

Maryland State Board of Law Examiners
JULY 2021 UNIFORM BAR EXAMINATION (UBE) IN MARYLAND
REPRESENTATIVE GOOD ANSWERS

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MPT 1

Representative Good Answer No. 1

To: Hon. Joann Gordon
From: Examinee
Re: Winston v. Franklin T-Shirts, Case No. 21-CV-0530

I. Introduction

You asked me to consider the four factors of fair use to determine whether Franklin T-Shirts use in contravention to Naomi Winston's copyright is or is not actionable.

II. Copyright and Fair Use

The owner of copyright under 17 U.S.C. 101 has the exclusive right to do and authorize a number of things, including reproducing the copyrighted work, preparing derivative works based upon the copyrighted work, and to distribute copies to name a few. 17 U.S.C. 106. Nonetheless, "the fair use of copyright . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." 17 U.S.C. 107. The fact that the use meets the above criteria, in and of itself, does not qualify the use as fair use. *Brant v. Holt*, United States District Court for the District of Franklin (1998). The courts must consider the following factors to determine if the use is fair use: "1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 2) the nature of the copyrighted work; 3) the amount and substantiality of the person used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work." *Id.*

II. Purpose and Character of the Use.

"The first factor requires an analysis of the purpose and character of the use, including whether it is of commercial nature . . . or for nonprofit educational purposes." *Brant*. "Political discourse is vital to the essence of our democracy, and uses for that purpose should, absent other factors, weigh heavily in favor of fair use." *Id.* The mere fact that a candidate for governor used a musician's song to send an uplifting purpose did not weigh in favor of fair use, especially when the candidate was not using the song to make a specific comment on his political agenda. *Id.*

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An important factor weighing in favor of fair use is whether the subsequent user of the copyrighted material transformed the work. *Allen v. Rossi*, United States District Court of the District of Franklin (2015). "Simply reproducing the copyrighted work, even in another medium, is not the transformation that would justify a finding of fair use." *Id.* Indeed, reproducing a photograph into a three-dimensional sculpture was not fair use. *Rodgers v. Koons*. "Using an element of a copyrighted work in combination with other creative expression, for a different purpose than the copyright owner's and to make a different social commentary, changes - transforms - the use and argues for fair use." *Allen*. Thus, when graphic artist took part of a wildlife photograph and cropped out an endangered animal to place into a larger collage of endangered animals, the work was found to be transformative. *Id.*

To begin, the use at issue may fall under the category of criticism or commentary, but that does not stop the analysis. Here, Franklin T-Shirts took a copy of the Naomi Winston's photograph of Jim Barrows being walked away from a demonstration in which he was arrested for and convicted of disorderly conduct. The use of the photograph was to counter Jim Barrows' later run for mayor, more than 20 years after his arrest and conviction. Franklin T-shirts used the picture on t-shirts that it sold during the time Barrows was running for mayor. The t-shirt contained the words "Arrested and Convicted" in red over the photograph and pronounced a caption that Barrows is a Hypocrite. This use weighs in favor of fair use because it is associated with political discourse and it is directly associated with Barrows' stance on "law and order."

There is also an argument that Franklin T-Shirts transformed the work. Franklin T-Shirts did not merely reproduce the work, but Franklin T-shirts also included the words "Arrested & Convicted" and "Barrows is a Hypocrite" to show that Barrows own actions and conduct were in contravention to this political messages and agenda. Thus, this factor weighs in favor of fair use.

III. Nature of the Copyrighted Work

The second factor to consider for fair use is the nature of the copyrighted work. "This factor usually does not significantly figure in most fair use analyses." *Brant*. "Most cases see its application as favoring the use of published as opposed to unpublished works, and scientific or factual works as opposed to those that are creative and expressive." *Id.* The creator and copyright owner of an unpublished work "should have the right to first divulge the work to the public in the manner she desires." *Klavan*. However, "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of the [four factors]." 17 U.S.C. 107. But, the creator and copyright owner of an unpublished work "should have the right to first divulge the work to the public in the manner she desires."

Photographs are intrinsically creative arts, which weighs against fair use. *Allen*. But where the photo is more informative than artistic, and it has been published, it weighs in favor of fair use. *Id.* Further, the artistic merit of works may be limited upon the passage of time (e.g., 10 years). *Id.* The mere fact that use was commercial does not mean the use cannot be fair. *Klavan v. Finch*

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Broadcasting, United States District Court for the District of Franklin. Where the use involves something of importance to the public, the fact that the use was a commercial use does not bar a finding of fair use. *Id.*

Fair use of an unpublished work will be found where it depicts "a visual record of a significantly newsworthy event" and where it is the only visual record of the significant newsworthy event." *Klavan*. This was present where a news broadcast played the only video depicting violent actions by the Speaker of City Council and in the only video capturing the moment of the assassination of President Kennedy. *Id.* There are three significant factors in the case at bar that weigh in favor of fair use. First, the photograph taken by Ms. Winston of Mr. Barrows was published in two forms. The photograph was first published by *Riverside Record*, a local newspaper, and in Franklin in the 1980s. Thus, Ms. Winston was given the opportunity, and took the opportunity, to "first divulge the work to the public in the manner she desires." Not only was the use published, but the use involved factual depictions which weigh in favor of fair use.

Although photographs are intrinsically creative arts, the photo at issue is more informative than artistic because it depicts Mr. Barrows being arrested for disorderly conduct at the Franklin Fun Fair. Of course, the mere fact that Franklin T-Shirts used it in a commercial manner is no bar because it concerns something of importance to the public. Along those same lines, Ms. Winston was the only photographer on the scene that day. Similar to the video of the violent actions of the Speaker of City Council in *Klavan*, as well as the assassination of President Kennedy, this was a "visual record of a significantly newsworthy event" and it was the only visual record of such event. It is a matter of public importance to know where your candidate for governor, who is strict on law in order, has committed any crimes. As such, this factor weighs in favor of fair use.

IV. Amount and Substantiality of the Person Used in Relation to the Copyrighted Work.

The third factor requires courts "to analyze both the quantitative ('amount') and qualitative ("substantiality") use of the work." *Brant*. Where "the entire work was used, repeatedly, and without modification," the factor weighs against fair use. *Id.* However, "there are circumstances where use of the entire work can nevertheless amount to fair use (e.g., when the entire work is necessary for a commentary or a news report)." Moreover, where a user takes only a small portion of the copyrighted material, especially when that small portion does not go to the heart of the copyrighted work, the use will cut in favor of fair use. *Allen*. Where only eight seconds of a fourteen-minute work was used, and there were other portions of the video that had significance apart from the eight seconds, the use weighed in favor of fair use. *Kavlan*.

At the outset, Franklin T-Shirts used the photograph that Ms. Winston took of Mr. Barrows being arrested for disorderly conduct in its entirety. This would seem weigh against fair use. Moreover, the part of the picture of "the police leading a sneering Barrows away from the demonstration in handcuffs" is certainly the heart of the copyrighted work. However, the use at hand may meet the circumstances where use of the entire work can nevertheless amount to fair use. The use of the photograph at issue would be completely meaningless if Franklin T-Shirts was unable to use the entire photograph. Indeed, "the entire work [was]s necessary for a commentary." Although

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this is a much closer call than the first two factors, this factor may weigh slightly in favor of fair use.

V. Effect of the Use Upon the Potential Market.

The final factor "is the effect of the use on the market for, or value of, the copyrighted work." Brant. This is an important factor in many a copyright case. Id. "One of the purposes of copyright is to protect the economic interests of the copyright owner." Id. "[T]he statute speaks not merely of actual harm, but also of harm to the potential market for or value of the copyrighted work." Id. Where a musician contended that a candidate for governor's use of her song would make the song permanently identified

with him and his political views, that the singer feared loss of reputation with her fans because she had publicly opposed the candidate's views, and that the singer had not licensed the use of her song to the candidate, the use of her song by the candidate weighed heavily against fair use. Id. On the other hand, where the copyrighted work has yielded little value (e.g., \$100) over a long period of time (e.g., 10 years), and no one would have the "slightest notion" upon view that it is from the copyrighted work, the use will cut in favor of fair use." Allen. Fair use will too be found where the copyright owner still has many uses of the work subject to the fair use, where there is an untouched market for portion of the copyright not used, and where the copyright's value has actually been enhanced by the fair use. Kavlan.

Here, there are several facts of great import. First, Ms. Winston granted a single license use to the Riverside Record, a local newspaper, allowing it to publish the Photograph accompanying a story about the political demonstration in exchange for \$500 near the time of Mr. Barrow's arrest. Several years later, Ms. Winston licensed the photograph at issue, along with 72 other photographs, to the publisher of a coffee-table book of her photographs, entitled Franklin in the 1980s, which retailed for \$40. Ms. Winston received a one-time license fee of \$10,000, plus a 7% royalty for each copy sold. 3,500 copies were sold before the book went out of print in 1995. Ms. Winston made \$9,800. In the twenty-five (25) years that have passed, Ms. Winston has not received any revenues from uses of the photograph since 1995. There is an argument that this case is unlike the Allen case where Allen's picture of the wildlife scene yielded little to no value in the time that preceded the transformative, fair use of Allen's picture. Here, Ms. Winston has made considerable consideration from her picture of Mr. Barrows, in excess of \$10,000 to be exact. But much like the Allen case, Ms. Winston's photo has yielded little to no value in over ten (10) years, nor has the photograph been used in any fashion since 1995. There's no analogous argument to the Brant case in that Franklin T-Shirts use could damage her reputation or shed upon her views in a false light. Indeed, there are no set of facts that Ms. Winston favored Mr. Barrows for mayor. Moreover, there could be an argument that Franklin T-Shirts use has actually enhanced the value of Ms. Winston's photograph, which had little to no value in the preceding twenty- five years. Indeed, Franklin T-Shirts had sold 2,000 units of the shirt. One argument in Ms. Winston's favor is that the viewers of the photograph could have a notion that the photograph is the copyrighted material of Ms. Winston, since the photograph was published in coffee-table book of Ms. Winston's photographs. But taken as a whole, since there does not

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appear to be much effect on the actual market of the photograph, the potential market of the photograph (since Barrows has completely withdrew from public life, retired from his business, and moved to the neighboring state of Olympia), and likely does not adversely impact Ms. Winston's reputation, this factor likely weighs in favor of fair use.

