IN THE SUPREME COURT OF THE STATE OF MONTANA

No. _____

IN RE PETITION TO ADOPT
UNIFORM BAR EXAMINATION

PETITION FOR ADOPTION OF UNIFORM BAR EXAMINATION

The Montana Board of Bar Examiners hereby petitions the Court for authority to adopt use of and administer the "Uniform Bar Examination" ("UBE") as the testing component of the Montana bar admissions process. The UBE was developed by the National Conference of Bar Examiners ("NCBE") and, after a lengthy process of study and development, has been adopted for use in five states so far – Washington, North Dakota, Idaho, Alabama and Missouri. Several other states are presently considering adoption of the UBE. If approved, the Board intends to implement use of the UBE for use in the Montana Bar Examination in February 2012 or, at the latest, July 2012.[1]

[1] The Board acknowledges assistance with this petition from Greg Murphy of the Billings firm of Moulton Bellingham. Greg Murphy is a nationally-recognized expert regarding bar examining, and former chair of the National Conference of Bar Examiners (NCBE), chair of the Multistate Bar Examination Committee, and of the ABA Law School Accreditation Committee. Greg served as co-chair of the NCBE committee that studied, developed and proposed the UBE. Greg was a member and chair of the Montana Board of Bar Examiners for many years.

The Board also seeks to raise the passing score from 130, one of the lower passing scores in the country, to 135 (or its 400-point scale equivalent of 270). The passing score issue is addressed in further detail below.

Finally, the Board proposes to eliminate the Montana Essay Examination (MTEE) component of the Montana Bar Examination and replace it with more detailed on-line course materials and a requirement that applicants take and certify passage of an on-line, open-book test specific to Montana law. This final proposal is modeled on rules and procedures in place in Missouri following that state's adoption of the UBE.

Set out below is the Board's explanation of the UBE, the rationale for its proposal to adopt the UBE, to raise the passing score and to improve the process with respect to assuring applicant knowledge of specifics of Montana law. We also address the changes necessary in connection with adoption of the UBE.

What Is The Uniform Bar Examination?

Montana administers the basic form of the Uniform Bar Examination. The Montana Bar Examination as presently administered is comprised of the following components: (1) The Multistate Bar Examination ("MBE") (200 questions); (2) the Multistate Essay Examination ("MEE") (six questions); (3) the Multistate Performance Test ("MPT"); and (4) four Montana-created, hour-long, essay questions ("MTEE"). The scores on these four test components are scaled to the

MBE, and a final composite score for the examination is obtained. The minimum passing score in Montana is 130, although the Board, as explained below, recommends the passing score be increased to 135 to be more in line with the majority of jurisdictions and of our neighboring states.[2] In addition, applicants must take and achieve a minimum passing score (80 points) on the Multistate Professional Responsibility Examination ("MPRE"), administered separately from the four components described above.

The UBE will consist of the MBE, six one-half hour MEE questions, and two 90-minute MPT questions – the same exam as presently given less the four locally-prepared MTEE questions. Thus, applicants will not find themselves facing a different preparation regimen for the UBE than at present. Transition to the MBE should be seamless and is not expected to involve higher costs to the applicants. The reasons for the Board's recommendation, and what the Board proposes to replace the MTEE, is discussed further below in the section titled "The Montana Component."

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[2] Montana's minimum passing score is currently one of the lowest in the country and is significantly lower than neighboring states such as Colorado, Nevada, Alaska and Idaho. We propose raising the minimum passing score to a level in the mainstream with other states. The Board sees no reason for or advantage to Montana having one of the lowest passing scores in the nation. The chart showing passing scores in all jurisdictions is attached as Exhibit A. As can be seen, the passing scores of most neighboring jurisdictions are well in excess of 130. For example, the passing score for Utah is 135, Colorado 138, Alaska 140 and Idaho 140, although both North and South Dakota still use the same low passing score as Montana – 130.

The UBE has been under consideration for some time. A short UBE description titled "Understanding the Uniform Bar Examination" and more detailed articles regarding the UBE are attached to this petition as Exhibit B. Also attached, as Exhibit C, is a paper with "Frequently Asked Questions" (FAQs) and answers, addressing common questions regarding the UBE. Exhibits B and C were prepared by the National Conference of Bar Examiners (NCBE), the professional organization that prepares the MBE, the MEE and the MPT.

North Dakota, Washington, Idaho, Missouri and Alabama have adopted the UBE. In addition, the Conference of Chief Justices and the ABA Council of the Section of Legal Education and Admissions to the Bar have adopted resolutions endorsing consideration of the UBE. The two resolutions are attached as Exhibit D.

At the invitation of the NCBE, Justice Rice attended a conference in June 2009 in Madison, Wisconsin, devoted to consideration of the UBE. Likewise, Justice Leaphart attended a conference in April 2010 in Austin, Texas, that addressed, though in less detail, adoption of the UBE. Finally, Justice Cotter attended a conference in Salt Lake City in late 2010 that addressed, among other topics, the UBE and how various states were handling consideration and implementation of the UBE. Thus, some members of the Court have been exposed to information regarding the UBE and have suggested topics the Board should

address in its consideration of the UBE. The Board has done so and concluded that the UBE is a step forward in bar examining and should be used in Montana.

In considering adoption of the UBE as a component of the bar examination and admissions process, two key areas should be addressed: (1) demonstrating the superiority of the UBE, the advantages, if any, for Montana by participating, how the portable UBE score will work, and the degree of local control which will be retained (admissions, grading, scoring, and assurances regarding knowledge of local law); and (2) demonstrating that the stakeholders (the Board, the greater Bar, the Law School) are aware of and support the move to the UBE. We begin by addressing the uniform examination.

The Superiority and Advantages of a Uniform Examination

The Montana Bar Examination has come a long way since the early 1980s when Montana abolished the diploma privilege and larger numbers of applicants began sitting for the examination. Since that time, Montana has, through the efforts of various Board chairs and members as well as through its administrators, been involved on the cutting edge of the science of bar examinations and has been directly involved with the National Conference of Bar Examiners (NCBE). Due in part to this deliberate and detailed involvement with the NCBE and bar examiners around the country, the Montana Bar Examination has improved dramatically and

is now more psychometrically sound and reliable than in the years first following abolition of the diploma privilege.

Much improvement in the bar exam is attributable to use of testing products produced through the efforts of the NCBE. The initial NCBE product used in the Montana examination was the Multistate Bar Examination (MBE), now approved for use in every state in the United States, except Louisiana, and used in several U.S. territories including the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, and the Northern Marianas. In addition, the NCBE developed – and Montana has adopted – new and well-recognized tests such as the Multistate Essay Examination (MEE) and the Multistate Performance Test (MPT). The economies of scale achievable through the NCBE permit devotion of substantial resources to high quality examinations, resulting in testing products and testing expertise that cannot be developed when each jurisdiction acts alone, producing individual questions for use on each jurisdiction's exams. (Sample NCBE testing products are included in the appendix to this petition, as Exhibit E.)

Each of the NCBE examinations (MBE, MEE and MPT) is drafted by teams of content experts, including law professors, judges, and practicing lawyers. As an example, the MPT questions are drafted by a seven-member drafting committee. The questions are drafted according to published test specifications and each test item goes through multiple reviews. Not only does the committee review and

revise the questions multiple times, the questions are also independently and critically reviewed by outside content experts. The items are pre-tested to identify potential problems which might arise in the administration of the examination so that corrections can be made before the item is administered. After the examination is conducted, the NCBE conducts a grading and scoring workshop, aimed at assisting graders to score the exam answers consistently and uniformly.

This test development process is comprehensive – and expensive – and produces testing items of the highest quality. Because the Board believes that applicants to the bar, the bench, the bar, and the public of Montana expect and are entitled to the highest quality bar examination possible, the Board has consistently studied and recommended adoption of new NCBE products. The Board has great confidence in the MBE, MEE and MPT, and regards those products as superior to questions written locally by Board members or outside drafters. Adoption of the UBE – and continuing use of these key NCBE testing components – is strongly endorsed by the Board.

Advantages and Local Control

By agreeing to adopt the UBE, Montana will provide an important advantage to persons taking the examination. One of the requirements for adopting the UBE is agreement that UBE scores from other jurisdictions are transferable,

though for limited periods of time. Thus, for example, a University of Montana graduate taking the Montana bar examination will be able to transfer his or her score to any other state using the UBE. MBE scores now are transferable, and there is no reason that a properly scaled and equated UBE score should not be transferable as well.

It is important to note that the UBE and transferability of scores does not mean reciprocity of admissions among jurisdictions, nor will it serve to allow large out-of-state firms or national plaintiff groups to gain a foothold for their firms here. Because UBE scores may be transferred only from other UBE jurisdictions and only for a short period of time, the utility of the UBE as a means to gain admission by out-of-state lawyers is drastically limited. Further, as a matter of law, and of policy, Montana will and should continue to control who it admits to its bar. Among the elements that will remain in the control of the Board and Court are:

- Montana will retain control over who may sit for the test and who will be admitted.
- The Montana Board will continue to grade MEE and MPT questions through its own efforts and limited use of Montana lawyer graders.
- Montana will determine its own passing standards and, in particular, its minimum passing score, though that score should be in line with passing scores of neighboring states. While UBE scores are transferable, within certain time limitations, transfer of a passing score in one jurisdiction does not necessarily mean that the score constitutes a passing score in another. The transferred score must meet the passing standard of the jurisdiction to which it is transferred.

- Montana will continue to make its own character and fitness evaluations and decisions.

- Montana will continue to make its own decisions relating to testing accommodations for the disabled.

- Montana will continue to decide the minimum educational requirements for admission to the bar. At present, Montana requires that all applicants have obtained a Juris Doctor, or equivalent degree, from a law school approved by the American Bar Association.

- Montana will retain the 3-year limit on transferability of MBE scores and will apply that same 3-year limit to transfer of the entire UBE score. That means an established lawyer who has practiced longer than three years but who has a UBE score will not be able to transfer that UBE score to Montana in order to gain admission. At the end of three years, the UBE score may no longer be transferred, thus removing the possibility that UBE score portability will be regarded as indirect reciprocity.

- Montana may continue to set its own pro hac vice rules.

- The Board will continue to establish and propose for adoption its own rules for admission. Those rules will, of necessity, be modified if the Court allows adoption of the UBE and its adoption of the minimum passing score of 135, along with implementation of the Montana educational component discussed below.

Given that the bar exam as presently constituted is made up of the three UBE components plus four one-hour Montana essay questions, changing to use of the UBE is really no change at all other than agreeing to adopt the concept of score portability – i.e., the ability to transfer, within a limited period of time, a UBE score obtained in one UBE jurisdiction to another UBE jurisdiction.[3] The only

[3] Thus, a Montana examinee would be able to transfer their UBE score to North Dakota, Idaho, Missouri, Alabama or Washington as of the time of filing this petition. It is safe to predict that

change of significance to address is the substitution of the Montana on-line content test for the four one-hour MTEE questions presently administered. That issue is addressed below, under the heading "Montana Component."

Raising the Passing Score

As to the minimum passing score, the Board recommends adoption of a scaled score of 270 on a scale of 400 on the UBE. (Note that, on a 200-point scale, the equivalent score is 135.) As noted above, the present passing score in Montana is 130, a standard that exists principally as historical artifact. When Montana adopted the MBE in the early 1980s, the minimum passing score was set at 135, but the Board had discretion to move the pass line up or down dependent upon circumstances following each examination. Over time, the score migrated to 130, without sound bases to justify the change, and was ultimately codified by rule at 130. The 130 passing score, however, is among the very lowest minimum passing scores in the United States. There appears to be no sound reason why Montana should continue with a low minimum passing score, and the Board recommends adoption of 135, a score in line with those of neighboring states such as Utah (135), Colorado (138), Alaska (140) and Idaho (140).

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other states, and particularly other western states, will adopt the UBE as well. Likewise, a score obtained in a UBE jurisdiction will, for a limited period of time, be transferable to Montana.

It should also be noted that the pass rate in Montana is one of the highest in the country, generally in the middle to high 80%s and even low 90%s. This high pass rate exists because Montana has a comparatively low passing score. The Board is aware, anecdotally, of applicants unsuccessful in other states searching for a low-score, high pass-rate state in which to take the exam and become licensed. The Board does not wish for Montana to maintain that reputation.[4]

Having discussed the Board's reasons for recommending adoption of the UBE and its recommendation for a minimum passing score of 135 (270 on the new scale), we turn now to the issue of whether the Montana Bar Examination should retain as a testing component questions devoted to Montana-specific topics, i.e, whether Montana should retain the Montana Essay Examination (MTEE).

The "Montana Component"

When the Court approved giving the MEE (Multistate Essay Examination) in Montana as part of the Montana Bar Examination, it ordered that a half day of examination be separately devoted to testing on Montana law, referred to as the

[4] Another important reason to increase Montana's passing score to at least a mainstream level is to avoid the possibility that an individual who has taken the UBE in another jurisdiction and failed would transfer the UBE score into Montana and pass because Montana would accept the score and measure it against its own passing score. Thus, for example, a person could score a 133 on the UBE in Idaho and fail (Idaho's passing score is 140). That examinee could transfer the 133 to Montana and it is a passing score. That possibility is not foreclosed, of course, but a ten-point gap between Montana's passing score and Idaho's passing score is simply too large and creates too great of an opportunity for examinees attempting to "shop" a UBE score. Indeed, that problem is exacerbated as more states adopt the UBE because Montana is among the eight jurisdictions with the lowest passing scores – Alabama (128), Minnesota, Missouri, New Mexico, North and South Dakota and Wisconsin, at 130.

"Montana component," and known, in the Board's vernacular, as the MTEE (Montana Essay Examination.) The rationale for this rule is undoubtedly the proposition that one who is licensed to practice in Montana should be familiar with Montana law. Thus, the Board separately develops and administers four one-hour essay questions that may be drawn from any of the 15 topics listed in Rule 102C of the Montana Board of Bar Examiners Rules. Those questions are generally drafted by members of the Board or outside content experts.

Mindful of its obligation to evaluate its testing methods from time to time, the Board has considered how the Montana component of the bar examination is developed and administered. Because the fundamental purpose of the bar examination is to help assure minimum competency to practice law in Montana, the Board respectfully submits that the Montana component (the MTEE) should be replaced by a more effective vehicle for achieving the desired end.

After the elements of honesty and integrity, it may be said that knowledge of generally accepted principles of law and the ability to employ the legal method of reasoning to come to appropriate conclusions from given facts is the next essential element of demonstrated minimum competency to practice law. The UBE will appropriately test if an individual applicant has that fundamental knowledge and ability and the Board is confident that no better test exists to accurately assess minimum competence.

