2) as a result of this mental disease or defect, the defendant at the time of the act did not know the nature and quality of the act, or that the act was wrong. *See generally* Wayne R. Lafave, *Criminal Law, Chapter 7: Insanity* § 7.2 (5th ed. 2010). The nearly two-century-old *M’Naghten* test is derived from the opinion in *M’Naghten*, 8 Eng. Rep. 718 (1843). In State A, as in most states, the defense must prove the affirmative defense of NGRI by a preponderance of the evidence.

**II. *M’Naghten* prong one (15%)**

Under the first prong of the *M’Naghten* test, the defense probably cannot prove by a preponderance of the evidence that the defendant suffered from a defect of reason caused by a disease of the mind. There has never been a comprehensive statutory or jurisprudential definition of “defect of reason” or “disease of the mind.” However, for a court to find a defendant NGRI, the defendant’s mental defect or disease must be sufficiently severe to cause the consequences described in the second prong of the *M’Naghten* test.

Here, the evidence indicating that the defendant was suffering from a mental disease or defect is the psychiatrists’ opinion that the defendant was having “mental health difficulties” and the defendant’s statement to his best friend: “I cannot attract customers because the United Nations has organized a secret boycott of my new business.” The court must balance this evidence against the evidence that, at the time of the armed robbery, the defendant (1) had not been diagnosed with a mental disease or defect, (2) had not sought mental health treatment, (3) had not displayed any other signs of cognitive impairment to his family or friends, (4) maintained

relationships with family and friends, and (5) managed to run his everyday life and operate his business. Thus, even if the defendant was suffering from some cognitive impairment at the time of the armed robbery, there appears to be insufficient evidence of a mental disease or defect that would satisfy the first prong of the *M’Naghten* test. *See generally* Paul H. Robinson, “Criminal Law Defenses: A Systematic Analysis,” 82 *Col. L. Rev.* 199 (1982).

### III. *M’Naghten* prong two (30%)

Under the *M’Naghten* test, a finding that the defendant was suffering from a “defect of reason” caused by a “disease of the mind” is necessary—but insufficient—to support a verdict of NGRI. *See, e.g., People v. Stoffel*, 794 N.Y.S.2d 230 (2005) (affirming the defendant’s conviction, because his schizophrenic delusions did *not* prevent him from knowing right from wrong). The bifurcated second prong of the test requires that the defense also prove that, as a result of this mental disease or defect, the defendant either did not know the nature and quality of the act or did not know that the act was wrong.

Here, the evidence gathered by the police and the court-appointed psychiatrists establishes that the defendant knew the nature and quality of his armed robbery of the store. 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,” which indicates that the defendant understood the robbery as a solution to his financial woes. The defendant also described his plan to flee: “If you read about me in the papers tomorrow, I’ll already be far away.” Finally, the defendant instructed his friend to destroy evidence (“delete this text”) and to lie to the police (“tell the police you never knew me”). Taken together, these facts establish that the defendant knew the nature and quality of the act of robbing the store.

On these facts, there is also sufficient evidence that the defendant knew that the act of armed robbery was wrong. Various state laws (and judicial interpretations of the NGRI defense) differ on the definition of “wrongfulness.” *See State v. Crenshaw*, 659 P.2d 488, 491 (Wash. 1983) (“The definition of the term ‘wrong’ in the *M’Naghten* test has been considered and disputed by many legal scholars.”). Some states define “wrongfulness” as legally wrong and provide the NGRI defense if the defendant’s mental disease or defect prevented him from knowing that his acts were legally wrong (i.e., criminal violations). *See State v. Hamann*, 285 N.W.2d 180, 184 (Iowa 1979) (“We hold the words ‘right’ or ‘wrong’ under the *M’Naghten* rule refer to legal right or wrong.”) Other states define “wrongfulness” as morally wrong and provide the NGRI defense *only* if the defendant did not know that his acts were morally wrong (i.e., the type of acts that society would condemn). *See People v. Schmidt*, 110 N.E. 945 (Ct. App. N.Y. 1915); *People v. Wood*, 187 N.E.2d 116 (Ct. App. N.Y. 1962); *State v. Roberts*, 876 N.W.2d 863 (Minn. 2016) (“The word ‘wrong’ in this [M’Naghten] statute is “used in the moral sense.”); *State v. Bott*, 246 N.W.2d 48, 52 (Minn. 1976). This means that a “defendant must know that his act was wrong in a moral sense and not merely know that he has violated a statute.” The remaining states do not define “wrongfulness.” *See LaFave, supra*, at 406–07.

Regardless of whether the state defines wrongfulness as a legal or moral wrong, none of the evidence indicates that the defendant believed that his acts were legally or morally justified or acceptable. The defendant entered a store, demanded “Give me all your money or I’ll shoot you,” stole \$5,000, and sped away from the scene driving over 80 mph. The day before the armed 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.” As noted above, taken together these facts establish both that the defendant knew the nature and quality of his acts and that his armed robbery of the store was legally and morally wrong.

In sum, even if the defense satisfied the first prong of the *M’Naghten* test by proving that the defendant suffered from a “defect of reason” caused by a “disease of the mind,” the defense could not satisfy the second prong because on this record there is insufficient proof to demonstrate, by a preponderance of the evidence, that the defendant did not know the nature and quality of his armed robbery of the store or that his act was legally or morally wrong.