VI. CONCLUSION

After weighing each of the factors, Franklin T-Shirts use of Ms. Winston's photograph of Mr. Barrows getting arrested in 1985 at the Franklin Fun Fair for disorderly conduct is most likely a fair use.

Representative Good Answer No. 2

MEMORANDUM

TO: Hon. Joann Gordon
FROM: Applicant
DATE: July 27, 2021
RE: Winston v. Franklin Summary Judgment

Fair use is an affirmative defense to a claim of copyright infringement. *Brant v. Holt* (1998) (Brant). In cases finding fair use, the use in question (absent any other valid defense) would constitute infringement. Brant. But the copyright statute excuses acts that would otherwise be infringements if they fall within the limits of the fair use provision of the Copyright Act 17 USC section 107. Brant. The Copyright Act requires that, to determine if a particular use is a fair use, we analyze four factors. *Allen v. Rossi* (2015) (Allen).

Factor 1: Purpose and Character of the Use

The first factor requires an analysis of the purpose and character of the use, including whether it is "of a commercial nature or for nonprofit educational purposes." Brant.

Was the purpose political?

In Brant, the use was not for commercial nor nonprofit educational purposes, rather the use was for political purposes. The court in Brant, concluded that political discourse is vital to the essence of democracy, and uses for that purpose should, absent other factors, weigh heavily in favor of fair use. However, in Brant, the defendant was not using that particular song to make any specific comment on his political agenda- it was more of a generalized feeling that all candidates espouse. Brant. Therefore, the court in Brant, found this factor only slightly favored the copyright owner and against fair use. Here, defendant Franklin T-Shirts, Inc (T-Shirts) is a purely commercial company that manufactures and sells t-shirts. However, its owner is active in Riverside politics and was a strong supporter of Barrow's opponent in the mayoral election. Additionally, the t-

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shirts were sold at cost for only \$4.00 and 2,000 units were sold. Finally, the purchasers of the t-shirts were overwhelmingly supporters of Barrow's opponent in the mayoral election. Therefore, a court would likely find that T-Shirts was making a specific comment on his political agenda, and not the use was not for commercial purposes because the t-shirts were only \$4 and sold at cost to Barrow's opponents. In conclusion, the purpose was likely political.

Was the purpose for news reporting?

Statute explicitly states that one of the uses that may be fair use is "news reporting." *Klavan v. Finch Broadcasting (2017) (Klavan)*. In *Klavan*, the defendant's purpose in using the excerpt of the video was to report the news to its viewers. While the use in *Klavan* was commercial (defendant operates the television station for profit), that does not mean that the use cannot be considered fair. *Klavan* citing *Campbell*. In *Klavan*, the news story was one of significant importance to the populace of Franklin City- it showed something about the Speaker of the City Council that reflected on his character and temperament. *Klavan*. Here, one could argue that the purpose of this use (photo on the t-shirts) was news because it is significantly important to the population of Riverside to inform them that a candidate running for mayor has been arrested and convicted of disorderly conduct. Similarly, to *Klavan*, it showed a political candidate in a manner that reflected on his character and temperament. However, a judge could also argue that this purpose was more political (see analysis above) than newsworthy because usually newsworthy information is published to newspapers or television and not spread through t-shirt sales. Therefore, the purpose was likely not newsworthy.

Was the use transformative?

A transformative use is not absolutely necessary for a finding of fair use, however, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. *Allen*. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against finding of fair use. *Allen* citing *Campbell*. In *Allen*, the defendant was selling copies- a commercial use- of a collage of endangered species photographs. However, in *Allen*, the defendant was giving the proceeds to noncommercial educational purpose, as endorsed by the statute. There may be cases where the reproduction of the entire work is transformative, by making a new work different in character and meaning from the original. *Allen*. But, as a general matter, simply reproducing the copyrighted work, even in another medium, is not the "transformation" that would justify a finding of fair use. *Allen* citing *Rodgers* (reproduction of a photograph into a three-dimensional sculpture was not fair use). That type of use simply treads on the copyright owner's right to make derivative works, 17 USC section 106(2). On the other hand, using an element of a copyrighted work in combination with other creative expression, for a different purpose than the copyright owner's and to make a different social commentary, changes - transforms- the use and argues for fair use. *Allen* citing *Blanch* (use of a portion of a copyrighted photograph in a collage, which in total made a comment on the materiality of commercialism, constituted fair use.) In *Allen*, the defendant's collage of endangered species was similarly transformative and weighed

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in favor of fair use. Here, T-Shirts took a copy of the photo and reproduced it in its entirety on a t-shirt. Then the words "Arrested & Convicted" were stamped over the photo in red which adds a creative expression for a different purpose than the copyright owners because the defendant is trying to hurt Barrow's campaign for mayor. Additionally, the caption Barrows is a Hypocrite was added to further this message. Therefore, the work is likely transformative. Application of the first factor weighs in favor of fair use.

Factor 2: Nature of the Copyrighted Work

Factor 2 usually does not figure in most fair use analysis, however it can be important in some instances. Klavan. Most cases see its application as favoring the use of published as opposed to unpublished works, and scientific or factual works as opposed to those that are creative and expressive. Brant. If the video was unpublished, it weighs against fair use. Klavan. This is because the creator and copyright owner should have the right to first divulge the work to the public in the manner she desires. Klavan. However, according to the last sentence of section 107, "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." Klavan. Thus, while the court must take into account the unpublished nature of the video, that does not end our inquiry. Klavan. Here, the work was published in a local newspaper with an accompanying story about the political demonstration. Additionally, the photograph was likely more factual because it was used to describe what occurred at the demonstration.

Factor 2 will militate in favor of fair use for two reasons: (1) if it is a visual record of a significant newsworthy event and is more vivid and revealing than a mere description would be and, more significantly, (2) it is the only visual record of the significant newsworthy event. In *Time, Inc. v. Bernard* (1968), a book's use of line drawings made from single frames of the only motion picture capturing the moment of the assassination of President John Kennedy was deemed by the court to be fair use because the case involved the use of the only visual record of an event of transcendent national importance. It is important to note that that this case was brought before the current Copyright Act was enacted, at a time when the fair use doctrine was uncodified and entirely judge made. However, the Franklin court still finds it persuasive. Here, the photo was a visual record of a newsworthy event and more vivid and revealing than a description would be. Additionally, Winston was the only professional photographer on the scene that day. Therefore, this weighs in favor of fair use.

Although photographs are intrinsically creative works (weighing against fair use), a photo that is more informative than artistic will weigh in favor of fair use. Allen. Furthermore, if a photo is published, it will weigh in favor of fair use. Allen. If the photograph is not used often (like in Allen, once only in the 10 years it was taken), it will weigh in favor of fair use. Allen. Here, the photo was more informative, it was published, and Winston has not received revenues from uses of the photo since 1995.

Application of the second factor weighs in favor fair use.

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Factor 3: Amount and Substantiality of the Portion Used

For this factor, the statute requires the courts to analyze both the quantitative ("amount") and the qualitative (substantiality") use of the work. Brant. The question is whether the defendant has taken the heart of the Photo. Allen. In Klavan, the court found that eight seconds of a 14-minute video was minimal. However, the substantiality portion used is closer. Klavan. The court will look at the most significant portion of the video and see if that portion was used. Klavan.

In Brant, the analysis was simple because the entire work was used, repeatedly, and without modification. The court in Brant notes that there are circumstances where the use of the entire work can nevertheless amount to fair use (e.g., when the entire work is necessary for a commentary or a news report). Here, the entire work is used on the t-shirt. However, the entire work is necessary for a commentary purpose because in order to understand what happened to Barrows so people will vote against him, they must see the entire picture of him being arrested.

Application of the third factor weighs slightly against fair use.

Factor 4: Effect of the Use on the Potential Market for and Value of the Work

The fourth factor, which some cases (but by no means all) have said is of great importance, is the effect of the use on the market for, or value of, the copyrighted work. Brant. One of the purposes of copyright is to protect the economic interests of the copyright owner. Brant. The statute speaks not merely of actual harm, but also of harm to the "potential market for or value of the copyrighted work." Brant.

The question for this factor is will the plaintiff lose a potential market. Klavan. Here, Winston only sold 3,500 copies and the book went out of print in 1995. Additionally, Winston licensed the photo to a publisher of a coffee-table book of her photographs, which retailed for \$40. She only received a one-time license fee of \$10,000 plus 7% royalty.

Are there many uses of that portion of the video that differ from the defendant's use and that could be licensed. Klavan. Further, there is an untouched market for the entire video and for other portions of it. Klavan. Does the defendant's use actually enhance the video? It is for the copyright owner, not the user, to determine what may enhance the work's value. Klavan.

The question is whether there is a substantial effect of the defendant's use on the actual or potential value of the copyrighted work. Allen. In Allen, the defendant only sold the rights to the photo once, for a mere \$100, and has not made any further sale in 10 years. Allen.

Application of the fourth factor weighs in favor fair use.

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Conclusion: Based on this analysis, I find that the factors weigh in favor of fair use and Summary judgment will likely be granted.