Thus, the question remains whether the MTEE is required to determine minimum competence to practice law in Montana. As it presently exists, the Board drafts and grades four essay questions administered as part of the bar exam. Those four questions, by deliberate choice, are not focused on unusual or arcane rules of law because the Board firmly believes that memorization of quirks or arcania of Montana law is not essential to minimum competence and is unfair to applicants in this high stakes examination. Specific local knowledge may or may not be necessary at some point in practice, but that is a different question. The Board believes an applicant who has appropriately demonstrated minimum competence on an examination devoted to determining minimum competence is fully capable of learning and applying the various quirks of the law in Montana. Stated differently, is the MTEE necessary to examine knowledge and skills adequately addressed and tested by the UBE or is there a more efficient and effective method of assuring a degree of familiarity with special areas of Montana law?

Different states have taken differing approaches. For example, North Dakota has simply adopted the UBE with no allowance for any sort of state-specific component. Arizona, which has not yet adopted the UBE but seems poised to do so, will likely apply a seminar-based approach to conveying specifics of Arizona law to its applicants. Missouri takes a third path. Missouri has made Missouri-specific materials available on-line and requires applicants to the bar to

take and pass an on-line "open-book" examination. The Board recommends the Missouri approach.

With respect to the Montana component, it is important to acknowledge that Montana law differs from that of other jurisdictions in some limited respects. But if one examines fundamental concepts of Montana law one discovers that it is not, in the main, at odds with that of most other jurisdictions or generally accepted principles of law. For example, Montana has adopted forms of a number of uniform or model laws, including the Uniform Commercial Code, the Uniform Probate Code, the Uniform Enforcement of Judgments Act, the Uniform Partnership Act, and the Model Business Corporations Act. This list is merely illustrative. The point is that, as a general proposition, Montana law is consistent with general principles widely recognized.

Nevertheless, it may be reasonably maintained that minimally competent lawyers in Montana should have familiarity with some of the special features of Montana law. For example, it may be that Montana lawyers should be aware of Montana's Unfair Trade Practices Law, § 33-18-101, MCA, *et seq.*, and in particular the provisions of § 33-18-242, MCA. The same might be said about Montana's comparative negligence law at § 27-1-702 through § 27-1-706, MCA, or the statutory provisions relating to product liability set forth in § 27-1-719. Minimally competent Montana lawyers should be aware of the statutes of

limitations for various causes of action. §§ 27-2-201, *et seq.*, MCA. Suffice it to say that the set of special or specific Montana laws, the awareness of which might be judged to be necessary to minimum competency, is limited and can, with directed effort, be compiled and conveyed to applicants in a coherent and focused manner. The Board believes that conveying such information to applicants as proposed in this petition is more valuable than testing by way of four general essay questions chosen from the 15 topics listed in Rule 102C.

The Board submits that rather than asking applicants to respond to four essay questions on limited areas of Montana law as a way of assuring familiarity with, perhaps, only four aspects of Montana law, applicants should instead be required, as a condition of license, to take and sign a Certificate of Completion of a mandatory open book test referred to as the "Montana Educational Component Test," or "MECT." Given the limits of the four-question format, retaining the MTEE cannot be said to guarantee that even well-known uniquely Montana-law topics will be the subject of examination. Addressing those topics in the on-line materials and requiring successful completion of an on-line multi-question test at least calls a greater number of specifics of Montana law to the attention of applicants and also provides a resource to those applicants once they have passed the examination and are beginning to practice law. Of course, those same materials will be available to all Montana lawyers as well as the public in general.

The Board proposes that Montana follow the Missouri model and its development and use of the "Missouri Educational Component Test." Attached to this Petition as Exhibit F is an example of the subject outlines that are on-line and available for review by applicants -- and the public – through the Missouri Court website. Also attached as Exhibit G is the print-out of this year's on-line open book test each applicant is required to take and pass prior to certifying compliance with the MECT requirement. Finally, Exhibit H is the web page describing the Missouri Educational Component Test. The full set of materials and the MECT itself can be found at http://www.courts.gov/page.jsp?id=325.

The Board proposes that former Board Chair, Greg Murphy, and current Board Chair, Randy Cox, be charged by the Court with surveying the bench, leading members of the bar, and the faculty of the University of Montana Law School with the goal of developing a list of important features of Montana laws and then constructing the list of materials and topics to be prepared and made available on-line. Development of the on-line materials and the MECT itself will be the direct responsibility of the Board of Bar Examiners.

The Board of Bar Examiners believes that the UBE appropriately tests for the standard of minimum competence. The Board further believes that if a state-law component remains a requirement that the requirement is well satisfied by use of the Missouri model and the Board's development of the MECT. Review

of on-line materials and the requirement of an open book test will satisfy the requirement of exposure to and knowledge of both well-known and more obscure aspects of Montana law. It is also worth noting that the placement of Montana law outlines on-line will serve as a resource not only to bar applicants but also to practicing lawyers and the public.

Other Interested Constituencies

The University of Montana Law School and the State Bar have been alerted to this proposed change in the bar examination, and were provided advance copies of various drafts of this petition. The faculty of the University of Montana Law School invited Board Chair, Randy Cox, and former Board Chair, Greg Murphy, to attend a faculty meeting, and that meeting was held with extensive discussion and interchange of ideas. Greg Murphy was invited to attend, speak and answer questions at a board meeting of the Montana Trial Lawyers Association. Randy Cox has met with the Past Presidents Committee of the State Bar and with the President of the Student Bar Association of the UM Law School. Comments were solicited, and received, from the State Bar and the law school faculty. While the Board does not presume to speak for either the State Bar or the UM law school, the Board has been in close and regular contact, and we are optimistic that they will support the recommendations made in this petition.

The State Bar of Montana has reasonable concerns regarding the financial impact of adopting the UBE. It should be noted that, at this point, the Board does not anticipate lowering fees for bar examinees and applicants to the Bar notwithstanding some cost savings by discontinuing use of the MTEE, although that may occur in the future once the on-line MECT has been developed and is up and running. There have been discussions between Chris Manos of the State Bar and Board Chair, Randy Cox, regarding anticipated costs of the on-line course and test. Missouri was able to develop on-line content with little cost and to put the materials on the Court's website without use of outside consultants and with reliance upon in-house IT staff. Thus, the present fee structure should remain until we determine if there will be a need to use those exam fees to develop the MECT.

CONCLUSION

For the reasons stated above, the Board respectfully requests that the Court allow adoption of the UBE in Montana, consider whether a state-specific component is required and, if so, direct the adoption and use of the Missouri-modeled "Montana Educational Component Test," or MECT. Further, the Board respectfully requests that the Court increase the passing score required on the Montana Bar Examination to 135 (or its newer-scaled equivalent of 270).

The Board stands ready to respond to the Court's questions or inquiries at any time. The Board has studied this particular issue for well over two years and

firmly and unanimously believes that this Petition should be granted and the changes recommended be implemented.

DATED this 28th day of April, 2011.

MONTANA BOARD OF BAR EXAMINERS

By _____

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CERTIFICATE OF SERVICE

This is to certify that the foregoing *Petition for Adoption of Uniform Bar Examination* was served by U.S. Mail upon the following this 28th day of April, 2011:

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MONTANA BOARD OF BAR EXAMINERS

By _____
Randy L. Cox, Chair

EXHIBIT A

Idaho's "% MEE and/or local essay" portion of the written subcomponent combined score weight was corrected from 50 to 33.3 in this online version of Chart VII. 2/18/2010

CHART VII: GRADING AND SCORING

JURISDICTION	WHAT IS YOUR AVERAGE GRADING/ REPORTING PERIOD? (FEBRUARY/JULY)	DO YOU USE BOTH THE MBE AND WRITTEN COMPONENTS?		DO YOU SCALE THE WRITTEN COMPONENT TO THE MBE?		ARE YOUR SCORES COMBINED?		COMBINED SCORE WEIGHTS				MINIMUM PASSING STANDARDS		
								OVERALL COMPONENT		WRITTEN SUBCOMPONENT		TOTAL BAR EXAM SCORE		
		YES	NO	YES	NO	YES	NO	% MBE	% WRITTEN	% MEE AND/OR LOCAL ESSAY	% MPT AND/OR LOCAL PT	REPORTED SCORE SCALE	200-POINT SCALE*	MPRE
Alabama	both 9 weeks	X		X		X		50	50	40	10	128	128	75
Alaska	both 10–12 weeks	X		X		X		50	50	37.5	12.5	140	140	80
Arizona	both 9 weeks	X		X		X		33	67	67		410	136.7	85
Arkansas	both 4 weeks	X		X		X		33	67	48.5	18.1	405	135	85
California	13 wks./17 wks.	X		X		X		35	65	39	26	1,440	144	86
Colorado	both approx. 9 wks.	X		X		X		50	50	30	20	276	138	85
Connecticut	6 wks./8 wks.	X		X		X		50	50	50		264	132	80
Delaware	11 weeks	X		X		X		40	60	40	20	145	145	85
Dist. of Columbia	both 9–10 weeks	X		X		X		50	50	25	25	266	133	75
Florida	both 6–8 weeks	X		X		X		50	50†	50		136	136	80
Georgia	both 13 weeks	X		X		X		50	50	28.6	21.4	270	135	75
Hawaii	both 10–12 weeks	X		X		X		50	50†	35	10	134	134	85
Idaho	both 6 weeks	X		X		X		50	50	33.3	16.7	1,680	140	85
Illinois	both 7 weeks	X		X		X		50	50	43	7	264	132	80
Indiana	both 8–9 weeks	X		X		X		50	50	30	20	264	132	80
Iowa	both 6 weeks	X		X		X		50	50	30	20	266	133	80
Kansas	both 6 weeks	X		X		X		50	50	50		133	133	80
Kentucky	both 9 weeks	X			X‡		X	—	—	—	—	—	—	75
Louisiana	5–6 wks./8–9 wks.		X		‡			—	—	—	—	—	—	80
Maine	both 8–10 weeks	X		X		X		36	64	54.5	9	138	138	80
Maryland	8–9 wks./13–14 wks.	X		X		X		33	67	55.5	11.1	406	135.3	
Massachusetts	both 14 weeks	X		X		X		50	50	50		270	—	85
Michigan	May 15/Nov. 15	X		X		X		50	50	50		135	135	85
Minnesota	both 12 weeks	X		X		X		50	50	37.5	12.5	260	130	85
Mississippi	Apr. 25/Sept. 25	X		X		X		40	60	45	15	132	132	75
Missouri	both 7 weeks	X		X		X		40	60	50	10	1,300	130	80
Montana	both 7–8 weeks	X		X		X		35	65	50	15	130	130	80
Nebraska	both 5–6 weeks	X		X		X		50	50	50		135	135	85
Nevada	both 8 weeks	X		X		X		33	67	56.1	10.5	75	140	85
New Hampshire	both 10 weeks	X		X		X		50	50	30	20	270	135	79
New Jersey	in May/in Nov.	X		X		X		50	50	50		133	133	75
New Mexico	both 6–8 weeks	X		X		X		50	50	33.3	16.7	130	130	75
New York	in May/in Nov.	X		X		X		40	60†	40	10	665	133	85
North Carolina	both 4 weeks	X		X		X		40	60	60		346	138.4	80

CHART VII: GRADING AND SCORING (*CONTINUED*)

JURISDICTION	WHAT IS YOUR AVERAGE GRADING/ REPORTING PERIOD? (FEBRUARY/JULY)	DO YOU USE BOTH THE MBE AND WRITTEN COMPONENTS?		DO YOU SCALE THE WRITTEN COMPONENT TO THE MBE?		ARE YOUR SCORES COMBINED?		COMBINED SCORE WEIGHTS				MINIMUM PASSING STANDARDS		
								OVERALL COMPONENT		WRITTEN SUBCOMPONENT		TOTAL BAR EXAM SCORE		
		YES	NO	YES	NO	YES	NO	% MBE	% WRITTEN	% MEE AND/OR LOCAL ESSAY	% MPT AND/OR LOCAL PT	REPORTED SCORE SCALE	200-POINT SCALE*	MPRE
North Dakota	both 7 weeks	X		X		X		50	50	30	20	260	—	80/85
Ohio	both 12 weeks	X		X		X		33	67	53.3	13.3	405	135	85
Oklahoma	both 7 weeks	X			X	X		50	50	50		2,400	135	75
Oregon	both 6 weeks	X		X		X		50	50	37.5	12.5	65	—	85
Pennsylvania	5 wks./9 wks.	X		X		X		45	55	—	—	272	—	75
Rhode Island	both 10 weeks	X		X		X		50	50	41	9	276	138	80
South Carolina	8 wks./12 wks.	X			X‡		X	—	—	—	—	—	—	77
South Dakota	both 12 weeks	X		X		X		50	50	30	20	130	130	75
Tennessee	6 wks./9 wks.	X			X‡		X	—	—	—	—	—	—	75
Texas	10 wks./14 wks.	X		X		X		40	60†	40	10	675	135	85
Utah	both 8 weeks	X		X		X		50	50	33.3	16.7	270	135	86
Vermont	both 6–8 wks.	X		X		X‡		—	—	—	—	—	—	80
Virginia	both 9 weeks	X		X		X		40	60	60		140	140	85
Washington	both 10 weeks		X		‡			—	—	—	—	—	—	
West Virginia	both 7 weeks	X		X		X		50	50	30	20	270	135	75
Wisconsin	both 6 weeks	X		X		X		50	50‡	37.5	12.5	258	129	
Wyoming	both 8–10 wks.	X			X‡		X	—	—	—	—	—	—	75
Guam	both 6–8 wks.	X		X		X		50	50	38.9	11.1	132.5	132.5	80
Northern Mariana Islands	both 8–9 wks.	X			X‡		X	—	—	—	—	—	—	75
Palau	5 weeks	X			X‡		X	—	—	—	—	—	—	75
Puerto Rico	both 8–9 wks.		X		‡			—	—	—	—	—	—	
Virgin Islands	both 8 weeks	X			X	X		50	50	50		70	—	75

See supplemental remarks.

*Each value is a rough approximation of the score on a 200-point scale that would be required to meet the jurisdiction's minimum passing standard. Please note that this value is not applicable to individual bar examination components nor is it used to determine actual pass/fail outcome. In addition, local grading policies, bar exam characteristics, and other statistical factors may lead to fluctuations in these values and may affect the comparability of these scores across jurisdictions.

†Includes a local multiple-choice or short-answer component.

‡ See supplemental remarks for scoring details.

Florida The total score includes performance on a locally developed multiple-choice component.

Hawaii The written score includes performance on a locally developed multiple-choice component that is weighted 5% and assesses Hawaii rules of professional responsibility.

Idaho Overall component combined score weights are effective with the July 2010 examination.

Kentucky The examination includes both the MBE and a written component that consists of equally weighted performance on the MEE and locally developed essay questions. There is a separate minimum passing standard on each component. To pass the examination, an applicant must achieve a score of 132 or greater on the MBE and an average score of 75 or greater on the written component.

Louisiana The examination is composed of a written component that consists of performance on 9 locally developed sections. The minimum passing standard on each section is a score of 70. To pass the examination, an applicant must achieve the minimum passing standard on 7 sections including the 4 that cover Louisiana Code topics.