[NOTE: The fact that the defendant now suffers from brain damage is obviously not relevant to the question of the defendant’s mental state at the time of the crime. *See, e.g., Drope v. Missouri*, 420 U.S. 162, 176–177 (nonresponsibility and incompetency to stand trial are separate inquiries).]

# CONTRACTS ANALYSIS

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## CONTRACTS I.A., C., & E.; III.A.

### ANALYSIS

#### Legal Problems:

- (1) Does Article 2 of the Uniform Commercial Code or the common law of contracts apply to a dispute under a mixed contract for a transaction in both goods and services?
- (2)(a) When parties have entered into a written agreement which states that it is their complete agreement, under what circumstances are terms that were orally agreed to before the written agreement part of the resulting contract?
- (2)(b) When parties have entered into a written agreement which states that it is their complete agreement, is a subsequent oral agreement part of the resulting contract?
- (3) Is an agreement to modify a contract in which one party gives up rights and gets nothing in return enforceable?

### DISCUSSION

#### Summary

Contracts for the sale of goods are governed by Article 2 of the Uniform Commercial Code; most other contracts are governed by the common law of contracts. In a mixed (or hybrid) contract, involving both goods and nongoods (such as services), courts typically use a “predominant purpose” test to determine which body of law—the common law of contracts or Article 2—applies to the whole contract. In this case, it is not clear whether the goods aspect or the nongoods aspect predominates. Good arguments can be made either way.

Whether an oral agreement that predates a written agreement is part of the resulting contract is governed by the parol evidence rule. Under the common law parol evidence rule, the test is whether the written agreement is completely integrated (in which case a prior oral agreement that is within the scope of the written agreement is discharged by it) or only partially integrated (in which case the prior oral agreement is discharged only if it is inconsistent with the written agreement). Here, a strong argument can be made that the written agreement is completely integrated in light of the statement in the agreement that it is the parties’ “complete agreement.” Yet such a statement is not definitive. If the written agreement is completely integrated, the prior oral agreement about the lodging (which appears to be within the scope of the written agreement) would be discharged by the written agreement. If the written agreement is partially integrated, the prior oral agreement about lodging does not appear to be inconsistent with the written agreement and thus would probably not be discharged.

## Contracts Analysis

The parol evidence rule does not apply to the oral agreement lowering the price of the apprenticeship because the rule does not apply to oral agreements entered into subsequent to a written agreement. There was no consideration supporting the potter's agreement to lower the price, so, under the common law, the modification would not be binding on the potter because of the lack of consideration.

### ***Point One (25%)***

In this transaction involving both goods and services, the “predominant purpose” of the contract determines whether Article 2 of the Uniform Commercial Code or the common law of contracts governs. Here, persuasive arguments can be made that either the goods aspect or the nongoods aspect predominates.

Contracts for the sale of goods are governed by Article 2 of the Uniform Commercial Code. *See* UCC § 2-102. Most other contracts are governed by the common law of contracts. The contract here is mixed (or “hybrid”) in the sense that it contains both sale-of-goods aspects (the sale of equipment and tools used in the pottery-making process) and nongoods aspects (the apprenticeship training). In such a hybrid contract, involving both goods and nongoods, courts typically use a “predominant purpose” test to determine which body of law applies to the whole contract, rather than dividing the contract into goods and nongoods aspects. *See* James J. White & Robert S. Summers, *Uniform Commercial Code* 28 (6th ed. 2010).

Which aspect predominates here—the sale of the tools and equipment or the apprenticeship training? Comparing the prices assigned to each aspect of the transaction by the parties, the \$5,000 goods portion is larger than the amount attributed to the services portion (whether the initial \$4,000 or the potter's agreement to lower it to \$3,500), suggesting that the goods aspect predominates and, thus, that Article 2 applies. But it can be argued that, notwithstanding the dollar amounts, the apprenticeship aspect predominates. After all, the woman's main interest was to improve her pottery skills through the apprenticeship, and the purchase of the tools and equipment could seem to be secondary to her main purpose. If the apprenticeship aspect predominates, the contract is governed by the common law of contracts.

[NOTE: Good arguments can be made for either conclusion. Credit should be given for understanding of the criterion (predominant purpose) and thoughtful application of that criterion to the facts, regardless of which conclusion the examinee reaches. In addition, answers may note that there are some decisions in which courts have found a contract to be divisible and applied Article 2 to the goods portion and the common law of contracts to the nongoods portion. *See, e.g., Foster v. Colorado Radio Corp.*, 381 F.2d 222 (10th Cir. 1967).]

### ***Point Two (40%)***

Under the parol evidence rule, whether the oral agreement relating to lodging is part of the contract will depend on whether the parties intended the subsequent written agreement to be a complete and exclusive statement of the terms of the transaction.



Whether the terms of an oral agreement that predates a written agreement are part of the resulting contract is determined by application of the “parol evidence rule.” The common law parol evidence rule applies if a contract has been reduced to a writing that is “integrated”; that is, constituting a final expression of one or more terms of an agreement. *See* Restatement (Second) of Contracts § 209(2); 3 *Corbin on Contracts* § 588. This is the case here. Notwithstanding the subsequent modification of the agreement, it appears that the parties intended the terms stated in the written agreement to be final with respect to the matters they addressed; thus, the contract was integrated with respect to those terms.