MPT 2

Representative Good Answer No. 1

Fawccett & Brix LLP
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Hayden, Franklin 33054

Dear Canyon Gate Property Owners Association,

Below is our firm's analysis regarding potential claims the Stewart family may have regarding their proposed improvements to their home. In short, although the ACC correctly determined that the Stewarts' fence should not be approved, the Stewarts have a viable claim that their proposed outbuilding should have been adopted.

Issue #1: The first issue is whether the Board should uphold the Association's architectural control committee's (ACC) denial of the Stewart's application for a structure and fence?

Because the plain language of the Canyon Gate Covenants, Conditions, and Restrictions ("Covenants") prohibit the Stewarts' new structure and fence, the ACC's denial was appropriate.

Restrictive covenants are a "contract between a subdivision's property owners as a whole and individual lot owners and are thus subject to the general rules of contract construction." (*Coleman v. Ruddock* (Fr. Sup. Ct. 1999)). In construing a restrictive covenant, "a court must ascertain the drafter's intent from the instrument's language, giving a restrictive covenant's words and phrases their commonly accepted meaning." (*Foster v. Royal Oaks* (Franklin Ct. Appeal 2017)). Although at common law, covenants restricting the free use of land were disfavored, see *Foster v. Royal Oaks*, the Franklin Supreme Court had held that Section 403's reasonable construction rule concerning restrictive covenants supersedes this common law rule. See *Humphrey's v. Oliver* (Fr. Sup. Ct. 2007)). Under Franklin Property Code Section 403(a), a restrictive covenant "shall be reasonably construed to give effect to its purposes and intent." However, under Section 403(b), a restrictive covenant may not be construed to prevent or restrict the use of property as a family home.

The Stewart's Outbuilding

The first issue is whether the Stewarts' proposed outbuilding violates the Covenants. The Stewarts proposed to build a structure that will be 600 square feet (30 feet wide, by 20 feet deep). The ACC denied this, citing Covenant Rule 5C, which states that the maximum allowable square footage of all outbuildings shall not exceed 100 square feet per acre of a homeowner's

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lot. The Stewarts' home is on two acres, and thus their maximum size under Rule 5C should be 200 square feet.

There is no question that the Stewarts' design exceeds 100 square feet. However, a primary issue here is whether the outbuilding is an outbuilding or a residential building. A residential building is one "which is used for residential purposes or in which people reside, dwell, or make their homes, as distinguished from one which is used for commercial or business purposes." (20 Am. Jur. 2d Covenants 179 (2018)). Notably, the definition of a residential building "does not mean only the occupying of a premises for the purpose of making it one's 'usual' place of abode; a building is a residence if it is 'a' place of abode." (*id.*). On the other hand, *Black's Law Dictionary* defines an outbuilding as a "detached building (such as a shed or garage) within the grounds of a main building." And USLegal.com defines an outbuilding as "a structure . . . not connected with the primary resident on a parcel of property."

The Stewarts will likely argue that their proposed outbuilding may, in fact, be a residential building. For one, the new structure would be connected to the existing home by a breezeway whose roof would extend from the edge of the new structure's roof to the existing roof of the Stewart's house. Thus, the home could be considered as a single-family home that does not violate Section 3B. Moreover, the Stewarts are building this structure, not as a barn or garage, but as a guest house so that Mrs. Stewart's 72-year-old mother can move into the new structure. Franklin courts have recognized that "a court must ascertain the drafter's intent from the instrument's language, giving a restrictive covenant's words and phrases their commonly accepted meaning." (*Foster v. Royal Oaks* (Franklin Ct. Appeal 2017)). Here, assuming this dictionary definitions are, in fact, commonly accepted within the community, the ACC may have wrongly denied the Stewarts' application.

Moreover, under Franklin Property Code Section 403(b), a restrictive covenant may not be construed to prevent or restrict the use of property as a family home. Here, the ACC's decision, which would preclude Mrs. Stewarts' mom from moving into the family home, may run afoul of Section 403(b). This case is different from *Powell v. Westside Homeowners Association* (Franklin Ct. Appeal 2019), in which the court upheld an HOA's determination that a homeowner, who parked his minivan on his lawn, violated the HOA's restrictive covenants and needed to be removed. There, the restrictive covenant stated, in relevant part, that "no vehicles . . . shall be parked or stored between the curb and building line of any lot, other than on a paved driveway." Critically, the court noted that this covenant did not violate Franklin Property Code Section 403(b), which dictates that a restrictive covenant may not be construed to prevent or restrict the use of property as a family home. Because the covenant simply prevented homeowners from parking on their lawns, the court found that the restriction was reasonable. Here, the covenant, if construed to apply to guesthouses, more significantly interferes with a homeowner's ability to use their home as a residence.

The ACC may argue that, under Franklin Property Code Section 403(a), a restrictive covenant "shall be reasonably construed to give effect to its purposes and intent." Here, no other lots in the entire neighborhood have an existing guesthouse. And the ACC could argue that the purpose

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of the covenant was to outlaw all additional structures. Ultimately, on balance, the plain meaning of the words of the covenant suggest the ACC erred.

The Stewarts' Proposed Fence.

The second issue is whether the ACC correctly denied the Stewarts' request to build a fence. Per Section 7A of the Canyon Gate Covenants, Conditions, and Restrictions, fences taller than six feet are not permitted. Here, the Stewarts proposed to install an eight-foot-tall fence so that the dog would not get injured on their property. Unlike the proposed guest house, this fence does not seem to violate Franklin Property Code Section 403(b), which prevents covenants from restricting the use of property as a family home. Instead, the focus is whether Rule 7A prevents the fence.

In *Foster v. Royal Oaks* (Franklin Court of Appeal (2017)), the Franklin Court of Appeal's upheld a property association's determination that a family's construction of a fence violated certain restrictive covenants. The defendants in that case built a wrought iron fence 10 feet from the street, even though their deed required any fence be set back 25-feet from the street.

In *Foster*, the defendant-owners claimed that the trial court had misinterpreted the neighborhood's restrictive covenant. There, the deed restrictions prohibited any fence from being erected "nearer to the street than 25 feet." But an additional provision stated that "*to the extent not otherwise limited* by these deed restrictions, no building or other structure shall be located nearer to a side-lot line than five feet." (emphasis added). The defendants claimed that, because the *side* of their home faced the street with the 25-foot restriction, the second provision should control. But the Franklin Court of Appeals held that this interpretation "lacks merit." Because the second restriction only applied "to the extent not otherwise limited" by other deed restrictions, the side lot line rule did not apply as another section required a greater setback.

Here, the Covenants provide for no exemptions. Section 7A simply states that [n]o fence having a height greater than six feet shall be constructed or permitted to remain in the subdivision." Given that the language is plain and unequivocal, the ACC correctly determined that the 8-foot-high fence should not be permitted, and the Board should uphold its decision.

Issue 2: If the board affirms the ACC's denial, and the Stewarts sue, what outcome is likely and what remedies are available.

If the Stewarts sue, they are likely to win on the issue of the new outbuilding, and you may be liable for damages under Franklin Property Code Section Section 404, but they likely to lose on the issue of a fence.

Suit on the New Structure

In *Foster*, the court held that "an association's application of a properly interpreted restrictive covenant in a particular situation is presumed to be proper 'unless the court determines that the association acted in an arbitrary, capricious, or discriminatory manner.'" (*Foster* (quoting *Cannon*

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v. Bivens (Fr. Sup. Ct. 1998))). Thus, here, if the covenant was properly construed, then the burden is on the Stewarts to prove by a preponderance of the evidence that the ACC's denial of the variance was arbitrary, capricious, or discriminatory. (*Foster*). But as mentioned above, the Stewarts' have a strong argument that, at least as applied to the new proposed structure, the Covenant was not properly interpreted.

If the Stewarts file suit and win, they are likely to receive injunctive relief from the court. They will also likely argue that they are entitled to damages under Franklin Property Code Section 404. Section 404(b) allows a court to "assess civil damages for the violation of a restrictive covenant in an amount not to exceed \$200 for each day of the violation." The Stewarts will likely argue that, here, your ACC is in violation of the neighborhood's restrictive covenant.

The amount of damages a court can assess under Franklin Property Code Section 404 is unrelated to any showing of injury or harm. (*Foster*). Instead, damages are related to the number of days that the violation takes place. Under Franklin Property Code Section 404(b) a court may assess civil damages for the violation of a restrictive covenant in an amount not to exceed \$200 for each day of the violation. Because Section 404(b)'s damage provision is not intended to provide compensatory relief, the sole focus is on the days the violation occurred--not the injury suffered. Because the Stewarts application was denied on July 16, 2021, the court may count the number of days from the date of denial. The Stewarts may also obtain attorney's fees and costs as, in *Foster*, the district court awarded relief pursuant to Section 404 in addition to attorney's fees and costs.

Suit on the Fence

The Stewarts are unlikely to win a suit based on the denial of their proposed fence.

In *Mims v. Highland Ranch Homeowner's Ass'n*, the Franklin Court of Appeals upheld a determination that an association had acted in an arbitrary, capricious, or discriminatory manner in denying a request to build a carport. In *Mims*, although the deed restrictions did not prohibit carports, an ACC member told the homeowner that any carport plan submitted to the ACC would be denied "no matter what." In fact, the ACC did not review the submitted plans nor did it ever contact the homeowner who submitted the plans for the carport. Notably, in *Foster*, the court distinguished its case from *Mims*, noting that there, the homeowners had deviated from approved plans and the ACC had attempted to work out other fencing options. Here, this case is like *Foster* and unlike *Mims*. Here, the fence was explicitly prohibited by the neighborhood Covenants. Moreover, the ACC never indicated that it would deny any fence application submitted by the Stewarts. Rather, the ACC simply intended that the Stewarts family comport with the community restrictions.