New York The total score includes performance on a locally developed multiple-choice component that is weighted 10%.

South Carolina The examination includes both the MBE and a written component that consists of performance on 6 locally developed essay sections. There are separate minimum passing standards for the MBE and essay sections—a score of 125 or greater on the MBE and a score of 70 or greater on each essay section. To pass the examination, an applicant must meet the minimum passing standards on 6 of 7 sections (the MBE is considered a section). A score of 110 or less on the MBE results in automatic failure.

Tennessee The examination includes both the MBE and a written component that consists of performance on 12 locally developed essay questions. There is a separate minimum passing standard for each essay. To pass the examination, an applicant must achieve 1) a score of 125–129 on the MBE and meet the minimum passing standards on 9 essays, or 2) a score of 130–134 on the MBE and meet the minimum passing standards on 8 essays, or 3) a score of 135 or greater on the MBE and meet the minimum passing standards on 7 essays.

Texas The total score includes performance on a locally developed short-answer component that is weighted 10% and assesses Texas and/or federal rules related to Procedure and Evidence.

Vermont The examination includes both the MBE and a written component that consists of performance on the MPT and locally developed essay questions. There is a separate minimum passing standard for each component. To pass the examination, an applicant must achieve a score of 135 or greater on the MBE and a score of 135 or greater on the written component. An applicant who achieves a score of 130–134 on either component can still pass if the other component score exceeds 135 by 2 points for each point by which the lower score was below 135.

Washington The examination is composed of a written component that consists of performance on locally developed essay questions. To pass the examination, an applicant must achieve an average score of 70% or higher.

Wisconsin The written component of the examination consists of performance on the MPT, the MEE, and locally developed essay questions. The composition and weighting of these written subcomponents is determined individually for each administration.

Wyoming The examination includes both the MBE and a written component consisting of performance on 10 locally developed essay questions. There is a separate minimum passing standard for each component. To pass the examination, an applicant must achieve a score of 130 or greater on the MBE and an average score of 70 or higher on the written component (and achieve 70 or greater on at least 6 out of 10 essays).

Northern Mariana Islands The examination includes both the MBE and a written component that consists of performance on the MPT, locally developed essay questions, and the MEE. There is a separate minimum passing standard for each component. To pass the examination an applicant must achieve a score of 120 or greater on the MBE and an average score of 65% or greater on the written component.

Palau The examination includes both the MBE and a written component that consists of performance on locally developed essay questions. There is a separate minimum passing standard for each component. To pass the examination an applicant must achieve a score of 120 or greater on the MBE and an average score of 65% or greater on the written component.

Puerto Rico The combined passing score is 596 points out of 1,000. Exam dates are in March and September.

EXHIBIT B

Understanding the UNIFORM BAR EXAMINATION

What Is the UBE?

The Uniform Bar Examination (UBE) is prepared by the National Conference of Bar Examiners to test knowledge and skills that every lawyer should be able to demonstrate prior to becoming licensed to practice law. It is comprised of the Multistate Essay Examination (MEE), two Multistate Performance Test (MPT) tasks, and the Multistate Bar Examination (MBE). It is uniformly administered, graded, and scored by user jurisdictions and results in a portable score that can be used to seek admission in jurisdictions that accept UBE scores.

The UBE is administered over two days, with the MBE given on the last Wednesday of February and July and the MEE and MPT given on the Tuesday prior to that. The MEE and MPT scores are scaled to the MBE, with the MBE weighted 50%, the MEE 30%, and the MPT 20%.

Jurisdictions that use the UBE continue to

- decide who may sit for the bar exam and who will be admitted to practice.
- determine underlying educational requirements.
- make all character and fitness decisions.
- set their own policies regarding the number of times candidates may retake the bar examination.
- make ADA decisions.
- grade the MEE and MPT.
- set their own pre-release regrading policies.
- assess candidate knowledge of jurisdiction-specific content through a separate test, course, or some combination of the two if the jurisdiction chooses.
- accept MBE scores earned in a previous examination for purposes of making local admission decisions if they wish. Note, however, that candidates must sit for the entire UBE in a single administration to earn a portable UBE score.
- set their own passing scores.
- determine how long incoming UBE scores will be accepted.
- maintain the security of test content and provide appropriate testing conditions by administering the UBE at specified times and in accordance with the rules laid out in the Supervisor's Manual, including the guidelines for room setup, book distribution, seating charts, and proctor selection and training.

To consistently assess candidates across jurisdictions, UBE jurisdictions will

- administer a common set of MEE questions.
- administer the entire examination to each UBE candidate. Banked or transferred scores may not be used in calculating UBE total scores.
- ensure that their graders are trained and calibrated.
- grade the MEE and MPT based on uniform criteria, using generally applicable rules of law rather than jurisdiction-specific law.

- have NCBE perform the scaling of the MEE and MPT scores to the MBE to ensure that score calculations are performed consistently across jurisdictions.
- make admission decisions based on NCBE's scaled score calculations; that is, they will not conduct regrading after examination results have been announced.
- report on their test administrations and permit occasional audit by NCBE to verify that best practices are being followed.

To facilitate score portability and transfers, UBE jurisdictions will

- generate a UBE total score expressed on a 400-point scale.
- require candidates to provide sufficient demographic information on the MBE answer sheets to identify their scores for transfer by NCBE, including the candidate's name, date of birth, and Social Security Number or NCBE number.
- submit all UBE scores to a central registry maintained by NCBE to ensure that a full score history is reported by NCBE to receiving jurisdictions when candidates request UBE score transfers.
- provide, or have NCBE provide, candidates with their written scaled scores, MBE scaled scores, and UBE total scores so that candidates can determine if their scores are high enough to transfer to other jurisdictions.

Role of the Jurisdictions

Representatives of numerous jurisdictions have been actively involved in shaping the UBE. UBE jurisdictions continue to participate in the discussion of issues of mutual interest and the implementation of best practices.

NCBE is prepared to assist jurisdictions that are interested in developing courses or tests on unique aspects of jurisdiction-specific law.

National Conference of Bar Examiners
302 South Bedford Street, Madison, WI 53703-3622
Phone: 608-280-8550 | Fax: 608-280-8552 | TDD: 608-661-1275 | **www.ncbex.org**

Inquiries regarding the UBE may be directed to Laurie Elwell, NCBE Special Projects Coordinator, at lelwell@ncbex.org or 608-316-3084.

THE TESTING COLUMN

COMING TOGETHER: THE UBE

by Susan M. Case, Ph.D.

The Uniform Bar Exam (UBE) may be summarized in a simple albeit somewhat adulterated haiku:

The UBE is
the MBE, six MEEs,
and two MPTs.

Of course, the UBE is a little more complicated than that. This column will flesh out some of the details that both enrich the concept of the UBE and make its implementation challenging.

Jurisdictions will decide when (or if) they want to be part of the UBE. Of course, once part of the UBE, they may opt out at any time.

First of all, let me describe the three tests that make up the UBE. Most of you have a basic idea about their formats, but you may not have actually seen an example for some time. Each of the tests has a different purpose, and together they are designed to assess the extent to which examinees have the requisite knowledge and skills to be licensed to practice law.

THE MBE

The purpose of the MBE is to assess the extent to which an examinee can apply fundamental legal principles and legal reasoning to analyze a given fact pattern. The questions focus on the understanding of legal principles rather than memorization of local case or statutory law. This is not the multiple-choice test that you might remember from school or that is parodied in the popular press. This is a professionally developed examination of the highest quality. Questions are not tricky, nor do they test knowledge of trivial or esoteric facts. Instead they provide 200 sample cases that require examinees to apply their legal knowledge to situations that a newly licensed lawyer would be expected to handle.

All MBE questions are developed and reviewed multiple times by a committee of content experts and a series of outside reviewers. Both practitioners and law professors participate in the review process. Many MBE questions are also pretested during actual MBE administrations to ensure that they are appropriate in terms of difficulty and the extent to which they separate highly knowledgeable examinees from less knowledgeable examinees. These development steps are essential in order to produce multiple-choice questions for high-stakes examinations. Content experts are reconvened following each MBE administration to review the performance of questions and to ensure that the questions are scored fairly in accordance with generally accepted legal principles at the time of administration.

Sample MBE-Style Question and Answer

Sample MBE-Style Question

A man borrowed money from a bank and executed a promissory note for the amount secured by a mortgage on his residence. Several years later, the man sold his residence. As provided by the contract of sale, the deed to the buyer provided that the buyer agreed "to assume the existing mortgage debt" on the residence.

Subsequently, the buyer defaulted on the mortgage loan to the bank, and appropriate foreclosure proceedings were initiated.

The foreclosure sale resulted in a deficiency.

There is no applicable statute.

Is the buyer liable for the deficiency?

(A) No, because even if the buyer assumed the mortgage, the seller is solely responsible for any deficiency.

(B) No, because the buyer did not sign a promissory note to the bank and therefore has no personal liability.

(C) Yes, because the buyer assumed the mortgage and therefore became personally liable for the mortgage loan and any deficiency.

(D) Yes, because the transfer of the mortgage debt to the buyer resulted in a novation of the original mortgage and loan and rendered the buyer solely responsible for any deficiency.

Answer

The correct answer is C because, with a mortgage assumption, the buyer who assumes the mortgage debt becomes primarily liable. The man, absent a release by the bank, also is liable, although the man is secondarily liable. This situation can be contrasted with one in which the buyer purchased "subject to the mortgage," in which case only the man would be liable for any deficiency.

The MEE

The purpose of the MEE is to assess examinee ability to (1) identify legal issues raised by a hypothetical factual situation; (2) separate material which is relevant from that which is not; (3) present a reasoned analysis of the issues in a clear, concise, and well-organized composition; and (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation.

The MEE consists of nine 30-minute questions, from which each participating jurisdiction currently selects the questions (usually six or fewer) it will administer. Each question deals with one or more of the following areas:

Business Associations (Agency and Partnership; Corporations and Limited Liability Companies)
Conflict of Laws
Constitutional Law
Contracts
Criminal Law and Procedure
Evidence
Family Law
Federal Civil Procedure
Real Property
Torts
Trusts and Estates (Decedents' Estates; Trusts and Future Interests)
Uniform Commercial Code (Negotiable Instruments (Commercial Paper); Secured Transactions)

The UBE will include a particular preselected six questions in each administration.

The key to the quality of the MEE is found first in the questions. Like the MBE's questions, these are developed and reviewed multiple times by a committee of content experts and a series of outside reviewers. The MEE questions are also pretested under examination conditions by a group of newly licensed lawyers. This pretesting allows the developers to be assured that each question is appropriate in terms of difficulty, that the time constraints are appropriate, and that the grading materials provide a spread of scores. These development steps are essential in order to produce essay questions for high-stakes examinations.

A second important attribute of the MEE is the grading materials that are provided to aid in grading each essay. A summary provides a brief synopsis of the type of response that is required. Also provided is a list of the legal problems in the essay question and an outline of points that the question writers believe should be awarded to the sections of the response. Together these grading materials aid the graders in ensuring that they understand the law associated with the essay question and provide the structure that is necessary to ensure fair and consistent grading.

Finally, a grading workshop is held for both MEE and MPT graders immediately after each bar exam to help them become familiar with the essay questions and the grading materials. While this workshop is offered at one central location now, we are exploring ways of providing it by videoconferencing for those who prefer that method.

Sample MEE Question, Summary, and Grading Excerpt

Sample MEE Question

Cal is the CEO and chairman of the 12-member board of directors of Prime, Inc. (Prime). Three other members of Prime's board of directors (the Board) are also senior officers of Prime. The remaining eight members of the Board are wholly independent directors.

Recently, the Board decided to hire a consulting firm to help Prime market a new product. The Board met to consider whether to hire Wiseman Consulting (Wiseman) or Smart Group (Smart). The Board first heard from a representative of Wiseman. The Wiseman representative described some of the projects Wiseman had completed for other clients and outlined the work it proposed to do for Prime for $500,000. The Board then heard from a representative of Smart, another consulting firm. The Smart representative described a similar work plan and stated that Smart's proposed fee was $650,000. Either of these amounts would be a significant outlay for Prime.

After the Board heard both presentations, Cal disclosed to the Board that he had a 25% partnership interest in Smart. Cal stated that he would not be involved in any work to be performed by Smart for Prime. He knew but did not disclose to the Board that Smart's proposed fee for this consulting assignment was substantially higher than it normally charged for comparable work. The Board did not ask about the basis for Smart's proposed fee.

After receiving all of this information, and no other information, the Board discussed the relative merits of the two proposals for 10 minutes. The Board then voted unanimously (Cal abstaining) to hire Smart, even though hiring Smart would cost Prime approximately 30% more than hiring Wiseman. Cal was present throughout the meet-

ing but did not participate except to the extent indicated above.

1. Did Cal violate his duty of loyalty to Prime? Explain.
2. Assuming Cal breached his duty of loyalty to Prime, does he have any defense to liability? Explain.
3. Did the directors of Prime, other than Cal, violate their duty of care? Explain.

Sample Summary

Cal, the CEO and chairman of the board of Prime, owes a fiduciary duty of loyalty to Prime. Even though Cal did not participate in the Board's discussion of the consulting project, and even though the contract with Smart was approved by a majority of disinterested directors, Cal breached his duty of loyalty by failing to disclose the substantially higher fee charged to Prime by Smart, a partnership in which Cal has a financial interest. Here, a court would be unlikely to find that the contract was objectively fair to Prime, given Smart's substantially higher fee. Therefore, Cal has no defense to his breach of the duty of loyalty.

The Board may have violated its fiduciary duty of care when it approved the contract with Smart after only a 10-minute discussion and without seeking or receiving full information about the fees to be charged.

Sample Excerpt from the Grading Materials: Point Three

Prime's disinterested directors likely breached their duty of care when they approved, with minimal discussion and without full information, a contract in which a director had an interest.

If the directors do not qualify for the protection of the business judgment rule, they likely will be found to have breached their duty of care in approving the contract with Smart. The business judgment rule creates a presumption that "in making a business decision, the directors . . . acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984).

In this case, there is no evidence of bad faith. At least eight directors were entirely disinterested. Nor is there any evidence that the directors did not have an honest belief that they were acting in the best interests of Prime.

However, a court could find that the directors did not act on an informed basis in reviewing the two alternatives. Because the business judgment rule presumes that the Board was adequately informed, a party claiming that the directors breached their duty of care has the burden of showing that the Board did not have sufficient information to justify going with the higher-priced firm. The fact that Smart was going to charge Prime more than its customary rate suggests that the rate was not justified by added value. Arguably, the $150,000 price difference required the Board to at least ask more about Smart's rates. Moreover, if the Board had discussed the contract for more than 10 minutes, it might have realized that it lacked full information.

Therefore, it is likely that a court would find that the Board violated its fiduciary duty of care by approving the contract with Smart.