The effect of the integrated writing under the common law parol evidence rule depends on whether the writing is “completely integrated” or only “partially integrated.” A completely integrated agreement, one that is adopted by the parties as a complete and exclusive statement of the terms of the agreement (*see* Restatement (Second) of Contracts § 210(1)), discharges prior agreements to the extent that they are within its scope. Restatement (Second) of Contracts § 213(2). If the writing is only partially integrated (i.e., integrated but not completely integrated), it discharges prior agreements only to the extent that the written agreement is inconsistent with the prior agreement. Restatement (Second) of Contracts § 213(1).

Thus, the fate of the oral agreement about lodging depends on whether the writing in this case is a completely integrated agreement or only partially integrated. If the writing is completely integrated, it will discharge the oral agreement about lodging so long as that oral agreement is within the scope of the writing. It is likely that the statement “This is our complete agreement” would lead a court to conclude that the written agreement is completely integrated “in the absence of credible contrary evidence.” Restatement (Second) of Contracts § 210 cmt b. But “a writing cannot of itself prove its own completeness.” *Id.* In this regard, the Restatement provides that “wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties” (*see Id.*), and approaches to this inquiry vary from state to state.

A court would likely hold that the oral lodging agreement is within the scope of the writing inasmuch as it deals with arrangements for the apprenticeship. If a court also held that the written agreement is completely integrated, the written agreement would therefore discharge the oral lodging agreement. If, on the other hand, the writing is only partially integrated, it discharges prior agreements only to the extent that it is inconsistent with them. Restatement (Second) of Contracts § 213(1). The oral lodging agreement does not appear to be inconsistent with the written agreement; thus, if the written agreement is held to be only partially integrated, the oral lodging agreement would not be discharged.

[NOTE: The later oral agreement lowering the price of the apprenticeship is not subject to the parol evidence rule. Only prior or contemporaneous terms are subject to the parol evidence rule. *See* Restatement (Second) of Contracts § 213; Arthur L. Corbin, “The Parol Evidence Rule,” 53 *Yale L. J.* 603, 607 (1944). Thus, the parol evidence rule does not prevent the later oral agreement from being part of the parties’ contract.]

***Point Three (35%)***

Under the common law of contracts, the agreement modifying the parties' contract would not be binding because it was not supported by consideration.

Under the common law, an agreement modifying an existing contract, like other promises, generally must be supported by consideration. *See* Restatement (Second) of Contracts § 71. There was no consideration for the potter's agreement to lower the price of the apprenticeship. Rather, under the modified arrangement the woman had the same duties to the potter as before (while getting the benefit of the lower price). Performance of those existing duties (or, as they are often denominated, "pre-existing duties") is not consideration supporting the potter's agreement to accept a lower price for the apprenticeship than under the original agreement. Restatement (Second) of Contracts § 73. Nor was anything else exchanged in return for the potter's agreement to lower the amount of money to which he was entitled. While there are exceptions to the consideration requirement for modifications, such as the rule in Restatement (Second) Section 89(a) that consideration is not required if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made, no exception is relevant here. Thus, under the common law, the modification would likely not be binding on the potter.

# REAL PROPERTY ANALYSIS

REAL PROPERTY II.B.; III.F.; V.B.2.

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## ANALYSIS

### Legal Problems:

- (1) Which present title covenants, if any, did the developer breach?
- (2) Is the man entitled to damages for breach of the covenant against encumbrances because of the existence of the utility easement, which was plain and obvious?
- (3) Can the man force the utility company to remove the sewer lines from the land?
- (4) Is the man entitled to recover \$5,000 from the developer for water damage to his home?

## DISCUSSION

### Summary

Of the three present title covenants, the developer breached the covenant against encumbrances by giving the man a warranty deed that contained no exceptions. However, because the utility easements were plain, obvious, or well known to the man, the man should not be able to obtain damages for breach of that covenant.

Even if the man is not charged with actual notice of the utility easements, because the utility easements were promptly and properly recorded prior to the man's purchase of the home, the man had constructive (record) notice of them; thus, he cannot compel the removal of the sewer lines from the land.

Finally, the man can recover damages from the developer for breach of the implied warranty of habitability.

### ***Point One (35%)***

The developer breached the covenant against encumbrances.

A warranty deed contains six title covenants, three *present* covenants and three *future* covenants. The three *present* covenants are

1. covenant of seisin, a covenant that the grantor owns the land that the deed purports to convey to the grantee;
2. covenant of right to convey, a covenant that the grantor has a right to convey the land; and
3. covenant against encumbrances, a covenant that there is no outstanding right or interest in a third party which does not totally negate the title the grantor purports to convey.

[NOTE: A warranty deed also contains three future covenants. These are (1) the covenant of warranty, (2) the covenant of quiet enjoyment, and (3) the covenant of further assurances. The calls of the question, however, only relate to the present covenants, and examinees should receive no credit for addressing the future covenants.]

*See generally* Herbert Hovenkamp, Sheldon F. Kurtz & Thomas P. Gallanis, *The Law of Property: An Introductory Survey* § 17.1 (6th ed. 2014).

These warranties of title apply to all easements on the land except to the extent that they have been excepted by the terms of the deed. The fact that the contract between the developer and the man provided for a warranty deed with easements excepted is irrelevant to whether a breach has occurred because, as a result of the so-called merger doctrine, contractual promises relating to title do not survive the closing and the delivery of the deed. In other words, the only promises relating to title that survive the closing are those in the deed. *See* Stoebuck & Whitman, *The Law of Property* 906 (3d ed. 2000).