Alternatively, the Stewarts will likely argue that the ACC has waived its right to enforce the deed restrictions. To demonstrate a waiver of a restrictive covenant, a party must establish that "the violations then existing were so extensive and material and to reasonably lead to the conclusion that the restrictions had been waived." *Larimer Falls Comm. Assoc. v. Salazar* (Fr. Ct. App. 2005).

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In determining whether a condition has been waived, courts look at the number, nature, and severity of the existing violations.

Franklin courts have found evidence insufficient to support a waiver of a covenant when 1-10% of properties violated the covenant at issue. For example, as the court in *Larimer Falls* noted, no waiver was found when 4 out of 62 homes had non-conforming fences, 2 of 33 lots contained unapproved access roads, when 10 of 180 houses violated setback requirements, and when 15 of 150 homeowners stored prohibited recreational vehicles on their property.

Here, Canyon Gate consists of 45 single family homes. From what we know, a few homes in the community have some type of fencing that is noncompliant with the deed restrictions with regard to fence height, color, and/or material. These homes are also in violation of the neighborhood Covenants but have not been addressed due to lax enforcement. The Stewarts will likely contend that, because one former ACC member built, and has been permitted to retain, a non-conforming fence, it shows the ACC is acting arbitrarily. However, so long as the number of non-conforming homes is less than 5 (i.e., less than 10% of the community), your Association is likely able to enforce the covenant under *Larimer Falls*.

Respectfully,
Applicant

Representative Good Answer No. 2

TO: Canyon Gate Property Owners Association (Board of Directors)
FROM: Examinee
DATE: July 27, 2021
RE: ACC Denial of Stewarts' application

Statement of Facts

(omitted)

Question 1: Should the board uphold the ACC's denial of the Stewart's application for a structure and a fence?

Short Answer:

The ACC's denial of the application was erroneous as to the Structure because the Structure is part of the same residence, and as to the fence because the board waived enforcement of the fence, so the board should not uphold the denial.

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Issues and Analysis:

In determining whether the board should uphold the ACC's decision, there are several issues to consider. I take them in turn.

Issue 1: Is the 600 square foot building sought be the Stewarts an Outbuilding or a Residence?

Franklin Property Code provides that restrictive covenants, such as the one before us should be "reasonably construed to give effect to its purposes and intent." Section 403. It also provides that a "restrictive covenant may not be construed to prevent or restrict the use of property as a family home." Id (emphasis added). This applies no matter when the restrictive covenant was enacted. Id. In construing the covenant, the Franklin Supreme Court has instructed that courts must construe the "drafter's intent" by "giving a restrictive covenant's words and phrases their commonly accepted meaning." *Coleman v. Ruddock*.

At the outset, we must consider the effect of the language in Section 403 that a covenant "may not be construed to prevent or restrict the use of property as a family home." This is not a broad prohibition. In *Powell v. Westside* (Franklin Court of Appeals), a man sued claiming that an association was denying him the ability to use his property as a family home by not parking his minivan in the front yard. But the court found that it was not the case, because he could still use it as a family home even if he parked his car in the front of the house or on the parking pad. The same analysis is applicable here: if the covenant as otherwise construed would not allow the building, it is not denying the use of the family home because the existing house can still be used as a family home.

The issue here is whether the building sought is a "Residence," and thus guided by Section 3 of the covenant, or if it is an "Building other than" a residence such as an "outbuilding" and thus guided by Section 5 of the covenant. Giving the words their ordinary meaning as the Franklin Supreme Court requires, Black's Law Dictionary from 2019 defines an outbuilding as a "detached building (such as a shed or garage) within the grounds of a main building." It is clear that the relevant building here is within the grounds of the main building. But there are two issues. First, is the building detached? The meeting with Jane Mendoza indicates that the structure "would be connected to the existing home by a roof-covered walkway" which would "extend from the edge of the Structure's roof to the existing roof on the Stewart's house." There is an argument to be made that this is still a detached building, as one has to go outside to reach the other building. But there is a plausible argument that the structure sought is not a detached building at all. In addition, the dictionary includes in parenthesis a shed and garage, which are both buildings that are not used for housing people. Canons of construction may indicate that this means the definition should be thought to include only buildings that do not house people. In addition, US Legal defines an outbuilding as a structure "not connected with the primary residence on a parcel of property" such as "a shed, garage, [or] barn." It is certainly clear from the facts that the Structure would be connected to the main house, even if just by a breezeway. Thus, it is likely that at least under this definition, it is not considered to be an outbuilding. Given that, and that

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the first definition leaves it ambiguous, it is likely that the proposed structure is not an outbuilding.

Further, a residential building "does not mean only the occupying of a premises for the purpose of making it one's 'usual' place of abode; a building is a residence if it is 'a' place of abode." Am Jur 179. We know from the facts that the structure is intended to be used to house an elderly parent. It will be, therefore, a place of abode. It matters not how much the elderly parent will be there, because she will be there, it is a residence. This, of course, does not end the matter. Section 3 of the covenant provides that "[o]nly one family residence may be erected, altered, placed, or permitted to remain on any lot." So, there is a further issue, once again, as to whether the Structure is connected to the already existed residence, which, from the discussion above as to the outbuilding, it likely is. And, it meets the requirements that a residence be set back from the street because it will be set back 50 feet from the street.

Of course, if it is an outbuilding, it was permissible to deny, because they were limited to 100 square feet per acre (2 acres here).

Issue 2: Does the covenant prohibit the building of the fence on its terms?

Yes. This issue does not depend upon whether the structure is an outbuilding or part of the residence.

All fences are covered by Section 7, which limits the height to 6 feet.

Issue 3: If the terms of the covenants do prohibit the building of the 600 square foot building and the fence, did the Board waive the right to enforce either covenant?

A board can, through its actions, waive the right to enforce a prohibition in the covenant. A waiver occurs if "the violations then existing were so extensive and material as to reasonably lead to the conclusion that the restrictions had been waived" Larimer, see also Powell. In determining if this is so, the number, nature, and severity of the violations are considered.

The Structure. As for the structure, if my analysis above is incorrect and it is considered to be an outbuilding, there was no waiver. The record provides that the ACC has approved shed and barns, but those complied with the covenant.

The Fence. The ACC has never "formally approved the installation of fences that are over six feet tall." Additionally, as for the number, it is unknown what number of fences are non-conforming, though there are some. Courts, generally, have not found the number of nonconforming items to be so severe when the number is fewer than 10% of the whole. See Powell Here, with 45 lots, 4 or fewer fences would not ordinarily give rise to a waiver. But that is not the end of the inquiry because the nature and severity is important. That one ACC member built a fence without approval which was nonconforming could "reasonably lead to the conclusion that the restrictions had been waived." This is an issue of first impression, and much may depend on agency law (if

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the ACC member had apparent authority on the agency, etc.), but it is at least plausible that the board and ACC has waived its ability to enforce the fencing restriction.

Issue 4: Should the board, in any event, grant a variance?

As noted above, the variance should be granted for the Structure, because it is likely a residence and thus allowed by the covenant. And enforcement of the fence covenant is arguably waived. But if I am wrong as to both of those, a variance is not needed. The covenant requires "compelling circumstances" to grant a variance and can choose not to grant one if not acting in an "arbitrary, capricious, or discriminatory matter." (See Cannon, FR Supreme Court). Because the facts do not indicate discrimination against the Stewarts (unlike in Mims, where they told him that there was no ability to grant a carport and they did not consider his appeal), this finding will not be found.

Question 2: If the board affirms the ACC's denial and the Stewarts sue the Association, what outcome is likely and what potential remedies are available?

Short Answer:

For reasons expressed mostly in Question 1, the Stewarts are likely to prevail, and they can certainly receive a permanent injunction from enforcement of the covenant and perhaps \$200 a day as statutory damages.

Issues and Analysis:

As noted above on the merits, the Stewarts are likely to prevail on the structure, and likely on the fence too. It is unclear what damages they can get. Section 404 provides that a court can assess civil damages for the violation of a covenant not to exceed \$200 a day for each day of the violation. But Courts have applied that when an association prevails, not when a homeowner prevails. If it can apply when an association violates the covenant, then the Stewarts may seek \$200 a day per day they were denied the ability to construct the Structure and Fence. They may also seek a permanent injunction allowing them to build the Structure and Fence. On the other hand, if the association somehow prevails, because there was no actual violation, the \$200 of damages are unavailable. But an injunction can be sought to prevent building of the Structure and fence.

MEE 1

Representative Good Answer No. 1

1. For the jury to find the son acted negligently, it would need to find that the six-year-old breached his duty to act with the care of other six-year-olds with the same experience, impairments, and abilities. A finding of negligence requires showing that the son owed a duty of care, he breached that duty, and that breach was the actual and proximate cause of the son's damages. Here, we know that the six-year-old was visually impaired, so the son will have a duty

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to act with the reasonable care of six-year-old who is visually impaired. The mother had instructed him to remain in her grasp, but the son broke free of her and began running towards a candy display. The act of running towards candy is probably typical of other six-year-olds, in some circumstances. Here, the store was crowded and there was the potential for jostling by other customers. Due to his visual impairment, a jury may find that it was unreasonable for a six-year-old with a visual impairment to begin running. The son did not notice the flattened cheesecake due to his running. The facts are sufficient to support a finding that the son acted negligently.