THE MPT

The purpose of the MPT is to assess fundamental lawyering skills in a realistic situation by asking the candidate to complete a task that a beginning lawyer should be able to accomplish.

The MPT requires applicants to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify

and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints.

Each 90-minute MPT is a self-contained case, including a File, a Library, and a task to be completed.

The development process for the MPT is similar to that of the MEE in that materials are developed and reviewed by a committee, materials are reviewed by external reviewers, and each MPT case is pretested. As noted above, a grading workshop is held for both MEE and MPT graders immediately after each bar exam to help them become familiar with the cases and the grading materials.

The example below illustrates a sample task. Because of the length of the MPT, I will not include the rest of the case materials here, but you may view sample questions, including the instructions, the File, the Library, and a description of the task, as well as the appropriate Point Sheet, on the NCBE website using the following link: http://www.ncbex.org/multistate-tests/mpt/.

Sample MPT Task

Burke & Clements, LLP
Attorneys at Law
4333 Skillman Avenue
Dixon, Franklin 33133

MEMORANDUM February 22, 2005

TO: Applicant
FROM: Thomas Burke
RE: *In re Rose Kingsley*

We represent Rose Kingsley, a local lawyer, in a fee dispute with Karen Greene, another local lawyer. Recently, Kingsley received $1 million as her fee for settling the $3-million Moreno case that Kingsley and Greene worked on. A few days ago, Kingsley received a letter from James Kuntz, an attorney representing Greene, demanding a portion of Kingsley's fee from the Moreno case.

Please draft a memorandum analyzing the following issues:

(1) whether Greene was a partner or an associate of Kingsley for purposes of Rule 200 of the Franklin Rules of Professional Conduct; and

(2) whether the requirements of Rule 200 have been met by the fee-splitting agreement between Kingsley and Greene and the communication with Moreno.

In each part of the memorandum, you should incorporate the relevant facts, analyze the applicable legal authority, and explain how the facts and law affect our client's obligations.

Selection of Essay Questions and Grading Consistency

We expect to establish a working group that will participate in conversations about the development of the UBE. One of the early conversations will focus on the selection of questions for upcoming exams and the development of grading materials that can be used by all participating jurisdictions. Use of the same essay questions and the same grading guidelines enhances the consistency of the exam across jurisdictions and ensures that all candidates are assessed on the same material and that scores reflect the same knowledge and skills.

The MEE and MPT will be scored in essentially the same way as they are scored now. The answers for candidates in each jurisdiction will be scored within that jurisdiction, and MEE and MPT scores will be scaled to the MBE scores within that jurisdiction.

Jurisdictions may continue to use the grading scale they are currently using. Scaling the grades for the written portions of the exam to the MBE will place all the grades on the MBE scale regardless of which grading scale the jurisdiction uses to grade the MEE and MPT.

To maintain scoring consistency and comparability of scores, all UBE jurisdictions will adhere to the following:

- MEE and MPT scores will be combined and scaled to the MBE.
- The MBE scores and the combined MEE/MPT scores will be weighted equally.
- The precise allocation will be MBE at 50%, MEE at 30%, and MPT at 20%.
- MEE essays and MPT cases will be graded based on uniform criteria.
- UBE jurisdictions will use the same MEE essay questions.

Other UBE Conditions

Aside from the decision that all UBE jurisdictions will use the MBE, six MEE essay questions, and two MPT cases, many other decisions will remain under the control of the jurisdictions. Stated most simply:

- Jurisdictions will retain control over who may sit for the tests and who will be admitted.
- Jurisdictions will determine their own passing standards.
- Jurisdictions will continue to make character and fitness decisions.
- Jurisdictions will continue to make ADA decisions.
- Jurisdictions will continue to determine educational requirements.
- Jurisdictions will continue to grade their own essays using their preferred score scales.

We recognize that many issues remain, and we expect the UBE to evolve over the next several years. Over time it will be possible to introduce new procedures that will enhance the scoring process. For example, an optional centralized scoring service could be offered to improve the consistency in scoring the MEE and MPT across jurisdictions. Other potential services would include centralized ADA processing and decisions, exam registration, and test administration. It is also possible that decisions outlined above may be modified somewhat as the time of implementation nears. We anticipate working with jurisdictions that wish to ensure that applicants are familiar with local law, either by developing examinations or by use of other methods.

As always, your comments are welcome.

Coming together is a beginning. Keeping together is progress. Working together is success.

—Henry Ford

Susan M. Case, Ph.D., is the Director of Testing for the National Conference of Bar Examiners.

THE TESTING COLUMN

THE UNIFORM BAR EXAMINATION: WHAT'S IN IT FOR ME?

by Susan M. Case, Ph.D.

By now, many of you are familiar with the basic concept of the Uniform Bar Examination (UBE). The UBE is an examination used across multiple jurisdictions; the score that an examinee receives is transportable to other UBE jurisdictions that are part of the UBE group. The UBE is composed of the Multistate Bar Examination (MBE), six Multistate Essay Examination (MEE) questions, and two Multistate Performance Test (MPT) tasks. Every UBE jurisdiction will use the same essay questions, the same performance tasks, and the same grading guidelines. The MBE will be weighted 50 percent and the written portion (MEE and MPT) will be weighted 50 percent.

As of February 2010, 34 jurisdictions use the MPT and 26 jurisdictions use the MEE. These numbers have increased considerably over the last few years. Given this current uniformity, some people are no doubt wondering why the UBE is being offered, why jurisdictions are interested in administering the UBE, and who will benefit from the new test. This column identifies the primary stakeholders and notes some of the advantages each will see.

It should be noted that NCBE does not anticipate a larger number of examinees as a result of the UBE. Although uniform adoption of the UBE will increase the number of MEE and MPT first-time takers, adoption of the UBE will reduce the number of examinees who are taking these tests for the second or third time as a result of seeking admission in another jurisdiction.

EXAMINEES

Each examinee who takes the UBE will receive a total scaled score. This score may be submitted to other UBE jurisdictions for use in seeking admission; such an examinee will not have to retake the examination. The pass/fail result will not transfer, but the actual score will transfer.

A pass from one jurisdiction does not guarantee a pass from another jurisdiction because jurisdictions have varying passing standards. Other admission requirements may also vary. While the UBE scores will transfer, jurisdictions will still review all applicants with regard to character and fitness and other requirements before admitting them. Some jurisdictions will likely add a test or course related to local content. In these jurisdictions, although examinees will be excused from retaking the MBE, MEE, and MPT, they will need to take the local component.

The equal weighting of the MBE and the written portion is a fair system overall. While research has not shown that any ethnic or racial group performs

better as a group on one format or the other, individuals may perform relatively better on one of the formats (i.e., some individuals perform better on the multiple-choice component whereas others perform better on the written components). Creating a single total scaled score allows examinees who perform better on one component to compensate for weaker performance on another component, and weighting the written and multiple-choice portions equally assures overall fairness.

An examinee who takes the bar exam in a jurisdiction, works exclusively in that jurisdiction, and never moves from that jurisdiction probably will not realize a particular benefit from the UBE. However, the transportability of the UBE score is a significant advantage to an examinee who fails to get the job he or she intends and has to move to another jurisdiction to find work, or one who ends up working for a firm that has clients in multiple jurisdictions.

Law Schools

The benefit to a law school is that all of its students, as well as students from many other schools in other jurisdictions, will be taking exactly the same exam and receiving scores that will have the same meaning across the country. While every jurisdiction with the exception of Washington and Louisiana currently uses the MBE, many jurisdictions use locally crafted essay questions. The UBE will only include essay questions and performance tasks that are developed centrally, researched thoroughly, and subjected to considerable quality control and review. These questions and performance tasks are packaged with grading materials, and graders have access to grading workshops to aid in the consistent grading of the essays and performance tasks.

The MBE and the written portions of the UBE will be weighted equally, ensuring reliable scores that do not give advantage to those who perform better on multiple-choice questions or those who perform better on written exams. Currently, the weights applied to each exam score vary by jurisdiction, making it more challenging for law schools to prepare their students who may be taking different bar exams.

Jurisdictions

The primary benefit to the jurisdictions is that they are relieved from the burdens of developing high-quality written exams and grading materials and of completing the development of these materials in a timely manner. The UBE questions and grading materials will be developed by committees of content experts under the direction of NCBE; the grading materials will be used by all UBE graders. This application of uniform grading materials will help to ensure grading consistency across UBE jurisdictions.

UBE jurisdictions will be invited to participate in the development of best practices materials. NCBE has already worked at developing best practices for various jurisdictions, but this process would become more efficient if the practices were applicable to a larger number of jurisdictions. These materials will address issues such as the best way to calibrate graders, the best structure for score reports and feedback to examinees, and the best means of giving feedback to law schools.

Currently NCBE provides aid to jurisdictions at no cost to the jurisdictions. This aid would be more efficient if the jurisdictions followed similar procedures. NCBE is also considering providing additional

services for UBE jurisdictions as needed. These services may include centralized ADA decision making, centralized grading of written materials, and centralized score reporting. Such services would be offered by NCBE, but UBE jurisdictions would determine which tasks and services they wish to retain and which they prefer to have done centrally.

The Public

The UBE will provide more consistency in the requirements for bar admission across the country. And more consistency will make the bar admissions process more understandable to members of the public. Take a minute to look at Chart VII: Grading and Scoring in the *Comprehensive Guide to Bar Admission Requirements 2010* found on our website (www.ncbex.org/comprehensive-guide-to-bar-admissions/). This chart highlights the differences among jurisdictions in grading and scoring the various components of the bar exam. The chart shows that most jurisdictions use the MBE, most scale the written component to the MBE, and most combine scores. But the MBE weights range from 33 to 50 percent, the MEE and/or local essay exam weights range from 25 to 67 percent, and the MPT and/or local performance test weights range from 7 to 26 percent. One might wonder: How were these weights determined? Which of these reflects best practices? Why is there so much variety from one jurisdiction to the next?

The passing standard score ranges from 65 to 2,400. Do the various constituents understand what these standards mean? Is it really 36.92 times as hard to be admitted in Oklahoma as in Oregon? Questions arise, such as: Why are these passing standards expressed as they are? How can these standards be interpreted? Can comparisons be made across jurisdictions?

Final Thoughts

Several jurisdictions are working to be on the forefront of the UBE, others are holding back to see how much momentum there is, and others have not begun to think about it. More than 20 years ago, I was involved in the development of a uniform licensing exam for physicians (the USMLE). In that case, the exam was developed for graduates of medical schools around the world (i.e., for both U.S.-trained and foreign-trained physicians) who seek to practice in the United States. The initial reactions to the USMLE were very similar to reactions to the UBE. Although one could argue that the human body is the same worldwide, concerns were raised about the differences from one jurisdiction to the next—differences in terms of ethnic and socioeconomic makeup, rural/urban breakdown, social and religious belief structures that combine to affect the prevalence of disease, the types of injuries, the availability of resources that affect treatment, and the structures of patient care.

Despite the challenges that complicated the development of a uniform medical licensing exam, we were able to develop an exam that met the needs of the entire country. I have no doubt that the same will be possible in law. It is important to remember that the multistate bar exams are not designed to assess the ability to apply knowledge to every conceivable legal issue that a newly licensed lawyer might encounter. Rather, they are designed to assess the ability to apply knowledge to a reasonable set of tasks to ensure that each admitted lawyer has at least minimal competence to practice law. The UBE seeks to achieve that goal while benefiting those involved in the bar admissions process.

Susan M. Case, Ph.D., is the Director of Testing for the National Conference of Bar Examiners.

Essays on a Uniform Bar Examination

For this issue of the magazine, we have chosen to bring our readership a series of brief essays on the concept of the uniform bar examination (UBE). Three phrases sum things up about the UBE as that idea exists today: "This is an idea whose time has come," "The devil is in the details," and—most importantly, perhaps—"It's the right thing to do."

As various groups and constituencies have considered the wisdom of placing law with other professions in requiring a common examination experience, enthusiasm for the UBE has increased. The model under consideration rests on the foundation of existing test instruments with which jurisdictions are already familiar. The use of these instruments (the MBE, MEE, and MPT) as a common battery and the trade-offs in moving to a uniform testing protocol will be the subject of discussion over the next months and years.

The array of essay contributors is representative of the participants in the dialogue that has occurred to this point. Their voices are their own. Contributors include two Supreme Court justices, three deans (one current, two former), three chairs of state boards of bar examiners (one current, two former), one bar admissions administrator, one lawyer who was integral to the process of bringing a single licensing test to fruition in the medical context, and our two measurement experts. We thank them for their thoughtful comments and observations.

A Uniform Bar Examination: An Idea Whose Time Has Come

by Frederic White

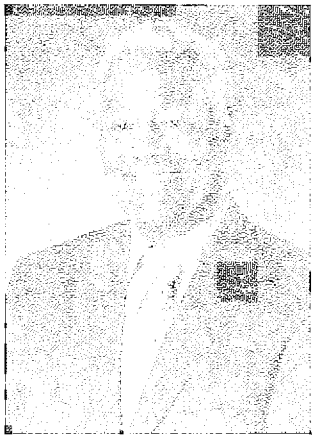
All of us agree that the practice of law has changed tremendously, particularly in the last 20 years. Venerable firms, some dating back to the nineteenth century, have folded or been swallowed up by newer, aggressive organizations. All across the country new firms have emerged; some of these have prospered, some have sputtered and died, and some have regrouped and become stronger. And they have spread out. Once confined to county, state, or sometimes regional lines, the practice of law has become nationwide and global. Today it is not unusual for some large law firms to staff multiple offices in different states but also to maintain, in effect, 24-hour operations with their affiliated offices throughout North and South America, Europe, Africa, and Asia. It's a new day.

Unfortunately, the licensing process for U.S. attorneys has not caught up with today's realities. Over the years the rise of mega-retail, banking, and industrial firms doing business across the country and beyond has, in some ways, made "local practice" a misnomer. Even given some local variations in practice or regional differences involving, for example, community property, a contract written in New York still involves virtually the same concepts as one written in Texas, Florida, or California. Consequently, other than for issues involving turf, territoriality, and protectionism—and a stubbornness thinly disguised as maintaining tradition—there is no rational justification for having each state administer its own bar examination.

Consider this: Virtually all jurisdictions now administer the Multistate Bar Examination. As of

July 2009, 23 jurisdictions will offer the Multistate Essay Examination, and only two of those jurisdictions do not use the Multistate Performance Test. In effect, a common licensing test is already in force. The ABA Bar Admissions Committee, realizing that the way law graduates enter into the profession is changing, has been looking at this issue for at least two years.