Here the deed warranted that there were no encumbrances on the land. An encumbrance is “some outstanding right or interest in a third party which does not totally negate the title which the deed purports to convey.” *Id.* at 908. An easement is such an encumbrance. *Id.* Thus, the covenant against encumbrances was breached by the existence of the utility easements on the land.

The developer may claim that the omission from the deed of the exception in the contract for easements and covenants of record was a mutual mistake, perhaps due to a scrivener’s error. Modern courts often apply merger only when use of the doctrine carries out the parties’ probable intent. If a court accepts this argument, there would be no breach of any title covenant, in effect resulting in a reformation of the deed to conform to the parties’ intent.

[NOTE: There is plainly no breach of the other two present covenants. The man received title to the land along with possession, so there is no breach of the covenant of seisin. Nor is there a breach of the covenant of the right to convey. Nothing indicates that the developer lacked the right to convey title to the man.]

***Point Two (25%)***

The law is unclear whether the man can recover damages for breach of the covenant against encumbrances where, as here, the easement was plain, obvious, or known to the man.

If a court determines that the covenant against encumbrances was breached, it is unclear if the man can recover damages. Courts are divided on the propriety of damages where the easement is plain or obvious or is known to the plaintiff. *Id.* at 909.

The man might argue that, because the developer contracted to exclude the easement from the covenant but then granted the covenant without exclusion in the deed, the developer had knowledge of a change in circumstances that no longer made it necessary to preserve in the deed the exception stated in the contract and therefore willingly gave the warranty.

The developer would likely argue that the man had notice of the easements. Although the underground utilities were not visible, the man had constructive notice of the easements given that they had been recorded, and furthermore, their presence would also have been established through a home inspection prior to the closing, and this would constitute actual notice of their existence. The developer might also argue that, because utilities are essential to use of any house as a typical home, the man must have wanted the benefit of the easements.

Here, the developer has the stronger arguments; the man did have constructive notice of the easements (and possibly actual notice). It would also be unreasonable for a home buyer to recover damages for breach of a warranty for an easement the buyer would have wanted the benefit of for the home. By denying damages to the man, a court would, effectively, recognize that the failure to exclude the easements from the warranty in the deed was a mistake and that damages would provide the man with a windfall.

Even if the court were to find that the man is entitled to damages, he could recover them only to the extent that he could prove the easements reduced the value of the land. This measure is the value of the land not subject to the easements, minus the value of the land as restricted by the easements. Because utility easements are so commonly used in residential building subdivisions, it is possible that the man will not be able to prove any significant decline in value. This may depend on whether the easements are standard and are located along the perimeter of the lot, so as not to interfere with reasonable present or future residential uses of the land.

***Point Three (15%)***

The man cannot compel the utility company to remove the sewer lines from the land.

Resolution of a dispute between the man and the holder of the sewer line easement is not dependent on or controlled by the fact that the man received a warranty deed from the developer. Rather, the question is whether the man had knowledge of the easements when he purchased the land. The facts state that the utility easements had been promptly and properly recorded prior to the delivery of the deed to the man. Therefore, regardless of the type of notice statute the jurisdiction has (notice, race-notice, or race), the man, even if he had no actual notice of the easements, was on record (or constructive) notice of the easements. Hovenkamp et al., *supra*, at 536. Thus, he takes subject to the easements, and he cannot force the utility company to remove the sewer lines from the land.

***Point Four (25%)***

The man can recover damages from the developer for breach of the implied warranty that applies to new home construction.

At common law, the rule of caveat emptor applied, and as a result the seller did not make any implied promises to the buyer relating to the condition of the premises. Today, it is generally true that a builder of a new home impliedly warrants to the buyer that the home is habitable and

## Real Property Analysis

fit for its intended purposes. Joseph William Singer, *Property* 518 (4th ed. 2014). This implied warranty allows a buyer to recover damages for losses resulting from defective construction or construction that was not done in a workmanlike manner. *See* Barlow Burke and Joseph Snoe, *Property: Examples and Explanations* 420 (3d ed. 2008).

The warranty applies to defects that are discovered within a reasonable period of time, are due to the builder's negligence or failure to do the work in a workmanlike manner, and cannot be attributable to later changes in the structure or to normal deterioration. *Id.* at 377–378. Courts vary in characterizing the warranty as based in contract or in tort law.

Here, the defect in the foundation clearly breaches the warranty. Thus, the man should be able to recover all damages for losses resulting from the developer's breach of the warranty.

# CIVIL PROCEDURE ANALYSIS

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## CIVIL PROCEDURE III.C.

### ANALYSIS

#### Legal Problems:

- (1)(a) Does a party violate Rule 11 by filing an answer containing a general denial, when there is no evidentiary support for the denial of some of the complaint's allegations and the attorney did not make any inquiry into the facts?
- (1)(b) What requirements must a party satisfy before filing a motion for sanctions under Rule 11?
- (2)(a) When an attorney files an answer on behalf of a client that contains a general denial that violates Rule 11, what sanctions should be imposed?
- (2)(b) When an attorney files an answer on behalf of a client that contains a general denial that violates Rule 11, on whom should the sanctions be imposed?