2. The facts are sufficient for a jury to find that Big Box acted negligently. The owner of a premises who invites members of the public to enter for the business and commercial purposes of the owner has a duty to inspect the premises for dangerous conditions, in addition to making safe or warning customers of known dangerous conditions. Big Box is a proprietor and son was on the premises as an invitee. Under traditional premises liability theory, Big Box violated its duty of care of inspecting its premises for dangerous conditions. Big Box did not assign an employee to monitor floor conditions and is not aware of when an employee had most recently inspected the floor. Big Box has a general policy of promptly cleaning known hazards on the floor, but this does not meet the applicable standard of care towards invitees on the premises. A store employee had also been in the area where the son fell and failed to notice or inspect the floor for cheesecake. Thus, the employer is liable also for its employee's failure to notice the cheesecake if negligent under a theory of respondent superior. There is no indication that the cheesecake was not visible to anyone with full visual abilities. Thus, there are sufficient facts for a jury to find that Big Box acted negligently.

3. The customer can be held liable for worsening the son's injury. Generally, individuals are under no duty to come to the aid of one in peril, absent special circumstances, such as creating the peril of another. In this situation, the son fell of his own accord, so the customer did not have to help the son to stand. Once he undertook the effort to aid the son, however, the customer must act with reasonable care appropriate to the circumstances, taking into account the emergency nature of the aid. Here, we are told that the customer negligently twisted the son's arm, therefore he has breached his duty of care and actual and proximately caused the enhanced injury to the son. The customer is a joint tortfeasor with Big Box and may be found liable for the full amount of the son's injury. It may be entitled to contribution from Big Box to the extent that Big Box's negligence contributed to the injury.

4. The son can recover the full amount of damages from Big Box only. The issue is whether the customer's negligence, causing an enhanced injury, is an independent intervening force that cuts off the liability of Big Box. Big Box is liable for all the consequences of its negligence that are foreseeable. Although the exact sequence of circumstances of injury may not be known ahead of time, if the results of its negligence are foreseeable, Big Box remains liable. Here, the customer acted to provide aid to one who was injured as a result of Big Box's negligence, and the customer was negligent in providing that aid. Because "danger invites rescue," and negligence in providing aid is also foreseeable, the results of the negligent aid is also foreseeable. Therefore, Big Box is liable for the full amount of damages caused by the customer and Big Box's negligence.

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Representative Good Answer No. 2

1. The issue here is whether the son exercised a level of reasonable care for a similarly conditioned child of like experience, age, and intelligence. TO be liable for negligence, there must be an injury, a duty, a breach of that duty and sufficient causation between the breach and the injury. The son was definitely injured, the facts do not indicate otherwise: these injuries could be both physical, or financial for any treatments that were necessary. When it comes to duty every person must exercise reasonable care to avoid harm to foreseeable victims. This involves acting as a reasonably prudent person in the situation would act. The general duty of all persons can be altered by age and physical condition. Most relevant to this circumstance, the duty of a child is lessened form that of a reasonable person, to that of a reasonable child of similar experience, age, and intelligence. In addition, with some sort of impairing physical disability, the duty of care is that of a reasonable person of the same condition. An individual breaches their duty when they fail to exercise that level of reasonable care necessitated by the duty. Causation is two-fold, actual, and proximate. to be the actual cause of an injury and individual needs to satisfy the "but for" test. This asks, but for the individuals breach, would the injury have resulted? next is proximate cause, which asks was the injury foreseeable to the individual? Meeting all 4 elements establishes a prima facie case of negligence.

In this particular circumstance, the big box and customer claim that the son was negligent in regard to his own injuries. The son definitely was injured, the facts note he had slipped on cheesecake and suffered physical injury. In addition, the son was injured even further when another customer unsuccessfully attempted to help the son stand: worsening the injury by twisting his harm. The son's duty, as a 6-year-old visually impaired child, is significantly different than the regular level of ordinary care to be exercised. Here the son's action should be compared to what another reasonable 6-year-old (of similar intelligence, age, and experience) visually impaired child would do. It is likely the son failed to exercise the level of care necessitated. A reasonable child of his circumstance in that situation would most likely not leave his mother's side when instructed not to and being firmly grasped by his mother. In addition, a reasonable child of the same age/impairment would probably know to not run in an unfamiliar public area. This breach was the cause of his injury as it satisfied both the actual/proximate causation tests. But for the boy running away from his other, he would not have slipped on the cheesecake, and it is foreseeable that running full speed, given his condition, could result in some kind of injury to oneself. Under the applicable standard of care the fact are sufficient to find the son acted negligently or at least contributed to his own injury.

2. The issue here is whether Big Box satisfied their duty of care to invitees of their business. Business owners have a heightened duty of care based in premises liability. When a business invites customers onto their property for purposes of business/ spending money, the customer has the status of "invitee" the highest status in premises liability compared to licensee: an individual permitted on the premises; and trespassers: individuals owed not duty and not permitted on the premises. A business owner has a duty to ensure there are no dangers on their premises that could harm foreseeable victims. This includes a duty to make reasonable inspections to ensure no such dangers exist.

Here, Big box had a duty to inspect the self-serve dining area since they exercised a degree of control over the area: they had employees clean hazards there before and had failed to reasonably inspect the area the day of the injury. This failure to inspect was the cause of the boy's injury, per the rule mentioned above. but for the employee's failure to inspect, the boy would not have been harmed, and

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it is foreseeable to Big Box that someone could be harmed by slipping in the area: they had taken precautions before.

3. The customer can be held liable. The general rule is that no one has a duty to rescue. However, if making an attempted rescue an individual has a duty to exercise reasonable care in doing so. If an individual injures another while attempting to rescue they can be held liable for putting the injured individual in a worse position than before the rescuing.

Here, the customer can be held liable. The customer attempted to help the son stand and did so in such a way that he injured the boy's arm worse than before he fell. The customer had no duty to help the boy, who was not even in grave danger, but assumed the risk of liability in doing so.

4. The general rule is that defendants are held joint and severably liable for the injuries of a plaintiff: the plaintiff can recover the full amount of their damages from either defendant and it is the job of the defendant to seek indemnification from his/her co-parties. a negligent individual who injured another is also liable for the injuries caused by those who attempted to rescue the harmed individual, since rescuers are always a foreseeable aspect of negligence. If the injuries are attributable to specific parties joint and several liability may not be proper.

Here, both the customer and Big Box were liable for the boy's injuries. HE can seek full amount of damages from either party. The customer will likely argue that he in no way contributed to the injuries of the boy from falling, only to the twisted arm.

MEE 2

Representative Good Answer No. 1

1. The issue is whether Ethan controls a majority of shares.

Generally, a merger of one company into another must be approved by a vote of a majority of shareholders of both companies. Here, Ethan, Carlos, and Diana own equal shares of Winery Inc., each is a 1/3 owner. Both Carlos and Diana support the merger and will vote in its favor. Their 2 out of 3 votes as Winery Inc. shareholders (and an assumed unanimous vote from Carlos and Diana as Organic Wines Corps' only shareholders) approving the merger will result in a successful merger. As such, Ethan will not be able to block the merger by merely voting against it.

2. The issue is whether Ethan has a right of appraisal.

Generally, a dissenting shareholder may exercise their right of appraisal and force a company to buy back their shares for fair market value determined by the court. To exercise the dissenter's right of appraisal, a shareholder must (1) notify the company of their dissent and intention to vote against the merger, (2) vote against the merger or abstain from voting, and (3) demand that the company buy back their shares for fair market value. Ethan will likely be able to exercise his right of appraisal. He has likely already expressed his dissent to the company and his disapproval of the merger as evidenced by the fact that only Carlos and Diana have decided to shift the company's business to become a "benefit corporation" and creating a benefit corporation in

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State B, Organic Wines Corp., in order to carry out their plan. If he has not already notified them of his disapproval, he must do so, then he must either vote against the merger or abstain from voting, and he must demand the fair market value of his shares.

3. The issue is whether Ethan, as a shareholder, can successfully sue Organic Wines Corp for

Assuming that Ethan does not exercise his dissenter's right of appraisal to receive the fair market value of his shares in Winery, Inc. and becomes a shareholder of Organic Wines Corp. after a successful merger, he will not likely be able to bring a successful action against the Organic Wines Corp. director in State A for promoting other agendas over maximizing shareholder profits. Even though State A's Business Corporations Act does not provide for benefit corporations and State A courts have held that domestic corporations must seek to maximize shareholder profits, by merging Winery, Inc. into Organic Wines Corp., Ethan is no longer a shareholder in a company that is domestic in State A. Organic Wines Corp is incorporated in State B, where the Business Corporations Act expressly provides for benefit corporations. As such, Organic Wines Corp.'s directors are excused/insulated from liability for making business decisions that serve a defined social or environmental purpose -- even when their decisions may negatively impact shareholder profits. Thus, Ethan will not likely prevail in an action against Organic Wines Corp.

Representative Good Answer No. 2

Issue One:

Ethan cannot block the merge of Winery Inc. into Organic Wines Corp. by voting against it. The issue is what percentage of shareholders are required to vote in favor of a fundamental corporate change in order for the fundamental corporate change to become effective.

Both a merger is a fundamental corporate change. Fundamental corporate changes require that a majority of members who can actually vote in favor of the corporate change.

Here, Ethan cannot block the merger of Winery Inc into Organic Wines Corp. Ethan, Carlos, and Diana are equal shareholders in the corporation, and the only shareholders. There is no indication that Winery Inc is sold on the public market. Carlos and Diana represent a majority of the shares that are actually entitled to vote. Therefore, the given that Carlos and Diana support the merger, Ethan will not be able to block the merger.

Issue Two:

Yes, Ethan has a right to demand that he receive payment in cash equal to the fair value of his shares in Winery Inc. The issue is whether shareholders of a closed corporation who oppose a fundamental corporate change may be bought out of the corporation by invoking their right of appraisal.