Furthermore, in the February 2008 issue of THE BAR EXAMINER, NCBE president Erica Moeser detailed how NCBE had recently hosted representatives from 21 jurisdictions who participated in a daylong discussion of the "feasibility and desirability of a common licensing test." The group included bar examiners, supreme court justices, and bar admissions administrators. General response following the session was positive. Of course, the devil is in the details and, as Ms. Moeser indicated, a UBE is not yet a fait accompli. Obvious issues that will have to be worked out include the following: selection of a proper pass/fail line, uniform weighting of test components, scaling of scores, and possible testing on local subject matter. These kinds of issues are not insurmountable and can be worked out by the stakeholders—the bar examiners, state courts, and bar administrators—to reach consensus.



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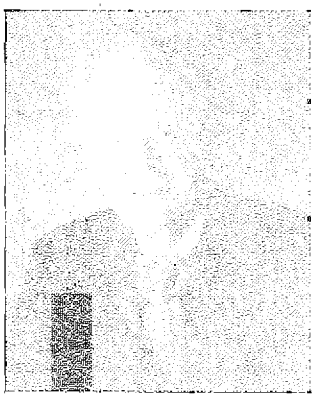
In today's global legal world, it has become easier for foreign-trained lawyers to achieve limited licensing rights to practice law in some states than it is for a U.S.-trained lawyer to do the same. The growth of cross-jurisdictional practice shows no signs of abatement. A common licensing examination is a reasonable response to today's practice realities. It is an idea whose time has come.

LIFE WITHOUT A LOCAL BAR EXAM

by Hon. Gerald W. VandeWalle

No local bar examination? We are losing our North Dakota identity! That was my first reaction in 1997 when the State Bar Board, now the Board of Law Examiners, informed the court that they were contemplating dropping the North Dakota essay portion of the bar examination in favor of the Multistate Essay Examination (MEE). I already thought that the 1976 adoption of the Multistate Bar Examination (MBE) to supplement what had previously consisted



HON. GERALD W. VANDEWALLE, raised in Noonan, North Dakota, is Chief Justice of the North Dakota Supreme Court. He was appointed to the North Dakota Supreme Court in 1978 and has been Chief Justice since January 1, 1993. VandeWalle is a former First Assistant Attorney General of North Dakota. He holds a B.S.C. and J.D. magna cum laude from the University of North Dakota, where he was editor of the NORTH DAKOTA LAW REVIEW. VandeWalle was president of the Conference of Chief Justices in 2000–2001 and Chair of the Section of Legal Education and Admissions to the Bar of the American Bar Association in 2001–2002.

solely of local essay questions left us little enough of our North Dakota jurisprudence, and now there would be nothing remaining that was exclusively North Dakotan. After all, I preceded the MBE; the bar exam I had taken consisted of a three-day, 18-subject essay examination whose questions were all either written or solicited by the members of the Bar Board. Of course, that was so long ago that I do not recall whether the questions actually tested on North Dakota law and, if they did, whether I realized I was being tested on a point of law peculiar to this state. Personal recollection and reaction aside, I felt our state pride was at stake.

Those were my initial thoughts. My egocentric reaction was soon replaced by acknowledgment of what I had been learning over the years from the testing experts: The results of local examinations are often unreliable. Criticism of local exams has included allegations that the questions are not well written; the grading of the essay questions is not consistent; and the small number of people writing the exams may, in itself, cause a statistically unreliable result. I leave it to the testing experts in the other essays to explain these allegations, but I had heard enough to convince me that we needed to move forward and replace our local essay portion of the examination with a more dependable option.

My conclusion was reinforced by several cases that came before the court challenging the validity of the North Dakota bar examination. *See, e.g., Application of Lamb*, 539 N.W.2d 865 (N.D. 1995) (inclusion of evidentiary issue in bar examination question on practice and procedure was not improper), cert. denied, *Lamb v. North Dakota State Bar Board*, 518 U.S. 1008, 116 S.Ct. 2530, 135 L.Ed.2d 1054 (1996); *McGinn v. State Bar Board of the State of North Dakota*, 399 N.W.2d 864 (N.D. 1987) (applicant not denied due process or equal protection by procedure used to grade essay portion of bar examination); *Dinger v. State Bar Bd.*, 312 N.W.2d 15 (N.D. 1981) (essay-type bar examinations are not invalid per se despite the fact that they require subjective evaluation). Perhaps the most intriguing appeal from an adverse recommendation for admission involved the contention that a model answer for one of the essay questions was incorrect and therefore unreliable. The argument would have had this court establish what presumably would be legal precedent on the subject in North Dakota by issuing an opinion on the answer to a bar examination question! *Faulconbridge v. North Dakota State Bar Bd.*, 483 N.W.2d 780 (N.D. 1992). We held that the procedure employed by the Bar Board to test the applicant was not unreliable and that his essay was therefore not graded arbitrarily or unreasonably.

A uniform bar examination? I know my initial reaction to giving up our local footprint on the bar examination is not unique; it was shared by the justices and many members of the Bar in North Dakota. I expect most of the justices and judges of the nation's appellate courts who deal with the admissions process have a sense of pride and accomplishment in what they are doing to protect citizens and enhance the quality and credibility of the legal profession in their respective states. But the question that needs to be asked is whether there is a better way of doing what we already may be doing relatively well. I submit the answer is a strong "Yes, there is a better way." The UBE would provide a professional and statistically valid examination. Although it would not completely eliminate such challenges as those posed in the cases cited above, it would surely diminish their force, as the examination would be expertly constructed and proficiently graded. I would no

longer have lingering doubts that our bar examination may be flawed, statistically invalid, or unfair.

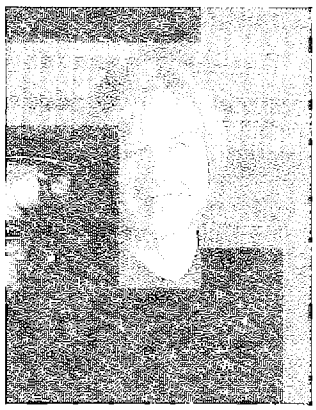
But what of the need to require lawyers entering practice in our state to have knowledge of some of the jurisprudence that is either not national jurisprudence or not tested by the UBE? Familiarity with unique local precedents is a real concern. However, there are means to ensure the applicant's knowledge of local jurisprudence other than by testing on a local bar examination. Because the applicant has presumably studied the local jurisprudence, why not, for instance, require the applicant to take a given number of hours of continuing legal education on those matters? Not only will that continue to expose the applicant to the subject, it will ensure a familiarity beyond that which ordinarily could be tested on a local bar examination. In addition to administering the UBE to its local applicants, a jurisdiction might also require a separate local examination, although that possibility may renew issues of reliability.

The ability of an applicant to practice law in North Dakota, and the quality and character of that applicant, remain my biggest concern. But as the pressure to recognize multijurisdictional practice and now practice in a global economy increases, so does the realization that a uniform bar examination makes good sense. Admission on motion, although not universally accepted, has surely increased in recent years. It would be reassuring to know that the applicants for admission from another jurisdiction have successfully passed the same bar examination as the local applicants.

A uniform bar examination? No testing on local precedents? The reply to the first question should be a resounding YES. The response to the second question should be decided locally and after considering and weighing the advantages and disadvantages of a local examination. It should not, however, be the justification for rejecting the concept of a uniform bar examination.

The Case for the Uniform Bar Exam

by Hon. Rebecca White Berch



Hon. Rebecca White Berch is Vice Chief Justice of the Arizona Supreme Court and a former longtime member of the Arizona Bar Examinations Committee.

Those who read The Bar Examiner need no introduction to the concept of a uniform bar examination (UBE)—a bar exam consisting of uniform content to be administered, as is the Multistate Bar Examination (MBE), in many states at the same time. The goal of those advocating the UBE is to provide a test that states can agree will function as the sole and common bar exam in those jurisdictions agreeing to sign on. Many of the issues surrounding the formulation, administration, and grading of such an exam were raised in Erica Moeser's February 2008 President's Page. It is not the purpose of this essay to rehash those issues; instead, I want to address the underlying question of why a jurisdiction might want to consider adopting a UBE. The answers are many.

People travel and move more than they used to. It's no longer common for a lawyer to live and practice entirely in one state. Many events may cause lawyers to move, such as a spouse's professional transfer to another state, a law firm's decision to send a lawyer to another state to work at a branch office, a wish to move closer to (or away from) relatives, or simply a desire to live in a different location. Even lawyers who do live in one state for their entire professional careers may have cases that cross state borders and require admission in another state.[1] Electronic communications and transfers of money already make it easy to effect multijurisdictional transactions on behalf of clients; the potential to join the bar in another state without taking that state's bar exam would further facilitate the practice of law.

A UBE would also eliminate a decision faced by law students who attend law school in a state other than their home state: namely, whether to take the bar exam in their home state or in the state where they attended law school—or, perhaps even more difficult, to try to determine where they might eventually practice and take the bar exam in that state. If all states were to honor the same examination, no matter where taken, such a decision would no longer be an issue.

Some worry that a test common to all jurisdictions would not fully protect each individual jurisdiction's special interests. But let's look at the basics. A bar exam is a test of minimum competence to practice law. On that point, we have already developed a high degree of national consensus on the content that should be tested. Almost every jurisdiction, for example, administers the MBE and uses the score on that test in assessing whether a bar applicant has sufficient knowledge of legal rules.[2] If your state uses the MBE, it already employs a significant component of the proposed UBE—and the tool that provides a statistical means for validating other parts of the bar exam and making scores comparable from year to year. In short, those 53 jurisdictions that use the MBE have already taken a significant step toward accepting the concept of a UBE.

The remainder of the UBE is likely to consist of multistate essay questions and perhaps a multistate practice question or two. This parallels the test given now in many jurisdictions.

Giving vetted questions such as those produced by NCBE for the Multistate Essay Examination relieves the pressure on states to develop or procure questions twice each year. Many states perform this task by contacting out-of-state law professors to write questions covering the state's tested subject matters. Occasionally the questions are quite good. Most often they are merely adequate. And every once in a while a question simply bombs. A test that controls the entry to a profession should not be subject to such vagaries.

States need not worry that a UBE would destroy their autonomy. States may give a short test on state-law issues peculiar to the home jurisdiction. Moreover, states would retain the ability to screen for character and fitness. States may assert autonomy in other ways as well: Under debate, for example, is whether the passing score should be set nationally or on a state-by-state basis. At least initially, states may wish to choose the score at which applicants would be deemed to have passed the exam. As happened with the MBE, however, over time, the UBE passing scores set by each state will likely migrate toward a consensus passing score.[3]

A UBE may resolve a number of other troublesome issues that plague bar examiners. It would ensure uniform content, uniform grading, a uniform passing score, uniform terms for evaluating special accommodations, and so much more. Let's focus for a moment on the special accommodations issue. As a bar examiner, I have read special accommodations requests from bar exam applicants and reviewed the accompanying files. I wondered whether our training as bar examiners was adequate to allow us to make judgments in these cases. Yet as a committee, we evaluated, discussed, and sent the requests and documentation out for professional evaluation. We received requests both meritorious and (in our opinion) dubious. Having experts available who specialize in evaluating accommodations requests and who would consistently apply uniform criteria to assess such requests—and then suggest appropriate accommodations that should be afforded—would help provide a level playing field for all test takers. It would also ensure that those taking the bar exam in Arizona (my home state) would receive the same accommodations that they would have received had they taken the bar exam in Iowa (or some other UBE state).[4] It would also provide support to bar exam committees on those occasions when they deny accommodations and the decision is subsequently challenged.

How to grade and whether grading should be done nationally are issues still under discussion. Perhaps each participating UBE state could send x graders for each y number of UBE examinees to a national training center. The graders could then either grade exams at the center or return to their home states to grade. Such national training would provide not only consensus regarding the answers but also support for the graders.

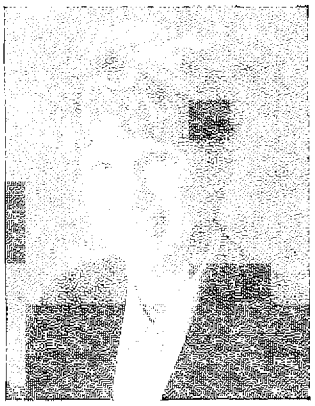
Many of these issues are still fluid, and many other issues exist. Indeed, nothing has been finalized yet. But a UBE has the potential to help remove concern that states are testing, grading, and granting accommodations according to different and perhaps illogical standards. It should help instill confidence, through the psychometric testing of the NCBE products likely to be used in the UBE, that the bar exam tests what it purports to test. I encourage you to contemplate the benefits to your jurisdiction that might flow from the implementation of a UBE.[5]

ENDNOTES

1. States now handle some of these situations through pro hac vice or admission on motion rules. *See, e.g.*, Ariz. R. Sup. Ct. R. 38(a) (pro hac vice admission).
2. Fifty-three jurisdictions currently use the MBE. Only Louisiana, Washington, and Puerto Rico do not. COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2009, 17 (National Conference of Bar Examiners and American Bar Association Section of Legal Education and Admissions to the Bar).
3. Grading, too, may remain the province of the states. At this time, all issues are open for discussion.
4. Disclaimer: No state is yet a "UBE state." I have chosen Arizona and Iowa as examples of what might be.
5. I approach this issue as a former bar examiner, question procurer, grader, and floor monitor, and now as a member of the state supreme court, which is charged with oversight of bar admissions.

The Uniform Bar Exam: Change We Can Believe In

by Rebecca S. Thiem



Rebecca S. Thiem is a member of the NCBE Board of Trustees and co-chairs its Special Committee on the Uniform Bar Exam. In December 2008 she completed 18 years as a member of the North Dakota Board of Law Examiners and 13 years as its chair. Thiem practices law in Bismarck, North Dakota.

Change was the mantra of the last seemingly unending election season. I must admit that, by nature, I like change. My typical response to a new challenge is, "Yes, I can." (Although I am usually willing to give most anything a whirl, I hope I am not as irrationally impulsive as Jim Carrey's Yes Man.)

I am also by nature not a patient person. So since I became convinced more than four years ago that a uniform bar exam would be a more reliable, valid, and fair final checkpoint in deciding who deserves a law license, it has been hard for me to understand why it's not already a done deal.

These qualities of mine, as well as my tendency to say what I think, may not be the best attributes for convincing you to believe in the positive change a uniform bar exam would bring. But if you are intrigued (and are still reading this), let me share how I arrived at this conclusion.

After graduating from law school over 28 years ago, I became a grader in the commercial law area for my state's Board of Law Examiners. There were no detailed subject matter outlines to guide the preparation of the essay exam, only general topics. There were no calibration sessions or model answers with cited legal authorities, alternative responses, and suggested grading allocations. Grading the exam often required my independent research of North Dakota statutes and case law, particularly whenever an examinee answered a question in an unexpected way.

Eighteen years ago the North Dakota Supreme Court appointed me to the three-member Board of Law Examiners, and I became its chair five years later. Although board members did not grade exams, they continued to prepare, edit, and select essay questions for the exam; they also regraded exams whenever an applicant appealed the initial grading. If an examinee then challenged the final grade he or she received, the board was in the awkward position of having to defend a question and model answer it had drafted and approved. And because our graders were instructed to score exams by comparing one examinee's answer to another's, the regrading of a single exam became virtually impossible.