### DISCUSSION

#### Summary

The filing of a general denial by the defendants' attorney violated Federal Rule of Civil Procedure 11. Rule 11 requires an attorney to conduct a reasonable inquiry before filing an answer that denies all of the complaint's allegations. Here it appears that the attorney conducted no inquiry into the facts and that many of the factual allegations that were denied concerned facts that could easily have been checked by the attorney before the answer was filed. In addition, the attorney violated Rule 11 by denying that venue was proper because that denial was a "legal contention" that was not warranted by existing law. Finally, the attorney failed to withdraw or correct the answer, even though the plaintiff properly gave the attorney a 21-day "safe harbor" in which to correct the pleading. Thus, the court should find that the defendants' answer violated Rule 11.

The court has discretion not to impose any sanctions even if it finds a violation of Rule 11. If the court does impose sanctions, it has discretion to choose among a range of monetary and nonmonetary sanctions. If warranted for effective deterrence, the court could order payment to the plaintiff of the reasonable attorney's fees directly resulting from the Rule 11 violation.

The sanctions could be imposed on the defendants' attorney, the law firm of which he is a partner, and the defendants themselves. However, if the court finds that the defendants' attorney violated Rule 11(b)(2) by asserting a legal contention unwarranted by existing law, any monetary sanctions attributable to that violation could be imposed only on the attorney and not on the defendants. The facts do not indicate that the driver and the moving company are responsible for, or even knew of, the attorney's decision to file a general denial. Thus, the sanctions, if any, likely would be imposed on the defendants' attorney and his law firm, and not on the defendants.

***Point One(a) (35%)***

The court should grant the motion for sanctions because the defendants' attorney violated Rule 11 by filing an answer that contained improper denials of factual and legal contentions.

Every pleading, written motion, or other paper (except for discovery requests and responses) must be signed by an attorney, or by a party if the party is unrepresented. Fed. R. Civ. P. 11(a). An attorney's signature on a pleading "certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances[,]"

- (1) [the pleading] is not being presented for an improper purpose . . . ;
- (2) the . . . legal contentions are warranted by existing law or by a nonfrivolous argument for [changing existing law];
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Fed. R. Civ. P. 11(b).

Here, the driver and the moving company filed an answer, which is a "pleading" subject to Rule 11. *See* Fed. R. Civ. P. 7(a) (defining "pleading" to include answer). The facts state that the defendants' attorney signed the answer, as required. *See* Fed. R. Civ. P. 11(a).

The defendants' answer was a general denial, which is technically allowed under the Federal Rules of Civil Procedure, but only if the party "intends in good faith to deny all the allegations of a [complaint]—including the jurisdictional grounds . . ." Fed. R. Civ. P. 8(b)(3). A defendant's answer must respond to legal conclusions stated in the complaint (e.g., an assertion that venue is proper) as well as to factual allegations. *See Farrell v. Pike*, 342 F. Supp. 2d 433, 440–441 (M.D. N.C. 2004) (party must respond to both the factual and legal allegations); *Northern Indiana Metals v. Iowa Express, Inc.*, 2008 WL 2756330 (N.D. Ind. 2008) (same). Because "there is almost always something in the complaint that, in good faith, should be admitted," a general denial is likely to be improper in most cases. William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, *Practice Guide: Federal Civil Procedure Before Trial* (National ed.) § 8:937 (2014). *See, e.g., Nat'l Rest. Ass'n Educ. Found. v. Shain*, 287 F.R.D. 83, 87 (D.D.C. 2012) (general denial improper when defendant does not contest federal court's jurisdiction, even if other facts are contested).

In this problem, the effect of the general denial was to deny all of the complaint's allegations, including accurate factual contentions that the driver and the moving company would be unable to deny in good faith, such as their state of citizenship and the driver's employment by the moving company at the time of the accident. Because these denials were not "specifically identified" as



being “reasonably based on belief or a lack of information,” they were proper only if they were “warranted on the evidence.” Fed. R. Civ. P. 11(b)(4). However, these denials weren’t warranted on the evidence, as the defendants’ later admissions made clear. In addition, the denial of the propriety of venue was not warranted by the facts or by existing law. Venue is appropriate in the federal district court in which a “substantial part of the events or omissions giving rise to the claim occurred.” 28 U.S.C. § 1391(b)(2). The accident occurred in the district in which the plaintiff filed suit. Even if the defendants’ attorney did not know the venue rule, Rule 11(b)(2) required him to investigate the statutory provision before filing his answer. If he had done so, he would have seen that denying the propriety of venue was unwarranted under the law.

A lawyer who files an inaccurate pleading is not subject to sanctions if the lawyer acted in good faith after making a pre-filing “inquiry” that was “reasonable under the circumstances.” Reasonableness is judged as of the time the pleading was submitted, and depends on “such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.” Fed. R. Civ. P. 11 advisory committee’s note to 1983 amendment. *See, e.g., C.Q. Int’l Co., Inc. v. Rochem Int’l, Inc.*, 659 F.3d 53, 62–63 (1st Cir. 2011) (reasonableness of investigation depends on totality of circumstances, including complexity of subject matter, time available for inquiry, and the ease or difficulty of gaining access to relevant information).

Here, the defendants’ attorney had only a few days to investigate, and the attorney was in the midst of a trial at the time. Nonetheless, the attorney or another member of the firm should have known, or could have easily discovered, simple facts such as the state of citizenship of his clients, that the driver was acting in the course of employment at the time of the accident, and that the driver resided in the district where the action was filed. Even a brief conversation with the clients would have permitted verification of those facts. The inference that the earlier denial of these factual contentions was not “warranted on the evidence” is further supported by the defendants’ response to Requests for Admission, in which the defendants admitted these same facts. On the basis of the facts given in this problem, it seems likely that several of the original factual denials were unwarranted.