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A closed corporation is one that is not traded on the public market. A fundamental corporate change is a merger or a change of business form. In a closed corporation, the shareholder who is opposed to a fundamental corporate change may invoke their right of appraisal, but they must first perfect that right. In order for the shareholder to perfect their right to be bought out due to a fundamental corporate change, the shareholder must: (1) notify the corporation of their intention to invoke their right to withdraw, as well as their disapproval of the fundamental corporate change, (2) vote against the fundamental corporate change or abstain from voting, and (3) after the vote demand that they be bought out. The theory behind this right is that shareholders of private corporations are unable to sell their shares on the open market.

Here, it is clear that Winery Inc is a closed corporate. Ethan, Carlos, and Diana are the only shareholders of Winery Inc, and they each possess equal shares. Winery Inc merging into Organic Wines Corp would be a fundamental corporate change. Ethan, if opposed, is entitled to receive a cash payout of his shares if he perfects his right of appraisal. This would require Ethan to notify his fellow board members that he objects to the merger and intends to exercise his right to be bought out. Ethan would then have to vote against the merger or abstain. If the merger is voted in favor of, Ethan must make a demand on the board that he be bought out of the corporation.

Issue Three:

No, Ethan could not sue Organic Wine Corp directors in state A for promoting sustainable and organic practices at the expense of maximizing shareholder profits. The issue is what body of law applies to govern corporate affairs when a corporation is incorporated. When a corporation is incorporated, the internal affairs rule stipulates that the body of law that will govern the corporation's affairs is the law of the state where the corporation is incorporated.

Here, Organic Wines Corp is incorporated in State B. This means that State B law will control the internal affairs of Organic Corp under the internal affairs rule. Under State B law, directors of a benefit corporation are provided statutory protection from liability for claims that they did not seek to maximize shareholder profits if their decisions are consistent with the corporation's stated social or environmental purpose. Organic Wines Corp's stated social or environmental purpose is "promoting sustainable and organic vineyard, winery, and production practices." Therefore, the directors of Organic Wine Corp would be insulated from liability, under State B law, in their decision to promote sustainable and organic practices because their decision conformed to the corporation's stated social or environmental purpose.

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MEE 3

Representative Good Answer No. 1

1. Personal Jurisdiction/Due Process

The first issue is whether State A's exercise of personal jurisdiction over the woman violated her rights under the due process clause. Personal jurisdiction deals with the power of the court to exercise power over the defendant. A court may exercise personal jurisdiction over a defendant if there is basis for it. One such basis allowing for personal jurisdiction over the defendant is if they are personally served within the state. Here, the woman was served personally within State B, and therefore State A cannot use this basis as grounds for personal jurisdiction. Another such basis that authorizes personal jurisdiction is from a long arm statute. Here, State A's long arm statute states that a State A court may exercise personal jurisdiction over a nonresident for the purposes of determining paternity, child support if they engaged in sexual intercourse in the state. Here, while the woman was living State A and eight months after her relationship with the man, the woman gave birth to the daughter in State A. The woman adds that that was the only person she had sexual intercourse with while in the state. Therefore, the long arm statute would allow for State A to bring the mother into court in State A.

The exercise of personal jurisdiction must nonetheless still comply with the due process clause of the 14th Amendment, however. To comply with the due process clause, the woman must have had such significant contacts with the State A such that State A hearing this suit would not offend the notions of substantial fairness and justice. The contacts must be purposeful such that the woman could foresee being taken to court in State A. Here, the man is likely to argue that the court has personal jurisdiction since the woman has engaged in sexual intercourse within the state. That birth may be a logical reality of that sexual intercourse, and that knowing the man still lived in the State A she should have foreseen the courts in State A would determine issues such as custody and support. The woman is likely to counter that this occurred over 15 years ago, and she has since lived in State B with her daughter this whole time, and therefore it is not foreseeable she would be taken to court there. The court is likely to see that while the woman did engage in sexual intercourse and give birth within the state, the amount of time out of state and the lack of contacts with State A are compelling and maintaining the suit would not comply with due process. If the court determines that the sexual intercourse within the state is sufficient, it may exercise specific personal jurisdiction in State A for these particular issues.

2. Subject Matter Jurisdiction

The second issue is assuming that State A court did properly exercise personal jurisdiction over the woman, and the man's paternity is undisputed, does the court have subject matter jurisdiction to award the man sole custody of the daughter and require the woman to pay the man child support. Under the UCCJEA, a court has subject matter jurisdiction to make an initial child custody determination if it is the child's home state. The child's home state is the state where the child has been domiciled in continuous for the 6 months preceding the suit or if not for 6

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months were a parent resides. Here, the daughter has lived with her mother for 14 years in State B. Going to visit her father is not sufficient to change her domicile. Even assuming that the daughter is in State B and not State A for the continuous 6 months, the mother still nonetheless lives there and has with the daughter within the last 6 months. State B is therefore the home state of the child and therefore it is the state that must make the initial custody determination. Since the court cannot make the child custody determination it will not be able to make a child support determination. If the man wants to seek child custody he must file for it in State B and prove that it is in the daughter's best interest. Once a state makes an initial child custody determination it will have continuing and exclusive jurisdiction until it no longer has a significant connection with the daughter.

Representative Good Answer No. 2

1) At issue is whether state A's long-arm statutes is within the constitutional limitations on exercise of personal jurisdiction. For a forum court to exercise personal jurisdiction it must both have a statute authorizing personal jurisdiction ("PJ") and such statute must be within constitutional limits provided by due process. Here state A has a long-arm statute, a statute which allows exercise of a state's jurisdiction to the full extent of constitutional personal jurisdiction.

The constitutional analysis for PJ involves three factors: (1) the defendant must have minimum contacts with the forum state and these minimum contacts must demonstrate the defendant purposefully availed themselves to the law of the forum state such that exercise of PJ would be foreseeable; (2) the suit in question must be sufficiently related to the minimum contacts such that the minimum contacts give rise to the case at hand; and (3) the exercise of jurisdiction must not offend traditional notions of fair play and substantial justice, accounting for the interests and the parties to determine whether an exercise of PJ is sufficiently fair under the due process clause.

Minimum Contacts

Here there are sufficient minimum contacts. The woman first came to the state for a temporary job, indicating that she never had domicile in State A, since that requires both physical presence and an intent to stay. This means that state A could not now or ever exercise general jurisdiction. However, when the woman conceived a child in state A, with a father from state A, and gave birth to said child in state A she established contacts with the forum state by availing herself to the laws and protections of the state. Since she knew the father was a resident of state A and likely knew that he continued to be a resident of state A (given his high-profile research) she could reliably foresee a suit of paternity, particularly since paternity may be established within 21 years after a child's birth in state A. Thus, minimum contacts with state A were established by the woman's actions.

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The woman's contacts with the forum are sufficiently related to the suit at hand to give rise to supplemental jurisdiction. To exercise supplemental jurisdiction a state must establish that the minimum contacts of the first prong are related to the claim brought before the forum court. The issue at hand is a paternity and child custody suit. This controversy arose from the minimum contacts established above, namely the conception of her child with a man from state A and the birth of her child in state A. This is sufficient for supplemental jurisdiction to apply.

Fairness

Finally, courts will look to the interests of parties to determine whether exercise of PJ will offend traditional notions of fair play and substantial justice. In weighing this courts often will look at the interests of the parties and the forum state as well as the convenience of a forum in litigating a matter and prejudice to any party based off the proposed forum. Here State A is interested in providing a forum for paternity suits to citizens of the state, including the man. Since the girl has come to state A and the DNA test was performed in state A all the evidence is most conveniently litigated in state A. Nothing indicates any particular hardship to the woman in the facts provided, and even though the man is a respected scientist of great means his financial situation should not be an indication that he is more able to litigate his rights in a foreign court. As such it appears that state A is a fair court which would not offend traditional notions of fair play and substantial justice.

Since all three factors are present here, exercise of personal jurisdiction under the long arm statute is within the limits of due process and state A may bring the woman into the case.

2. At issue is whether custody may be litigated in a state other than the child's residence or home state. Under the Uniform Child Custody Jurisdiction Act (UCCJA) residence for a child is established where the custodian parent has lived with a child for 6 months. Even when a child has moved to another state subject matter jurisdiction may be inappropriate where the requirements of the UCCJA are not met. Here, the custodian parent is the mother, and the child lived with her for years in State B. The daughter moved across state lines without her mother's consent to be with her father, but her father cannot properly bring a suit since it has not been 6 months, taking his daughter from her mother's custody was unlawful, and the daughter had no substantial ties to state A other than her father. As such the court cannot exercise subject matter jurisdiction to award the man sole custody of the daughter. Additionally, since child support is only paid to a custodian parent the man would need to litigate his rights in another forum to establish custody before he could bring a claim for child support. If he were to do this he may be able to bring a suit for child support, but until he has custodial rights he has no rights to child support and may not bring a claim.

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MEE 4

Representative Good Answer No. 1

1. Did the officer's warrantless seizure of the man and warrantless seizure of the purse in the man's home violate the man's Fourth Amendment rights?

The fourth amendment protects against the unreasonable search and seizure of persons or property. Generally, in order to search or seize people or property, the police need a warrant. However, there are exceptions to the warrant requirement.

An officer may arrest a person without a warrant if they person committed a misdemeanor in the officer's presence, or if the officer had probable cause to believe the person committed a felony. Here, when the police officer pulled up to the scene a girl told him that the man fleeing had just knocked over the woman and stolen her purse. This is a robbery, which is a felony. A robbery under common law occurs when there is a (1) taking (2) of another's property (3) without their consent (4) with the intent to permanently deprive them of the property, and (5) the taking occurs from the body of the person by force, or in the presence of the person by threat of physical force. Here, the man took the purse of the woman without her consent from her body by physical force. Therefore, it was a robbery. Based on the woman lying on the ground, the girl's testimony, and the man fleeing with a purse, the officer had probable cause to chase the man and arrest him because he had probable cause that a felony had just been committed.