In the mid-1990s, the board took its first serious look at the MEE offered by NCBE. To me, it was a no-brainer. The questions and accompanying model answers were obviously higher-quality testing instruments. Although our court initially hesitated, concerned about the loss of local control over testing, we explained that the board did not regularly test unique state-substantive matters because requiring knowledge of intricate details is not a fair test of an examinee's general ability to practice law. A good lawyer checks out the local law for these details. And often the unintended effect of testing a unique state statute was failing the out-of-state applicant.

The court ultimately accepted our recommendation that using the MEE would better measure whether the law student met the threshold prerequisites for practicing law, which, in turn, would better protect the public.

In the 10-plus years since adopting the MEE and MPT, the board has not been disappointed either in the quality of the questions or in the resulting scores. Use of the MEE and MPT also afforded the benefit of NCBE-sponsored calibration sessions, which provided our graders with significantly more sophisticated grading skills. Later, as a member of NCBE's MEE Policy Committee, I was further reassured about our decision after learning more about the professionally driven process for drafting, reviewing, and revising the MEE questions and model answers.

North Dakota, as a state with a small number of examinees and limited resources, was one of the earlier states to adopt both the MEE and MPT as the essay portion of its licensing exam and has used the MBE since the 1970s. As of July 2009, 21 jurisdictions (18 states, the District of Columbia, and 2 territories) will use the MBE, MEE, and MPT. Although there are variations in the number of questions and topics chosen, these jurisdictions are already using a hybrid uniform bar exam.

I suspect the uniform bar exam has been the subject of backroom discussions for decades—primarily in the context of the dreaded national exam and the feared loss of testing on local law. Similar arguments were raised in the mid-1990s against approving a uniform physicians' exam. Ultimately, the state medical boards recognized that there are general skills and knowledge required of any competent physician, regardless of geographical location and expected patient characteristics.

Since at least 2002, the organized bar, bar examiners, courts, and legal educators have been questioning whether a uniform bar exam and its expected pooling of resources would improve the reliability and validity of state bar exams and better meet the needs of law schools with their national student bases and law school graduates with their multijurisdictional practices. In August of that year, the ABA Commission on Multijurisdictional Practice recognized that geography no longer dictated the substantive law a lawyer would practice, nor the location in which that practice would take place. Because of the global nature of our economy, a lawyer commonly faced conflict-of-law questions that required the analysis of the laws of other states and maybe even other countries. The ABA Commission recommended that while jurisdictions should maintain a state-based system of bar admissions, they should also adopt model rules allowing licensed attorneys to be admitted by motion or allowing lawyers to practice in more limited ways through motions to appear pro hac vice. However, the granting of such motions assumed the lawyer was qualified to practice law merely by holding a license in another state, regardless of the validity and reliability of the exam taken or even if no exam was taken.

In 2002, representatives from the ABA, AALS, NCBE, and CCJ formed the Joint Working Group on Legal Education and Bar Admission. The Joint Working Group held a conference in Chicago in October 2004 at which the participants engaged in a frank dialogue about the bar exam. A few participants wanted to eliminate the bar exam altogether, but most recognized the legitimate need for a final exam to protect the public. However, the legal educators frequently expressed frustration about the widely differing passing standards among the states and the lack of transparency about the exams

or cut scores in some jurisdictions. Most of the scoring differences could not be justified by the unique characteristics of state-substantive law, and with the MBE as the primary testing tool used in all but two states, it was hard to explain the wide variation in cut scores.

As a result of the Joint Working Group's activities, the Bar Admissions Committee of the ABA Section of Legal Education and Admissions to the Bar created a subcommittee to consider the potential use of a uniform bar exam. Very quickly the subcommittee transformed into a committee of the whole, which in short order reached a consensus that a uniform bar exam was a great idea—while acknowledging that, as they say, the devil is in the details.

After NCBE's Long Range Planning Committee decided that NCBE had a role in analyzing the concept of a uniform bar exam, Chair Diane Bosse created NCBE's Special Committee on the Uniform Bar Exam, which I co-chair with Greg Murphy. Like the ABA Bar Admissions Committee, and regardless of the changing composition of the committee and its varied meeting places, the group reached the consensus that serious consideration should be given to the development of a uniform bar exam, using the MBE, MEE, and MPT, and applying a common testing, grading, scoring, and combining protocol. The Special Committee on the Uniform Bar Exam acknowledged, however, that the uniform bar exam could never be a mandate and that each jurisdiction would adopt its own cut score. In addition, each jurisdiction would also be free to educate and/or test its applicants on state-specific law.

To explore this proposal, the Special Committee on the Uniform Bar Exam sponsored a conference in January 2008 attended by representatives of 21 jurisdictions, including 10 Supreme Court Justices and 17 chairs and administrators from state examining boards. The invitees were either from jurisdictions using the MBE, MEE, and MPT, or from jurisdictions using the MBE and either the MPT or the MEE. Although questions and concrete concerns were openly voiced, the group generally favored the development of a uniform bar exam. The Committee presented a specific written proposal to the jurisdictions at a January 2009 meeting. The proposal was discussed and refined during the meeting and should be circulated to jurisdictions at about the time of this publication.

So where does this leave us? Although there are certainly valid concerns to be addressed, there is a growing consensus that uniform bar exam components, with uniform scoring and weighting, would provide a more reliable, fair, and credible method of determining which law school graduates are entitled to the privilege of a law license. The public deserves nothing less. This is a change we can believe in—and one we can accomplish.

Rethinking the Purpose of the Bar Examination

by Bedford T. Bentley, Jr.

Bedford T. Bentley, Jr., has been the bar admissions administrator in Maryland for nearly 22 years; he has chaired and is a member of NCBE's Diversity Issues Committee and currently serves as a member of NCBE's Editorial Advisory Committee.

Many issues are likely to arise in the quest to foster the adoption of a uniform bar examination (UBE). Ultimately, presuming the quest is successful, a UBE will be a national instrument for determining whether a bar applicant is qualified to be licensed to practice law, and, perhaps sometime thereafter, a license issued by one state will be recognized by any other state. This article suggests that a re-examination of the purpose of the bar examination should be a part of the process of shaping a UBE.

The present form of the bar examination in its 51 manifestations across the United States has 51 histories and represents the cumulative product of more than 100 years of evolution. (For purposes of this discussion, I include the District of Columbia as a state.) A recent survey conducted by the National Conference of Bar Examiners reveals that there are 30 different subjects tested on bar examinations administered among the 51 states in the United States.[1] The fewest subjects tested in any one state is 12 (three states) and the greatest number of subjects tested is 19 (six states).[2]

Table 1 lists the subjects, grouped by most common and least common, and the number of states that test each subject.

The table is organized to rank the subjects in order of the number of states testing the subject. The numbers say a lot. There are 10 subjects that are tested nearly universally: Business Associations, Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Professional Responsibility, Real Property, Torts, and Trusts and Estates. Two subjects are just below the first rank: the Uniform Commercial Code (46 states test negotiable instruments and secured transactions and 40 states test other articles) and Family Law. After Conflict of Laws (32 states), there is a steep falloff, and the remaining 16 subjects are tested in a smattering of states.

It would be interesting to know the history behind each state's selection of bar examination subjects, but that would entail research far beyond the ambitions and scope of this essay. However, I would like to remark briefly on the discussions, in which I was personally involved, surrounding the decision to add Family Law to the subjects tested on Maryland's bar examination in 1993.[3]

The proponents of the decision were members of a bar task force investigating gender bias in Maryland. They argued that there was a need for greater familiarity with family law among Maryland lawyers in order to redress some of the effects of gender bias which their study had identified. In their view, adding Family Law as a subject to the bar examination would compel law students to take family law courses in law school and produce a legal community better able to deal with the legal problems of women. The law examiners argued that

TABLE I: Subjects Tested on Bar Examinations in the United States

Most Common Subjects

Subject	Number of States
Business Associations	51
Civil Procedure	51
Constitutional Law	51
Contracts	51
Criminal Law and Procedure	51
Professional Responsibility	51
Real Property	51
Evidence	50
Torts	50
Trusts and Estates	49
UCC—Articles 3 & 9	46
Family Law	45
UCC—Other Articles	40
Conflict of Laws	32

Least Common Subjects

Subject	Number of States
Personal Property	20
Income Taxes	15
Administrative Law	14
Equity	14
Creditor/Debtor/Bankruptcy	8
Community Property	7
Remedies	7
Employment/ Workers' Compensation	5
Indian Law	3
Consumer Law	2
Insurance	2
Oil and Gas	2
Water Law	2
Zoning and Planning	2
Local Government Law	1
Trial Advocacy	1

Family Law was not a subject well suited for the bar examination because it is largely driven by statute and because it relies so fundamentally upon equitable considerations to arrive at legal conclusions.

This clash of perspectives on the question of whether Family Law is an appropriate bar examination subject illustrates what I think is a basic question about the purpose of the bar examination: Should the bar examination test content knowledge, or should the bar examination test legal skills (by which I mean that distinctive approach to analysis familiarly referred to as "thinking like a lawyer")?

It is clear that testing legal skills necessarily implicates some degree of knowledge of legal doctrine. One must have some mastery of the special vocabulary and legal context in order to demonstrate one's legal skills. The question that I pose is one of degree. To be minimally competent, what doctrinal knowledge must the aspiring lawyer possess? What subjects are fundamental? How deep and how perfect must the bar applicant's doctrinal knowledge be? There seems to be general agreement on the idea that the bar examination is designed to assess whether the examinee is minimally competent. However, the question is: minimally competent to do *what*?

To address these questions, I turn for help to a framework articulated in the 1992 American Bar Association report "Legal Education and Professional Development: An Educational Continuum," bet-

ter known as the "MacCrate Report" in recognition of Robert MacCrate, Esq., chair of the ABA's Task Force on Law Schools and the Profession.[4] One of the signal contributions of the MacCrate Report is the elaboration of a comprehensive description of the skills and values that an effective lawyer should possess. The report identifies 10 fundamental lawyering skills: (1) problem solving, (2) legal analysis and reasoning, (3) legal research, (4) factual investigation, (5) communication, (6) counseling, (7) negotiation, (8) litigation and alternative dispute resolution, (9) organization and management of legal work, and (10) professional self-development.[5] The report also identifies four fundamental values of the profession: (1) provision of competent representation, (2) striving to promote justice, fairness, and morality, (3) striving to improve the profession, and (4) professional self-development.[6] The report contains a thorough dissection of each of these skills and values, which I will forgo here for the sake of brevity. I focus for now on the first and fourth values as guideposts to address the question of what the purpose of the bar examination should be.

To provide competent representation, value 1 specifies that the lawyer must attain and maintain a level of competence in his or her field of practice. Value 4 specifies that the lawyer must seek out and take advantage of professional opportunities to increase his or her knowledge and improve his or her skills. In other words, the lawyer must strive to acquire and master knowledge of the legal doctrine pertinent to the specific nature of his or her practice. The MacCrate Report steers clear of any attempt to describe or define the body of doctrinal knowledge that a new lawyer must possess to be competent. However, the MacCrate Report recognizes that the lawyer's education in doctrinal law is a continuing enterprise, which begins before law school, intensifies during law school, and continues throughout the course of practice.[7]

To return to the central question of this article, I think the bar examination cannot and should not attempt to assess the depth of an applicant's doctrinal knowledge base, if by that we mean the knowledge necessary to handle a specific client's case. Rather, the bar examination should be focused on that limited body of doctrinal knowledge considered to be necessary for one to be able to *evaluate one's own competency* to handle a particular legal matter. To put it another way, one should have sufficient knowledge to be able to assess whether one is *not* competent to handle a particular matter—to know what one does not know. The newly licensed lawyer is going to have to deepen and broaden his or her doctrinal knowledge in the course of accepting and assisting clients and developing a career. As the MacCrate framework suggests, the lawyer must cultivate and nurture his or her competency and must regard professional self-development as a fundamental personal responsibility. The newly minted lawyer is not prepared to represent his or her first client until he or she adds significant doctrinal knowledge to the foundation laid in law school.

The bar examination cannot and does not test many of the skills identified by the MacCrate Report as fundamental to the successful practice of law. A principal reason for that limitation is practicality. It simply is too costly to attempt to assess bar applicants' oral communication, negotiation, and trial/appellate advocacy skills, for example. It may be that future developments in technology will make it possible to evaluate some of these skills. For now, bar examiners must rely on the capacity of law schools to teach those skills and take comfort in the idea that

demonstrated competence on written examinations seems to correlate well with actual performance in the real world, as apparently has been confirmed in the profession of medicine.[8]

While there may be a prevailing perception that the nature of the bar examination is well understood, it also is clear that there is substantial variation in the form and content of the bar examination among the states. The quest for a UBE inevitably must address those differences, by harmonizing them or by crafting some way to navigate around the differences. I maintain that this process of working toward commonality necessarily must entail a careful rethinking of the purpose of the bar examination.

I informally surveyed the offices that subscribe to the bar administrators' listserv to test my suspicion that bar admissions rules and policies which touch on the purpose of the bar examination do not go far beyond Standard 18 of the Recommended Standards for Bar Examiners. My suspicion was confirmed. Standard 18 reads as follows:

> The bar examination should test the ability of an applicant to identify legal issues in a statement of facts, such as may be encountered in the practice of law, to engage in a reasoned analysis of the issues and to arrive at a logical solution by the application of fundamental legal principles, in a manner which demonstrates a thorough understanding of these principles. The examination should not be designed primarily to test for information, memory or experience. Its purpose is to protect the public, not to limit the number of lawyers admitted to practice.[9]

Standard 18 provides a helpful starting point, but needs some updating and elaboration, I believe, to be helpful as guidance—as a mission statement—for the effort to shape a UBE. An updated statement of purpose should incorporate the following characteristics:

1. It should make clear what doctrinal content is to be covered on the bar examination, in terms of both breadth and depth of subject matter.
2. It should represent a consensus of legal educators, legal practitioners, and bar admissions authorities as to the specific doctrinal content to be examined.
3. It should articulate the skills that a properly prepared bar applicant should possess and explain the role of the bar examination in assessing those skills.
4. It should offer specificity about what constitutes "minimum competence" so that bar applicants preparing for the bar examination better understand what is expected of them.

A fundamental tenet of jurisprudence is that the court will not decide a question unless the question is properly put before the court and resolution of the question is necessary to decide the case. I would argue that as we approach implementation of the UBE, the question of what is the purpose of the bar examination will ripen. There is, in a general sense, tacit agreement about what knowledge and skills a new lawyer should possess. The explicit articulation of what comprises that body of knowledge and skills would require a meeting of the minds of the academy, the profession, and the bar examining community. I believe that the implementation of the UBE presents the perfect occasion for negotiating this meeting of the minds.