***Point One(b) (15%)***

The plaintiff’s lawyer properly gave the defendants’ attorney an opportunity to correct the pleading before the plaintiff’s lawyer sought Rule 11 sanctions.

Before a party may seek sanctions under Rule 11, the party must serve on the opposing party a motion that describes the specific conduct that allegedly violated the rule. The opposing party must be given 21 days to withdraw or correct the challenged pleading. If the 21-day period passes, and the pleading is not corrected, the motion for sanctions may be filed with the court. Rule 11(c)(2).

Here, the plaintiff's lawyer followed the proper procedure for presenting a Rule 11 motion. First, the motion requesting that the answer be withdrawn and amended to reflect the admissions made in the response to the Requests for Admission was first served on the defendants' attorney. The plaintiff's lawyer then waited at least 21 days, the rule's "safe harbor" period, to allow the defendants' attorney to withdraw or appropriately correct the answer. Fed. R. Civ. P. 11(c)(2). When the attorney failed to do so, the Rule 11 motion was then filed in court. The motion set forth "the specific conduct that allegedly violat[ed] Rule 11(b)," insofar as the plaintiff requested the defendants' attorney to correct the answer by admitting the allegations that had been admitted in the responses to the Requests for Admission. *Id.*

***Point Two(a) (30%)***

The court has considerable discretion in imposing sanctions. The purpose of any sanctions award should be to deter similar future conduct by this lawyer or others. The sanctions may include an award of reasonable attorney's fees that were incurred because of the violation.

The court will probably determine that the answer violated Rule 11(b)(4) and Rule 11(b)(2). Nonetheless, the court is not obligated to impose any sanctions. Fed. R. Civ. P. 11(c)(1). "Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court . . ." Fed. R. Civ. P. 11 advisory committee's note to 1993 amendment.

Sanctions should be "limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(4). Sanctions can be monetary or nonmonetary. If the sanctions are monetary, they can include "an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." *Id.* Examples of nonmonetary sanctions would be "striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; . . . [or] referring the matter to disciplinary authorities . . ." Fed. R. Civ. P. 11 advisory committee note to 1993 amendment.

A non-exhaustive list of factors the court may consider in deciding what sanctions, if any, should be imposed for a violation includes

[w]hether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants . . .

*Id.*

Here, the defendants admitted, in their response to the Requests for Admission, the very facts they had earlier denied in their answer. This suggests that they were not willfully seeking to impose any unnecessary burden on the plaintiff or to deny uncontested facts. Moreover, because only a few months had gone by, the effect of the offending answer on “the litigation process in time or expense” was likely minimal. On the other hand, if this particular lawyer or law firm had a history of failing to follow the Federal Rules of Civil Procedure, or if improper general denials were a particular problem in this district, then the court here would be justified in ordering sanctions consisting of the plaintiff’s “reasonable” attorney’s fees “directly resulting from the violation.” Fed. R. Civ. P. 11(c)(4). The court would evaluate the time records submitted to ensure that the seven hours of work claimed “directly result[ed] from the violation,” but seven hours does not, on its face, seem unreasonable. Depending on the geographic region of the country and the plaintiff’s attorney’s seniority and level of skill, \$300 per hour is also probably a “reasonable” amount. *Id.* A sanctions award that fully compensates the plaintiff for the costs of challenging the defendants’ attorney’s misconduct can promote deterrence by helping ensure that misconduct does not go unchallenged in the future. *Rentz v. Dynasty Apparel Indus.*, 556 F.3d 389, 399–402 (6th Cir. 2009) (award of nominal sanctions vacated and remanded for reconsideration because sanctions failed to fully compensate moving party for costs of motion and thus were clearly insufficient to promote deterrent purposes of rule).

***Point Two(b) (20%)***

Sanctions may be imposed upon the defendants’ attorney, his law firm, and the defendants. However, monetary sanctions for asserting an unwarranted legal contention may not be imposed upon the defendants, but only upon the attorney or the law firm.

The court may impose sanctions on “any attorney, law firm, or party that violated the rule or is responsible for the violation.” Fed. R. Civ. P. 11(c)(1). Here, this would certainly include the driver’s and moving company’s attorney. In addition, the attorney’s law firm should probably also be held jointly responsible, because there do not seem to be any “exceptional circumstances” that would justify a departure from the general rule that “a law firm must be held jointly responsible for a violation committed by its partner . . .” *Id.*

There is authority for imposing sanctions on a party when the party authorizes its attorney to pursue a claim that “it knew, or should have known . . . was legally and factually baseless.” *Worldwide Primates, Inc., v. McGreal*, 26 F.3d 1090, 1093 (11th Cir. 1994). But there are no facts here that indicate that the driver and the moving company knew the content of the answer or were responsible for the attorney’s decision to make an unwarranted general denial.

If the plaintiff were to argue that the defendants should also be sanctioned because they contributed to the attorney’s decision to file a general denial by failing to give the attorney a copy of the complaint until very close to the date an answer was due, a court would almost certainly reject that argument.

## Civil Procedure Analysis

Even if the defendants were negligent in failing to get the complaint to their attorney at an earlier time, instead of filing a general denial the attorney could have requested an extension of time in which to answer and used that time to conduct a reasonable inquiry into the facts and law. Furthermore, the attorney could have avoided sanctions by filing an amended answer when requested by the plaintiff. There are no facts indicating that the defendants were responsible for these failures by the attorney.