Generally, the right to arrest without a warrant based on probable cause of a felony applies to arrests made in a public place. If the defendant is inside his home or somewhere with an expectation of privacy, an officer usually needs a warrant. There is an exception for when there are exigent circumstances. One such circumstances is hot pursuit. here, the officer was in hot pursuit of the defendant. He chased him from the scene of the crime down an alley, over fences, and between houses. The man quickly ran into his house, but the police did not need a warrant to then enter the house because he was in hot pursuit of the man. His breaking into the man's house and arresting him was therefore under the exception to the warrant requirement and not in violation of the man's 4th amendment rights.

The seizure of the purse was also not in violation of the man's 4th amendment rights. After arresting the defendant lawfully, the officer saw the purse lying right on the floor. It was in plain view and was immediately apparent to the officer that the purse was that of the woman who had just been robbed. Because the officer was lawfully in the defendant's house at this point, the plain view doctrine applies, and the 4th amendment rights of the defendant were not violated by the officer's seizure of the purse.

2. Would the trial court violate the man's constitutional due process rights by admitting testimony that reveals the girl's on-the-scene identification of the man or by allowing her to identify him in court?

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No, the trial court would not violate the man's due process rights by admitting testimony that reveals the girl's on-the-scene identification of the man or by allowing her to identify him in court. Identifications violate a defendant's due process rights when they are impermissibly prejudicial or create a substantial likelihood of misidentification. Here, the witness only saw one person, there was no lineup of several defendants for her to choose from. This could be seen as creating a substantial likelihood of misidentification or as unduly influential or prejudicial. However, the girl was not asked to identify the witness, she did so on her own. She did so while the incident was still fresh in her mind as it had just happened only minutes before. She just happened to look over and recognize the man as the same man who robbed the woman. Therefore, the circumstances do not indicate that the police were trying to coerce the girl into giving a positive identification of this man. They were not trying to get her to make any identification at all. She made the identification freely, without undue influence. Although the defendant at this point was in the back of the police car with cuffs on, which is highly prejudicial because it makes him seem guilty, the police did not set up the circumstance which led to the girl's identification, so there has been no state action here in violation of the defendant's due process rights. Similarly, the girl may testify at trial to her identification and may further identify the defendant at trial.

Representative Good Answer No. 2

1. The issue is whether the officer's warrantless seizure of the man and the purse violated the man's Fourth Amendment rights against unlawful searches and seizures.

The Fourth Amendment provides a constitutional right against unlawful searches and seizures from government officers or agents. The main inquiry is whether the defendant had a reasonable expectation in privacy in the place to be searched. Generally, a person may exclude evidence obtained without a search warrant unless there is an exception that applies. The search warrant exceptions consist of Exigent Circumstances, search incident to a lawful arrest, consent, automobile exception, plain view doctrine, Evidence obtained as a result of an administrative search, and a stop and frisk. Additionally, a person may not be seized without a warrant unless exception applies, such as an exigent circumstance, and the officer has probable cause to arrest a person. An officer has probable cause to arrest someone for a felony so long as the officer reasonably believes that the person he is arresting committed a felony. I will address the arrest warrant and search warrant issues separately.

Arrest Warrant

The officer has a strong argument for the warrantless seizure of the man because the officer possessed probable cause to arrest the man for robbery, which is a felony. Probable cause is when an officer believes that more likely than not a person committed a crime based on articulable facts. In this case, it was reasonable for the officer to believe that the man committed a crime based on the factual circumstances. The officer was in his car when he heard a teenage girl scream and point at the man carrying a purse and sprinting away saying that the man stole the purse. The officer proceeded to ask the man stop and identified himself as a police officer.

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The man continued to run away, thereby increasing the officer's probable cause because the man did not stop. Based on the fact, it was reasonable for the officer to believe that this man committed the felony crime of robbery and had probable cause to execute an arrest based on the articulable facts.

Search Warrant

As stated previously, ordinarily an officer is not permitted to search an area that a person has a reasonable expectation of privacy without a warrant. In this case, the defendant had a reasonable expectation in his home and ordinarily would be able to exclude any evidence obtained while searching without a search warrant. However, exceptions exist. The relevant exception is the Exigent Circumstances exception. Exigent Circumstances exist to protect the destruction of evidence or the danger to the public by allowing an officer a warrantless search. One such exigent circumstance is the "hot pursuit" doctrine of a felon. In this case, the exception would apply because the officer was chasing the man through backyards, hopping fences, in pursuit of the man who was suspected of committing a violent felony. The man ran into a home and locked the door. The officer tried to initially open the door, but the man locked the door and told the officer to get off the porch. The officer then proceeded to use reasonable force by kicking down the door to get inside the home to make a lawful arrest. Once inside, the seizure by the man was made pursuant to a valid warrantless search under the Exigent Circumstances doctrine.

The obtainment of the purse falls into another category, the plain view doctrine. The plain view doctrine is when an item or piece of evidence is immediately identifiable as being related to the crime suspected and is in plain view of executing a valid search/arrest. In this case, the officer was executing a valid search of the man in accordance with the exigent circumstances doctrine and spotted the purse at the man's feet. The purse was the purse identified by the teenage girl and thus, was immediately identifiable and was within the vicinity of the man and thus within in plain view. Furthermore, even if the plain view doctrine does not apply, the search incident to a lawful arrest would apply. An officer is permitted to search a defendant within the wingspan of the defendant when the officer is making a lawful arrest. The officer is making a lawful arrest as stated above, and the purse was at the man's feet when the officer arrested the man. Thus, the purse was within the man's wingspan and the obtainment of the purse was valid. Thus, the officer's warrantless seizure did not violate the man's fourth amendment rights.

2. The issue is whether the trial court would violate the man's constitutional rights by admitting identification testimony based on whether the identification was made during a time of "highly suggestion."

A court may prevent the introduction of an out of court identification of a defendant if the out of court identification was "impermissibly suggestive." Impermissible suggestion occurs when the officers or government make suggestion through words or conduct that a person was the perpetrator of a crime and the witness identifies that person as the perpetrator on the basis of the suggestion. Thus, the initial inquiry is whether there was impermissible suggestion.

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The man was handcuffed in the back of a squad car in front of the witnesses in view of the witnesses. The officers were conducting a reasonable inquiry as to what occurred. However, the man would likely argue that conducting the inquiry in front of the witnesses as the man was handcuffed in a squad car was impermissibly suggestive because it suggested to the witnesses that the man was the person who committed the crime. The officers would respond that the suggestive was not intentional but on accident by conducting witness interviews shortly after the suspected crime. The man has a strong argument because but-for him not being in handcuffs in the car, the girl who never saw the man's face would have never been able to identify the man. It is likely that a court would exclude any testimony by admitting testimony of on-scene testimony because it would violate the man's constitutional rights.

However, the inquiry does not end there. The prosecution may still be permitted to present in-court testimony, despite the existence of impermissible suggestion, if the prosecution can show that the witness's identification is independently reliable, absent the impermissible suggestion. If the prosecution can show that the girl's testimony about the big man with the purse was independently reliable, then the prosecution may admit in-court identifications without violating the man's constitutional rights.

MEE5

Representative Good Answer No. 1

Anti-lapse statute vs. Clause 3

Clause 3 of the will apply over the state's anti-lapse statute. At issue is whether a clause in a will can supersede a state statute. Generally, unless an anti-lapse statute exists, a bequest to a beneficiary who predeceases the testator will lapse and the beneficiary's heirs or estate will not receive anything. States currently have anti-lapse statutes which prevent the gift from lapsing and allow the bequest to go to the deceased beneficiary's issue. State A has an applicable anti-lapse statute. The first part of the statute explicitly states "[u]nless the decedent's will provides otherwise." Testator's will expressly states in Clause 3 of the will what should happen if beneficiaries predecease the testator. Since the will expressly states what should happen in the case of a beneficiary that predeceases the testator, Clause 3 of the will will apply instead of the state's anti-lapse statute.

Testator's house

Doris's nephew will take the house. At issue is who should receive testator's house; the charity or her nephew. Under Doris's will, everything was left to the charity. Doris predeceased testator and therefore Clause 3 of the will will apply. Under clause 3 of the will, if a beneficiary predeceases testator and the will does not provide otherwise, the heirs of the beneficiary will take the beneficiary's bequest. Doris's only heir is her nephew. While under her will the charity received everything, and one might think the charity should receive testator's house as well, the distribution of testator's estate is up to testator to determine, not Doris, and testator has

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determined that Doris' heirs, here nephew, should receive the bequest. Therefore, Doris' nephew will receive testator's house

Bill

The residuary bequest to Bill would probably lapse. At issue is which portion of the will should determine Bill's portion; the survivorship requirement of Clause 2 or Clause 3 of the will. When there are inconsistencies of the will, they should be attempted to be interpreted as close to the meaning the testator intended as possible. On the one hand, the testator specifically included a survival requirement in Clause 2, but on the other hand listed an anti-lapse determination in Clause 3. Notwithstanding the inconsistency, since Clause 2 specifically contained a survival clause, the Court should probably interpret that survival clause as applying to Clause 2, and the residuary bequest to Bill would probably lapse.

Bill's share if lapse

Depending on the state, either Alice or testator's sister will take Bill's share. At issue is who is entitled to Bill's share if the bequest lapses. States have different approaches to who should get Bill's share if it lapses. Some states will treat Bill's share as a residuary and give the bequest to the other residuary in the will, and some states would not treat it as a residual but as intestate property and give the bequest to testator's heirs. Under the residuary approach, Alice would take the whole residuary. Under the intestate approach testator's only surviving relative, his sister would take Bill's share.