ENDNOTES

1. Laurie Elwell, "Subjects Tested—51 Jurisdictions" (Excel spreadsheet, National Conference of Bar Examiners, October 28, 2008).

2. Although one might arrive at a different count by defining the subjects differently, the numbers quoted are reasonably representative of bar examination subject coverage.
3. Family Law became a subject on the Maryland bar examination effective in July 1993.
4. American Bar Association Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development: An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (July 1992).
5. *Id.* at 138.
6. *Id.* at 140.
7. *Id.* at 125.
8. Norman, Geoff, *So What Does Guessing the Right Answer out of Four Have to Do with Competence Anyway?* 77 THE BAR EXAMINER 4:18 (November 2008).
9. COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2009, ix (National Conference of Bar Examiners and American Bar Association Section of Legal Education and Admissions to the Bar).

EXHIBIT C

Uniform Bar Examination (UBE)
Frequently Asked Questions (FAQs)

As discussions about the UBE have proceeded, a number of questions have arisen. The NCBE staff has prepared this FAQ document in response.

1. What is the UBE?

The UBE is a bar examination that will be the same wherever it is used. It may be used by as many jurisdictions as choose to do so. Jurisdictions that use the UBE will be using the same exam components, scoring the components in a consistent manner, and weighting the components in the same way. As noted below, jurisdictions may also administer locally developed supplemental exam components if they wish.

The UBE includes three major components: the MBE, six MEE essays, and two MPT tasks.

2. Why will all jurisdictions be required to use the same MEEs and MPTs?

In order to ensure uniformity across jurisdictions, the UBE is comprised of a specific set of MEEs and MPTs. Using the same questions and the same scoring rules will provide a basis for consistently assessing all candidates. If a jurisdiction accepts UBE scores from applicants who were tested in other jurisdictions, it can be assured that those applicants were tested on identical test material and that the scores have the same meaning across jurisdictions. Of course, each jurisdiction will be free to establish the length of time that a UBE score will remain valid as an admission credential.

It is anticipated that representatives of UBE user jurisdictions will participate in the process whereby MEE topics are selected for each UBE.

3. How will the MEE and MPT be scored?

The MEE and MPT will be scored in essentially the same way as they are scored now. The answers for candidates in each jurisdiction will be scored within that jurisdiction, and MEE and MPT scores will be scaled to the MBE scores within that jurisdiction.

Jurisdictions may continue to use the grading scale they are currently using. Scaling the written grades to the MBE will place all the grades on the MBE scale regardless of which grading scale the jurisdiction uses to grade the MEE and MPT. The rank-ordering of candidates who take the MEE and MPT components, with scores set on the MBE scale, will achieve this result.

Over time it will be possible to introduce new procedures that will enhance the scoring process. For example, an optional centralized scoring service could be offered to improve the consistency in scoring the MEE and MPT across jurisdictions.

4. How will scores be combined?

As noted above, MEE and MPT scores will be combined and scaled to the MBE. The MBE scores and the combined MEE/MPT scores will be weighted equally. The precise allocation will be MBE at 50%, MEE at 30%, and MPT at 20%.

5. How may jurisdictions assess state-specific content if they wish?

By definition, the UBE would not include specific local content that is of unique interest in a particular jurisdiction (e.g., water rights). Jurisdictions that choose to use the UBE could assess applicant knowledge of local law in at least three ways: (1) requiring applicants to take and pass a course (similar to a CLE effort); (2) requiring applicants to pass a separate test on local content that could be administered at any time and would be scored separately from the UBE and treated as a separate hurdle; or (3) requiring applicants to take a separate test on local content just before or after the UBE is administered, which would be scaled to the UBE and could be combined with the UBE score for the purposes of making the local admissions decision. (While the description below assumes the supplementary course or test would be on local law, it is also possible that a jurisdiction would want to provide a course or further assess some topic already covered by the UBE.)

A course.

> Jurisdictions that want assurance of basic competence in some areas of local law could require all candidates to take and pass a course on local law. The format and duration of such a course would be determined by the jurisdiction, and presumably the length of the course would depend on the specific local content to be covered and the nature of this content. The courses could include assessment tools designed to ensure that candidates taking the course have mastered the required content.

This approach could accommodate a wide variation in the number and types of local issues to be addressed and would not introduce any substantial psychometric issues. The length of the course could be as long as necessary to cover the issues deemed important to cover. The process could use approaches currently used for continuing legal education.

A test of local content that is administered and scored as a separate requirement.

The jurisdiction could develop a separate test that covered local content and that would be administered and scored separately from the UBE.

The easiest way to do this would be to develop a bank of multiple-choice questions covering local content, and then draw a subset of these questions for administration. The questions could be reused over a period of time, with a different sample being used for each administration. It is possible that the candidates would get a sense of what is covered by the items in the item bank and prepare for the exam by studying this content. If the item bank covers the local content well enough, this would achieve the objective of having the candidates learn the local law. This format is similar to that used for the written test for a driver's license, and would serve the same purpose -- to ensure that passing candidates are familiar with the rules and requirements specific to the jurisdiction. As with the driver's test, the test administration could be offered frequently, and perhaps even continuously, since grading would be straightforward and quick.

Other approaches pose more difficulty. Essay tests usually require ongoing test development, and uniform test administration dates with sufficient candidates for training and calibration of graders. Stand-alone essay tests would typically require a full day of testing in order to achieve a sufficiently reliable score for licensure decisions. This would be an expensive enterprise and might be difficult for jurisdictions to implement effectively.

A test of local content that is scaled to the UBE and combined with the UBE.

A short test of local content (e.g., one or two essays) could be administered right after the UBE and scaled to the MBE. The score reported for UBE purposes would be the score for the UBE without the local component, rendering that part of the process uniform across jurisdictions and therefore portable.

The final score used to make the admission decision in the testing jurisdiction could be derived as a weighted average of the UBE score and the score on the local test. Even if the local test were relatively short and therefore not very reliable, the final score for the local test, combined with the score on the UBE, would be reliable enough to use in making a licensure decision. To maintain the high reliability derived from the UBE, it would be necessary that the weight assigned to the local content not be too heavy, but it could be proportional to the percentage of the total testing time devoted to the local test component.

This option could pose scheduling challenges if someone sought admission in two jurisdictions with local tests being administered at the same time. Presumably applicants with a prior UBE score would only sit for the state component in subsequent jurisdictions. Their score on the local component could then be combined with their UBE score using the same rule that is used to derive a final combined score for other test-takers.

This testing alternative strays farthest from the concept of a uniform examination, but its adoption need not be fatal to the notion of score portability.

NCBE is prepared to assist those jurisdictions wishing to undertake pilot projects aimed at incorporating local law into their licensing process.

6. What impact will the UBE have on diversity?

Adoption of the UBE per se will not have an impact on the pass rates of racial-ethnic groups within the candidate population, since racial-ethnic groups all tend to do about as well on locally developed written tests, the MEE, and the MPT as on they do on the MBE.

A shift to a particular set of common essay questions should not have an impact on the differential pass rates across racial-ethnic groups. NCBE will conduct specific simulations for any jurisdiction that is considering adopting the UBE to confirm that the general pattern that we have observed across a number of jurisdictions will apply in the particular case under consideration.

Of course, if a jurisdiction changes its passing score, this would have an impact (positive or negative) on overall pass rates and on diversity. Jurisdictions are free to retain their existing passing score – this is a local option.

7. Will ADA decisions be made by the jurisdictions or centrally?

Initially, jurisdictions will continue to make their own ADA decisions; however, an option to have these decisions made centrally may be offered eventually in response to demand. There would be considerable advantage in having all ADA decisions made centrally in order to ensure consistency.

8. Will applicants be required to graduate from ABA-accredited schools?

UBE jurisdictions will retain their own separate educational requirements. Some UBE jurisdictions will require graduation from ABA-accredited schools, while others will not. In all events, decisions about who qualifies to sit for the bar examination and who is eligible for admission will continue to reside within each jurisdiction.

EXHIBIT D

CONFERENCE OF CHIEF JUSTICES

Resolution 4

Endorsing Consideration of a Uniform Bar Examination

WHEREAS, the states' highest courts regard an effective system of admission and regulation of the legal profession as an important responsibility for the protection of the public; and

WHEREAS, the increased demand for lawyer mobility results in greater multijurisdictional practice and increased access to admission on motion; and

WHEREAS, the increasing use of uniform, high quality testing instruments has rendered most jurisdictions' bar examinations substantially similar; and

WHEREAS, law is the only major profession that has not developed a uniform licensing examination; and

WHEREAS, a uniform licensing examination for lawyers would facilitate lawyer mobility and enhance protection of the public; and

WHEREAS, state bar admission authorities and state supreme courts would remain responsible for making admission decisions, including establishing character and fitness qualifications and setting passing standards, and enforcing their own rules for admission; and

WHEREAS, issues relating to knowledge of local law can be addressed through a mandatory educational component, a separate assessment, or a combination thereof;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices urges the bar admission authorities in each state and territory to consider participating in the development and implementation of a uniform bar examination.

Adopted as proposed by the CCJ Professionalism and Competence of the Bar Committee at the 2010 Annual Meeting July 28, 2010.

Section of Legal Education and Admissions to the Bar

Council Resolution

Endorsing Consideration of a Uniform Bar Examination

WHEREAS, the Section of Legal Education and Admissions to the Bar of the American Bar Association regards an effective system of admission and regulation of the legal profession as an important responsibility for the protection of the public; and

WHEREAS, the increased demand for lawyer mobility has resulted in greater multijurisdictional practice and has increased utilization of admission on motion by experienced lawyers; and

WHEREAS, admission by motion does not apply to recently admitted lawyers; and

WHEREAS, adoption of a uniform licensing examination for lawyers in all jurisdictions would facilitate lawyer mobility and enhance protection of the public; and

WHEREAS, the increasing use of uniform, high quality testing instruments has rendered most jurisdictions' bar examinations substantially similar; and

WHEREAS, law is the only major profession that has not adopted a uniform licensing examination, the scores on which are transferable among jurisdictions; and

WHEREAS, after adoption of a uniform examination on legal knowledge, reasoning and skills, state bar admission authorities and state supreme courts would remain responsible for making admission decisions, including establishing character and fitness qualifications and setting passing standards, and enforcing their own rules for admission; and

WHEREAS, issues relating to knowledge of local law can be addressed through a mandatory educational component, a separate state-specific assessment, or a combination thereof;

NOW, THEREFORE, BE IT RESOLVED that the Council of the Section of Legal Education and Admissions to the Bar urges the bar admission authorities in each state and territory to consider participating in the development and implementation of a uniform bar examination.

ADOPTED by the Council of the Section of Legal Education and Admissions to the Bar on August 6, 2010.

EXHIBIT E

THE MEE®

MULTISTATE ESSAY EXAMINATION

February 2010 MEE Questions and Analyses

ncbe®

February 2010 MEE Questions and Analyses

Contents

Contents

Preface

The Multistate Essay Examination (MEE) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the questions and analyses from the February 2010 MEE. Each test includes nine questions; most jurisdictions that use the MEE select six questions for their applicants to answer. In the actual test, the questions are simply numbered rather than being identified by area of law. The instructions for the test appear on page iv. For more information, see the *MEE Information Booklet,* available on the NCBE website at www.ncbex.org.

The model analyses for the MEE are illustrative of the discussions that might appear in excellent answers to the questions. They are provided to the user jurisdictions for the sole purpose of assisting graders in grading the examination. For the February 2010 MEE, suggested percentage weights for question subparts are now expressed in specific values, not in a 10-point range. The model analyses are not an official grading guide. Some states grade the MEE on the basis of state law, and jurisdictions are free to modify the analyses, including the suggested weights given to particular points, as they wish. Grading of the MEE is the exclusive responsibility of the jurisdiction using the MEE as part of its admissions process.

The topics covered by each question are listed on the first page of its accompanying analysis, followed by roman numerals which refer to the MEE subject matter outline for that topic. For example, the Federal Civil Procedure question on the February 2010 MEE tested the following areas from the Federal Civil Procedure outline: I.A.1., jurisdiction and venue—subject matter jurisdiction—federal courts, and IV.C., pre-trial procedures—joinder of parties and claims (including class actions). Subject matter outlines are included in the *MEE Information Booklet.*

Description of the MEE

The MEE is a series of essay questions, any of which a jurisdiction may select to include as a part of its bar examination. Applicants are expected to spend approximately 30 minutes answering each MEE question administered. The areas of law that may be covered by the questions on any MEE are Business Associations (Agency and Partnership; Corporations and Limited Liability Companies), Conflict of Laws, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Family Law, Federal Civil Procedure, Real Property, Torts, Trusts and Estates (Decedents' Estates; Trusts and Future Interests), and Uniform Commercial Code (Negotiable Instruments (Commercial Paper); Secured Transactions). Some questions may include issues in more than one area of law.

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

Instructions

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

> Do not break the seal on this booklet until you are told to begin.
>
> Each question is designed to be answered in 30 minutes. There will be no break once the formal testing session begins. You may answer the questions in any order you wish. Do not answer more than one question in each answer booklet. If you make a mistake or wish to revise your answer, simply draw a line through the material you wish to delete.
>
> If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions to follow.
>
> Read each fact situation very carefully and do not assume facts that are not given in the question. Do not assume that each question covers only a single area of the law; some of the questions may cover more than one of the areas you are responsible for knowing.
>
> Demonstrate your ability to reason and analyze. Each of your answers should show an understanding of the facts, a recognition of the issues included, a knowledge of the applicable principles of law, and the reasoning by which you arrive at your conclusion. The value of your answer depends not as much upon your conclusions as upon the presence and quality of the elements mentioned above.
>
> Clarity and conciseness are important, but make your answer complete. Do not volunteer irrelevant or immaterial information.
>
> Your jurisdiction may instruct you to answer MEE questions according to the law of the jurisdiction. Absent such an instruction, you should answer the questions by applying fundamental legal principles rather than local case or local statutory law.

February 2010
Questions

Secured Transactions Question

Six months ago, Kitchenware, a manufacturer of copper cookware, borrowed $200,000 from Bank and signed a security agreement granting Bank a security interest in "all inventory that Kitchenware now owns or that it manufactures or acquires in the future." Bank filed a properly completed financing statement reflecting this security interest in the appropriate state office.

Copperco is a company that produces high-quality copper sheet that is suitable for fabrication into cookware. Two months ago, Kitchenware entered into a contract with Copperco to buy two tons of copper sheet to be used by Kitchenware to produce cookware. The contract, which was signed by both parties, required Copperco to deliver the copper sheet to Kitchenware's factory in two installments, one ton in the first installment and the second ton 30 days later. Kitchenware was to pay for each of the installments separately, with one-half of the contract price due 25 days after the first delivery and the balance due 25 days after the second delivery. Copperco's obligation to ship the second installment was expressly made conditional on full payment for the first installment. The parties further agreed that Kitchenware would have no rights in an installment of the copper sheet until it received delivery of that installment and that Copperco would retain title to all the copper sheet until Kitchenware paid the full contract price.