Finally, insofar as the general denial included an unwarranted “legal contention” (e.g., the denial of proper venue), any monetary sanctions resulting from that particular violation could not be imposed upon the driver and the moving company. Fed. R. Civ. P. 11(c)(5)(A).

# AGENCY ANALYSIS

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AGENCY VI.; VII.; VIII.

## ANALYSIS

### Legal Problems:

- (1) May a partner properly withdraw from a partnership that has no definite term or specific undertaking?
- (2) What is the legal effect of a partner's withdrawal from an at-will partnership—both on the partnership and on the withdrawing partner's duties?
- (3) What are the duties of a withdrawing partner during the winding up of a dissolved partnership with respect to business opportunities that came to the partner's attention during the partnership?

## DISCUSSION

### Summary

The man had the right to withdraw from the partnership, and his email stating that he was “leaving” expressed his will to withdraw. His withdrawal was not wrongful, given that the partnership had no definite term or particular undertaking.

The man's withdrawal from the partnership caused the partnership to be dissolved, but this dissolution did not terminate the man's duties to the woman during the winding up of the partnership business. During the winding up of the partnership business, the man continued to owe fiduciary duties to the partnership and the woman, as well as duties of good faith and fair dealing.

The opportunity to purchase the building was a partnership opportunity because of the partnership's prior interest in owning the building and because the opportunity was presented to the man while the partnership was still in existence and prior to its dissolution. The man's purchase of the building violated his duty of loyalty not to appropriate partnership opportunities during the winding-up process, and the purchase was not in good faith because the man failed to inform the woman of the opportunity when he learned of it before he withdrew from the partnership.

[NOTE: An examinee may analyze this question under either the Uniform Partnership Act (1914) (UPA) or the Revised Uniform Partnership Act (1997, as amended in 2013) (RUPA). Although the terminology regarding partnership dissolution and winding up are somewhat different under the two Acts, the legal ramifications of the partner's withdrawal in this two-person, at-will partnership are essentially the same under both Acts. In addition, the revised Act codifies and clarifies the fiduciary duties of partners, and the analysis on this topic cites both the RUPA provisions and applicable case law.

## Agency Analysis

All states, except Louisiana, have adopted a version of the Uniform Partnership Act. As of 2017, most states (37) have adopted the revised Act, though only a handful have adopted the 2013 amendments. The original Act, however, remains applicable in the following MEE jurisdictions: Missouri, New Hampshire, New York, Rhode Island, and Wisconsin. *See* Uniform Law Commission, Partnership Act.]

### ***Point One (25%)***

The man's email to the woman constituted a withdrawal from the partnership and did not violate the partnership agreement.

A partner may withdraw from a partnership by giving notice at any time. UPA § 31; RUPA § 601(1) (partner is “disassociated” from partnership upon partnership having notice of partner’s “express will to withdraw”). A partner always has the power to withdraw by express will, even if such withdrawal is wrongful or in contravention of the partnership agreement, such as early withdrawal from a partnership with a definite term. UPA § 31(2); RUPA § 601; *see also* Comment 1 to RUPA § 601 (partnership cannot eliminate *power* of partner to dissociate, but can eliminate *right* to dissociate and make such dissociation wrongful).

Dissolution is caused without any violation of the partnership agreement when, among other circumstances, a partner withdraws from an at-will partnership. UPA § 31(1)(b); RUPA § 801(1). In the absence of a definite term or particular undertaking, a partnership is deemed to be at will. *See* Comment, RUPA § 102(13) (partnership at will is “default mode,” unless partners have agreed to definite term or particular undertaking). *See also Girard Bank v. Haley*, 332 A.2d 443, 447 (Pa. 1975) (explaining that “particular undertaking” must be capable of accomplishment at some time, although the exact time may be unknown).

Here, the man’s email to the woman constituted a withdrawal from the partnership and did not violate the partnership agreement, given that there is no indication that the partners (who had been carrying on the business for many years) had agreed on a definite term or particular undertaking for their natural-foods store partnership. Thus, the man’s withdrawal from their at-will partnership was proper.

### ***Point Two (25%)***

The man's withdrawal from the partnership caused the partnership to be dissolved, but did not terminate the man's duties to the woman during the winding-up process.

Dissolution of a partnership results in a change in the legal relation of the partners but does not immediately terminate the partnership or the rights and powers of the partners. *See* UPA § 29; RUPA § 801(1) (in at-will partnership, notice of partner’s withdrawal causes partnership to be dissolved, and business must be wound up). Upon dissolution, the partnership continues until the winding up of partnership affairs is completed. UPA § 30; RUPA § 802(a) (partnership continues only for purposes of winding up).

Thus, dissolution marks the point when the partners cease carrying on the partnership business together and begin a process of settling the partnership affairs. The partners' rights, powers, and duties continue during the winding-up process that follows dissolution, during which the partnership liabilities are paid, the business is settled and closed, and the partnership assets are distributed. *See* RUPA § 802(b)(1). The partners' legal relationship and the partnership terminate only when all of the partnership affairs are completely wound up. UPA § 30; RUPA § 802(a).