Bill's share if does not lapse

Bill's daughter would take his portion if the bequest it Bill does not lapse. At issue is who is entitled to Bill's share if the bequest does not lapse. If Bill's share does not lapse, Bill's share would follow the requirements of Clause 3 and pass to his heirs. Bill's sole heir is his daughter. Therefore, his daughter would take his portion if the bequest to Bill does not lapse.

Representative Good Answer No. 2

1. Whether the anti-lapse statute or Clause 3 of the will determines who takes the share of a beneficiary who predeceased the settlor

The probate court's ultimate goal is to effectuate the testator's intent in interpreting the testator's will. Anti-lapse statutes typically determine what happens to the testator's estate if a named beneficiary predeceases the testator. Anti-lapse statutes were developed because they were deemed to be closer to what most testators would want to happen to a devise should that beneficiary predecease them.

Here, the applicable anti-lapse statute states "unless the decedent's will provides otherwise" a bequest to a deceased beneficiary will go to the issue of the deceased beneficiary. The will states

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that if any beneficiary is not living, the bequest shall go to that beneficiary's "heirs." Here, the clause in the will is controlling because it is most likely to effectuate the intent of the testator. Furthermore, the applicable anti-lapse statute says "unless the decedent's will provides otherwise" and in this case, the decedent's will does provide otherwise. Therefore Clause 3 of the will determines who will take the deceased beneficiary's share.

2. Disposition of testator's house

In interpreting a will, the court will apply the plain meaning of the language and will generally not allow extrinsic evidence to be admitted. In the law of wills, heirs are beneficiaries of a person's intestate estate.

Here, the testator's will left the house to the testator's friend Doris and provided that if any beneficiary did not survive the testator, then that beneficiary's bequest shall go to the beneficiary's heirs. Doris left her estate to charity but has only one heir - her nephew. The charity is a beneficiary/devisee of Doris but is not an heir. Therefore, Doris's nephew will get the house.

3. Whether the bequest to Bill lapses because of the express survivorship requirement Clause in the will

Traditional law required a beneficiary to survive the testator, or their bequest would lapse. The modern presumption applied by most states is that there is no survivorship requirement.

Here, the will provides says that Bill shall take one half of his residuary estate "if he survives me." The following clause states that the heirs of any beneficiary that does not survive him shall take that beneficiary's bequest. Because of the anti-lapse clause and the presumption against a survivorship requirement, the court will likely find that the bequest to Bill does not lapse.

4. Who is entitled to Bill's one-half share if his share lapses. Some jurisdictions apply the traditional "no residue of a residue" rule meaning that if a residuary beneficiary predeceases the testator, then the gift lapses but instead of being added back to the residue, it instead goes to the testator's intestate heirs. Other jurisdictions have gotten rid of this rule and find that if a residuary beneficiary predeceases and the gift lapses, it is added make to the residue and any remaining beneficiaries in the class of residuary beneficiaries will take.

If the applicable jurisdiction applies the traditional "no residue of the residue" rule, and the gift to Bill lapses, then the testator's sister will take, because she is the testator's only relative, and therefore her only intestate heir. If the jurisdiction applies the modern rule, then Bill's share will be added to the residue and the testator's friend, Alice, will take as the remaining residuary beneficiary.

5. Who is entitled to Bill's one-half share if the share does not lapse

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If Bill's one-half share does not lapse, then it will pass according to Clause 3, which states that the deceased beneficiary's heirs will receive it. Bill has only one heir, his daughter. Therefore, Bill's daughter will take Bill's share of the residue if the gift does not lapse.

MEE 6

Representative Good Answer No. 1

1. The federal court should not grant the attorney's motion to dismiss the woman's defamation claim on the ground that the federal court lacks jurisdiction over that claim even though it is based entirely on state law.

The main issue is whether the purely state law-based claim arises out of the same common nucleus of operative fact as the federal question claim so as to give supplemental jurisdiction.

A federal court must have subject matter jurisdiction over a claim to properly hear the claim. Subject matter jurisdiction can be in the form of federal question jurisdiction or diversity jurisdiction. Additionally, a claim that does not fall under the prior two forms of subject matter jurisdiction can still be heard by a federal court if the court has supplemental jurisdiction over the claim. A court has supplemental jurisdiction over a claim when (1) it has either federal question or diversity jurisdiction over the other claim, (2) the other claim and the supplemental claim arise out of the same common nucleus of operative fact, and (3) the supplemental jurisdiction is not being used to overcome lack of diversity jurisdiction.

The first prong is satisfied because, as the attorney has conceded, the U.S. District Court for the District of State A has federal-question jurisdiction over the woman's ADEA claim. The third prong is also satisfied and is essentially irrelevant because none of claims' subject matter jurisdiction is based on diversity (which would be impossible since both the woman and the attorney are domiciliaries of State A).

The same common nucleus of operative fact can also be viewed as whether the claims arose out of the same transaction or occurrence. Here, the court will likely find that the woman's ADEA claim, and the defamation claim arise out of the same common nucleus of operative fact. At the heart of the woman's claim is her firing by the attorney. The reasons why the attorney fired the woman will be relevant to both claims (whether age was a motivating factor and whether she was actually a thief). This occurrence of the allegedly wrongful firing will require the litigation and fact finding of a number of facts that are common to both claims. The fact that the second claim is entirely based on state law is immaterial. The federal court still can--and likely will--apply State A's defamation law itself.

Since the two claims arise from the same common nucleus of operative fact and the court has federal question jurisdiction over the ADEA claim, the court has supplemental jurisdiction over

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the defamation claim. Thus, the court should not grant the attorney's motion to dismiss for lack of subject matter jurisdiction.

2. The federal court should probably not grant the attorney's motion to dismiss the woman's defamation claim on the ground that the woman did not allege the "particular words constituting defamation" as required by State A.

The main issue is whether the rules for a complaint for a defamation claim are considered procedural or substantive. A federal court should generally apply the substantive law of the state it sits in (or whichever state a choice of law analysis says applies to a claim where there is conflicting state laws). In contrast, federal courts are permitted to apply their own law to procedural issues. Typically, documents brought before a federal court such as complaints are considered procedural and governed by the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure do not have the same particular rules for defamation cases that State A requires. Rather, a complaint must plainly articulate facts about the claim asserted and the relief requested. The woman gave plain facts in her complaint: that the attorney made comments "to the effect that [the woman] was dishonest and a thief" and she gave approximate dates of the comments and identified to whom the comments were made. She stated her cause of action (defamation) and most likely requested relief. Under the Federal Rules of Civil Procedure, the woman's complaint was likely sufficient. More importantly, it is immaterial that she did not allege the particular words constituting defamation as required by State A because federal law applies to procedural issues in federal court.

If by chance the court considers the issue of the complaint requirements for a defamation case a substantive issue, then the federal court would apply State A's laws. Under State A's rules requiring a defamation complaint state the particular words constituting defamation, the woman's complaint clearly fails and would be dismissed. However, as discussed above, federal rules likely govern the requirements for the complaint and the woman's complaint would not be dismissed.

Representative Good Answer No. 2

1. Supplemental Jurisdiction

The issue here is whether the federal court may exercise supplemental jurisdiction over a state law claim when the original claim is based on federal law. In general, the federal court needs subject matter jurisdiction to hear a claim. Subject matter jurisdiction cannot be waived by the parties and can be challenged at any time or raised sua sponte by the court. A federal court has subject matter jurisdiction over claims arising under federal law that are federal by nature of the claim on the face of a well-pleaded complaint. A court may also have subject matter jurisdiction by nature of supplemental jurisdiction. Supplemental jurisdiction gives a federal court subject matter jurisdiction over state law claims that arise out of the same transaction and occurrence as the federal claim such that there would be a common nucleus of operative fact. A common

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nucleus of operative fact, however, may not be found if facts to prove one claim differ from facts to prove the other.

Here, the state law claim is an action for defamation, while the federal claim is an action for violating the Age Discrimination Act. The attorney could argue that the facts that are necessary to prove the age discrimination claim would be different from the defamation claim such that they do not share a common nucleus of operative fact. The woman could argue however, that the facts proving defamatory statements may help prove that she was fired out of discrimination, as an action for defamation would fail when the statements at issue are determined to be materially true. Ultimately, because the facts to prove defamation may indeed prove discrimination, the court will have supplemental jurisdiction over the woman's defamation claim. Therefore, the federal court should not grant the attorney's motion to dismiss the defamation claim.

2. Procedural vs. Substantive, Pleadings

At issue here is whether a federal court sitting in State A must adopt State A's form of complaint and whether the woman's complaint was valid as a matter of federal law. As a general rule, a federal court sitting in state court must apply the substantive law of the state in which it sits but may apply its own procedural law. Substantive law is law that affects the primary legal rights of parties, while procedural law has to do with following proper standards to enforce those rights. Generally, if a matter is outcome-determinative such that it would lead to forum shopping, a federal court would apply state law to avoid forum-shopping altogether. Moreover, after *Iqbal*, federal law holds that a complaint will be satisfactory if it alleges more than legally conclusory statements and describes the complaint with sufficient particularity that the Court finds relief may be afforded.

Here, the form of the complaint is likely to be found a procedural law. Just how a plaintiff completes the complaint is not likely to effect the forum chosen for suit as the federal court still requires more than a legally conclusory statement and requires some showing of particularity so that it knows relief can be provided. The form of the complaint is not going to be found as outcome determinative such that it affects a party's primary legal rights. Accordingly, the federal court will apply its own federal law to determine if the complaint is satisfactory. The complaint, while it does not state the particular statement, does allege time and place of statements and persons to whom it was made. This sort of allegation is not a legally conclusory statement and describes the complaint with sufficient particularity such that relief may be afforded if proven as true. Therefore, the federal court should not grant the attorney's motion to dismiss the woman's defamation claim on grounds that the complaint did not adhere to State A's requirements.