Under the Uniform Partnership Act (1914), a partnership at will is dissolved by the express will of any partner, and any partner of the dissolved partnership has the right to have the partnership business wound up. UPA §§ 31(1)(b), 38(1). A similar result follows under the Revised Uniform Partnership Act, which provides that a partner in a partnership at will can dissociate from the partnership by that partner's express will, and upon dissociation the partnership is dissolved and its business must be wound up. *See* RUPA §§ 601(1), 801(1); *see also Fleming v. Hagen Estate*, 702 N.W.2d 786, 789 (Minn. Ct. App. 2005) (under revised act, withdrawal from partnership results in dissolution only in at-will partnership).

Here, although the man's withdrawal (or dissociation) caused their at-will partnership to be dissolved, the man continued to have duties to the woman and the partnership during the winding-up process. Because the man's withdrawal (dissociation) from the partnership was not wrongful, he had the power and the right to participate in the winding up of the partnership business, and his actions during that period bound the partnership. *See* UPA § 37; RUPA § 804(a) (dissolved partnership bound by acts of partner "appropriate for winding up the partnership business").

### ***Point Three (50%)***

During the winding-up process, the man owed the woman a fiduciary duty to account to the partnership for any benefit derived from the appropriation of a partnership opportunity, as well as duties of good faith and fair dealing. The man's purchase of the building for himself, without telling the woman, breached these duties.

During the winding-up process, partners who participate in the winding up of partnership business continue to have a fiduciary relationship to the partnership and the other partners. *See* RUPA § 409 (except for duty not to compete with partnership, all of partner's fiduciary duties continue to apply during "winding up of the partnership business").

Among the partner's fiduciary duties is a duty to account to the partnership for any benefit derived by the partner from the appropriation of any partnership opportunities. *See* RUPA § 409(b)(1)(C) (duty arises "in the conduct or the winding up of the partnership's business"). The duty not to appropriate partnership opportunities continues during the winding-up process, although "the scope of the partnership opportunities inevitably narrows." *See* Comment to RUPA § 409(b)(1)(C); *see also Bayer v. Bayer*, 215 App. Div. 454, 214 N.Y.S. 322 (1926) (partner's fiduciary duties in a dissolved partnership no longer extend to looking to the future of the business).

## Agency Analysis

A partnership opportunity includes one that is “closely related to the entity’s existing or prospective line of business, [that] would competitively advantage the partnership, and . . . that the partnership has the financial ability, knowledge and experience to pursue . . . .” *Triple Five of Minn., Inc. v. Simon*, 404 F.3d 1088, 1096 (8th Cir. 2005). A partner who learns of a business opportunity during the term of a partnership may not appropriate that opportunity (without sharing with his co-partners) during the winding-up process or after the partnership term ends. *See Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (lease extension and expansion beyond term of original joint venture); *Fouchek v. Janicek*, 225 P.2d 783 (Ore. Sup. Ct. 1950).

In addition, the partner must perform his duties during the winding up of the partnership business “consistently with the contractual obligation of good faith and fair dealing.” RUPA § 409(d). The obligations of good faith and fair dealing encompass a disclosure duty. *See* Comment 4 to RUPA (1997) § 404; *see also Hamilton Co. v. Hamilton Tile Corp.*, 23 Misc.2d 589, 197 N.Y.S.2d 384 (N.Y. Sup. Ct. 1960) (partner’s dealings during the winding-up process include continuing duties of “good faith and full disclosure”); 59A Am. Jur. 2d Partnership § 291, Termination of Partnership (2015) (dissociated partner may not use confidential partnership information after dissociation).

Here, the opportunity to purchase the building in which the store was located constituted a partnership opportunity. The partners’ prior interest in purchasing the building indicates that ownership of the building was an expectancy of the partnership, and there is no indication that the partnership lacked the financial resources to buy the building. Further, given the goodwill that the store had gained at its location, ownership of the building would likely be a partnership opportunity because owning and not having to lease the building would enhance the value of the partnership’s ongoing business. *See* Comment to RUPA (1997) § 803 (recognizing value of preserving partnership business as a going concern during winding-up process); *see also Paciaroni v. Crane*, 408 A.2d 946 (Del. Ch. 1979). In fact, the man’s eagerness to purchase the building provides evidence that ownership of the building created value for the ongoing business of operating the natural-foods store at that location.

The man breached his fiduciary duty to the partnership and the woman by not informing the woman of the opportunity to purchase the building so that their partnership could have acquired the goodwill (customer loyalty) that attached to the building’s location. In addition, the man breached his duty of good faith and fair dealing by not informing the woman of this business opportunity.

The man breached his duties to the partnership and the woman even though he did not begin negotiations for the building’s purchase and did not purchase the building until after withdrawing from the partnership. Courts have found a breach of fiduciary duties even when final negotiations and purchase of the partnership opportunity occur after withdrawal. *See Dzen v. Dzen*, 1999 WL 130545 (Conn. Super. Ct. 1999) (breach of fiduciary duty when partner, after withdrawal and during winding up of partnership, purchased property that had been leased to partnership); *Lavin v. Ehrlich*, 363 N.Y.S.2d 50 (Sup. Ct. 1974) (same).



[NOTE: An examinee might conclude that the man's continuation of the natural-foods store with the same customers, suppliers, and employees of the partnership also constituted a breach of duties to the partnership and the woman. These continuing dealings, however, are not raised in the question.

An examinee might also point out that the proper remedy in this case would be for the man to hold the building in trust as a partnership asset, thus allowing the woman to participate in the building's special value to the partnership. But the proper remedy for the man's breach of his duties is not raised in the question.]







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