Copperco promptly delivered the first ton of copper sheet to Kitchenware's factory. Twenty-three days after the delivery, Copperco loaded its truck with a second ton of copper sheet for delivery to Kitchenware's factory and planned to send the truck to Kitchenware in time to meet its delivery deadline. However, by 25 days after the first delivery, Kitchenware had not paid for the first installment of copper sheet. As a result, Copperco exercised its right under the contract to withhold shipment of the second installment and, accordingly, the truck with the second ton of copper sheet never left Copperco's plant.

Kitchenware has defaulted on its loan from Bank, and Bank would like to exercise its rights with respect to its collateral. The first ton of copper sheet delivered to Kitchenware is still at Kitchenware's factory, and the second ton of copper sheet that was not delivered to Kitchenware is still at Copperco's plant. Bank believes it has a security interest in both tons of copper sheet, while Copperco asserts that it has title to both tons of copper sheet and that its rights are superior to any rights of Bank.

1. As between Copperco and Bank, which has the superior claim to the first ton of copper sheet that was delivered to Kitchenware? Explain.

2. As between Copperco and Bank, which has the superior claim to the second ton of copper sheet, which is still at Copperco's plant? Explain.

Real Property Question

In 1960, Owen, the owner of vacant land, granted a power-line easement over the land to an electric company by a properly executed written instrument. This easement was never recorded. Consistent with the easement, the electric company erected power lines over the land. The power lines and supporting poles remain on the land.

In 1961, Owen granted an underground gas-line easement on the land to a gas company by a properly executed written instrument. This easement was never recorded. Consistent with the easement, the gas company dug trenches, laid pipes, and restored the surface of the land to its pre-installation condition.

In 1970, Owen conveyed the land to Abe by a full covenant and warranty deed that made no mention of the easements. The Owen-to-Abe deed was promptly and properly recorded. Abe paid full value for the land and had no actual knowledge of the two easements Owen had previously granted.

In 1995, Abe conveyed the land to Bob by a full covenant and warranty deed that made no mention of the easements. The Abe-to-Bob deed was promptly and properly recorded. Bob, who paid full value for the land, knew of the underground gas line because he had helped dig the trenches on the land. Bob had not visited the portion of the land crossed by the power lines and had no actual knowledge of the power-line easement.

In 2009, Bob decided to build a house on the land and hired an engineer to evaluate the proposed building site. Following an inspection of the proposed site, the engineer told Bob that each easement precluded building on the site.

Relevant state statutes provide

> (1) "A conveyance of real property is not valid against any subsequent purchaser who, without notice, purchases said real property in good faith and for valuable consideration," and
> (2) "Easements by prescription are abolished."

1. Did Bob take the land subject to the power-line easement? Explain.

2. Did Bob take the land subject to the gas-line easement? Explain.

3. Assuming Bob took the land subject to either easement, may Bob obtain damages from Owen based upon a breach of the covenant against encumbrances? Explain.

Family Law Question

Harry and Wendy married when they were both 23, shortly after Harry began his first year of law school. They decided that Wendy, who had completed two years of college, would temporarily quit college and get a full-time job until Harry started practicing law.

Wendy obtained a full-time job as a supermarket cashier. All of her earnings were used for Harry's and Wendy's support. Harry did not work during the school year but worked full-time during summers. All of Harry's earnings were used to pay his law school tuition.

Harry recently earned his law degree, passed the bar examination, and began working as a public defender.

Last month, after three years of marriage, Harry told Wendy that he felt they had drifted apart and that he wanted a divorce. Although deeply hurt, Wendy decided to separate amicably. Harry and Wendy had no children.

Harry suggested that he draw up a settlement agreement in order to avoid the expense of hiring a lawyer. Harry proposed that each spouse keep his or her own personal property and that he bear full responsibility for his educational loans. Harry also told Wendy that a divorce court would "definitely not impose any further obligations" on him because there were no children of the marriage. Wendy agreed to the terms of the settlement agreement proposed and prepared by Harry, and both parties signed it. In the agreement, each spouse waived "any and all rights to the past or future income of the other party."

Thereafter, following Harry's instructions, Wendy filed a petition for a no-fault divorce, requesting that the court incorporate their settlement agreement into the final divorce decree.

Prior to any hearing on the petition, Wendy learned that Harry had been involved in an adulterous relationship with another woman. Angry and mistrustful, Wendy contacted an attorney, who urged her to amend her divorce petition. The attorney suggested that Wendy petition the court to invalidate the settlement agreement, seek a divorce on grounds of adultery, and request alimony and a cash award representing her share of the value of Harry's law license, which he acquired during the marriage.

State law does not authorize reimbursement alimony.

1. Should the court invalidate the settlement agreement? Explain.

2. What, if any, are the advantages to Wendy of obtaining a divorce based on Harry's adultery instead of on no-fault grounds? Explain.

3. Assuming the court invalidates the settlement agreement, can Wendy obtain
   a) a cash award representing her share of the value of Harry's law license? Explain.
   b) alimony? Explain.

Torts Question

Penny lives in an apartment on Oak Street across from the Fernbury Baseball Park ("the Park"). The Park is owned and maintained by the Fernbury Flies, a professional minor league baseball team. As she left her apartment building one day, Penny was struck in the head by a baseball that had been hit by Dennis, a Flies player, during a game.

The section of Oak Street that adjoins the Park was once lined with single-family homes. Over the past two decades, these homes have been replaced by stores and apartment buildings, causing an increase in both car and pedestrian traffic on Oak Street.

The ball that struck Penny was one of the longest that had been hit at the Park since its construction 40 years ago. During the last 40 years, Flies' records show that only 30 balls had previously been hit over the Park fence adjoining Oak Street. Fifteen of the balls hit out of the Park onto Oak Street were hit during the past decade.

The Park is surrounded by a 10-foot-high fence, which was built during the Park's construction. All other ballparks owned by clubs in the Flies' league are surrounded by fences of similar type and identical height. These fences are typical of those used by other minor league teams in the United States. However, in Japan, where ballparks are often located in congested urban neighborhoods, netting is typically attached to ballpark fences. This netting permits balls to go over a fence but captures balls before they can strike a bystander or car.

After being struck by the ball, Penny was taken by ambulance to a hospital emergency room. After tests, the treating physician told Penny that she had suffered a concussion. The physician prescribed pain medication for Penny. However, because of a preexisting condition, she had an adverse reaction to the medication and suffered neurological damage resulting in the loss of sensation in her extremities.

Penny has sued Dennis, the player who hit the baseball that struck her, for battery and negligence. Penny has also sued the Fernbury Flies. She seeks to recover damages for the concussion and the neurological damage resulting from the medication.

1. Does Penny have a viable tort claim against Dennis? Explain.

2. Does Penny have a viable tort claim against the Fernbury Flies? Explain.

Corporations Question

Smith owns 10% of the common shares of Omega, Inc., a closely held corporation. Baker and Jones each own 45% of Omega's common shares. Baker and Jones also serve on Omega's board of directors and are paid corporate officers.

Omega has not paid a dividend on its common shares for several years. Smith, who is not an officer of the corporation and has never received a salary from the corporation, is very unhappy that no dividends are being paid.

When Smith complained to Baker and Jones about nonpayment of dividends, they said that while Omega could legally pay dividends, it has not done so in order to retain the corporation's earnings for expansion of the business. They also pointed to data showing that Omega's business has expanded considerably in the past several years, financed entirely through undistributed earnings, and told Smith that he should "go away and let us run the show." Smith complained that "only you are enjoying the fruits of Omega's success." In response to an inquiry from Smith, Baker and Jones refused to reveal the amounts of their salaries, even though those salaries are within industry range.

Baker and Jones each offered to purchase all of Smith's shares for $35 per share. Smith suspects that the shares are worth more than $35 per share. Smith has asked to inspect Omega's corporate books and records in order to determine the value of his shares, but Jones and Baker have refused to give Smith access to any corporate records.

Smith has asked your law firm the following questions:

1. Does Smith have a right to inspect Omega's corporate books and records to determine whether $35 per share is a fair price for his shares? Explain.

2. If Smith brings a suit to compel the payment of a dividend, must Smith first make a demand on the corporation? Explain.

3. If Smith brings a suit to compel the payment of a dividend, is that suit likely to be successful? Explain.

Federal Civil Procedure Question

Husband is an American citizen domiciled in State A. Wife is a citizen of a foreign country who was admitted to permanent residency in the United States five years ago and has been domiciled in State A since then.

After struggling with infertility, Husband and Wife consulted with Doctor, who created embryos in a laboratory using Husband's sperm and Wife's ova. Husband and Wife then entered into a surrogacy contract with Surrogate, a domiciliary of State B. Pursuant to the contract, Surrogate agreed to carry the couple's embryo, to relinquish to them any child born as a result of the implantation, and to waive any and all parental and/or custodial rights to the child. Husband and Wife also agreed, jointly and severally, to pay all of Surrogate's expenses and to assume custody and full financial and legal responsibility for any child born as a result of the implantation.

Doctor implanted one of the embryos in Surrogate. Surrogate gave birth to a baby in State A and listed Husband and Wife as the parents on the baby's birth certificate. Husband and Wife obtained a judgment from a State A court declaring that they were the legal parents of the baby and were entitled to sole custody.

The baby had serious medical problems at birth and remained in the State A hospital for three months. When the baby left the hospital, she went home with Husband and Wife. Surrogate returned to her home in State B.

The hospital sent the bill for the baby's medical care, which exceeded $500,000, to Surrogate. Surrogate has medical insurance with Insureco, an insurance company incorporated under the laws of State A with its principal place of business in State C. Surrogate's insurance policy covers all reasonable and necessary medical expenses incurred by Surrogate and her dependent(s), including "any natural child of Surrogate born after the policy is in force." However, Surrogate's policy expressly provides that Insureco will not cover expenses if a third party is liable for those expenses.

Insureco has refused to pay the baby's medical bill on the grounds that she is not a "natural child" of Surrogate within the meaning of the insurance policy and that the baby's expenses are Husband and Wife's responsibility.

Husband and Wife have also refused to pay the bill, claiming that they cannot afford to pay it and that the surrogacy contract is unenforceable under the applicable state law.

Surrogate has filed suit in the federal district court of State A against Insureco, Husband, and Wife. Surrogate alleges that Husband and Wife breached the surrogacy contract and that Insureco breached the terms of the insurance policy. Surrogate seeks to compel any or all of the defendants to pay the $500,000 hospital bill.

The defendants have moved to dismiss the action on the grounds that (i) the federal court lacks jurisdiction over the case, (ii) the case involves state-law domestic-relations issues (i.e., the

biological parentage of the child and the enforceability of a surrogacy contract) that are inappropriate for resolution by a federal court, and (iii) Surrogate improperly joined her separate claims against Insureco, on the one hand, and Husband and Wife, on the other, in a single action.

1. Does the federal district court of State A have subject-matter jurisdiction over Surrogate's claims? Explain.

2. Should the federal district court of State A dismiss the action because it involves domestic-relations issues? Explain.

3. Did Surrogate properly join Insureco, Husband, and Wife as defendants in a single action? Explain.

Evidence Question

Driver was driving an automobile that struck Pedestrian in the crosswalk of a busy street. Pedestrian suffered painful fractures and a concussion that affected her memory of the accident.

Pedestrian filed a negligence action against Driver, who responded with a general denial and an assertion that Pedestrian's negligence caused her injuries. The parties have stipulated to the severity of Pedestrian's injuries, to Pedestrian's pain and suffering, and to the total value of Pedestrian's damages. The parties are scheduled for a jury trial on the issues of both Driver's and Pedestrian's negligence.

Pedestrian plans to call Witness to testify at trial. Witness did not see the collision occur. However, Witness will testify that he walked past Pedestrian no more than five seconds before the collision, at which time Witness saw that Pedestrian was deeply engrossed in a cell phone conversation. Witness will also testify that he saw Driver's distinctive sports car as it approached the intersection in which Pedestrian was hit. Witness, who has no specialized training, experience, or education, will also offer the opinion that the car was speeding just prior to the collision because it was traveling noticeably faster than the cars near it, all of which appeared to be traveling at the same slower speed.

Pedestrian plans to call her Spouse to testify that Pedestrian is very cautious and risk-averse.

Pedestrian also plans to testify at trial. She will not deny having been on the cell phone when Witness walked by, but will claim to have lowered the cell phone and looked for traffic just prior to entering the intersection. In fact, Pedestrian intends to testify that she has used a cell phone for many years, that she talks on it while walking almost every day, and that she invariably ends a call or lowers the cell phone when preparing to cross a street in order to look both ways before entering the intersection.

Driver intends to undermine Pedestrian's credibility by introducing evidence of her memory loss. Pedestrian counters that if the jury hears about some of Pedestrian's injuries, then it must hear about all of them, and so Pedestrian seeks to introduce evidence on the full nature and extent of her other injuries.

At the final pretrial motion hearing, Driver's counsel argued that the court should grant these four motions *in limine*:

(1) to exclude Witness's opinion that Driver was speeding;
(2) to exclude Spouse's testimony;
(3) to exclude evidence of Pedestrian's cell phone use at any time other than the day of the collision;
(4) to admit evidence of Pedestrian's memory loss, but to exclude evidence of Pedestrian's other injuries.

The evidence rules of this jurisdiction are identical to the Federal Rules of Evidence.

How should the court rule on each of these motions? Explain.

Trusts Question

Settlor created a revocable trust naming Bank as trustee. The trust instrument directed Bank, as trustee, to pay all trust income to Settlor and, upon Settlor's death, to distribute all trust assets to "Settlor's surviving children." When Settlor created the trust, he had three living children, Alan, Ben, and Claire.

Settlor died last year. Alan predeceased him. Settlor was survived by three children, Ben, Claire, and Doris (born after Settlor created the trust), and two grandchildren. One of the surviving grandchildren was Claire's child and one was Alan's child. Alan's child was his only heir.

When Settlor created the trust, he funded it with cash. Bank promptly invested the cash in a broad range of stocks and bonds and held this broadly diversified portfolio for just over twenty years. Although the portfolio had by then significantly increased in value, Settlor was dissatisfied with the rate of appreciation. Settlor therefore directed Bank to sell 90% of the trust portfolio and to reinvest the proceeds in the stock of XYZ, a closely held corporation that Settlor believed would substantially appreciate in value.

The investment in XYZ appreciated more than 50% during the first two years after Bank purchased the stock. However, during the five years preceding Settlor's death, the XYZ investment depreciated to about 70% of its initial value. This depreciation was largely due to mismanagement by XYZ's board of directors. Although Settlor was neither a director nor an officer of XYZ, he was fully aware of the management problems. He discussed these problems with Bank and told Bank, "I expect things will turn around soon."

Immediately upon Settlor's death, Bank liquidated the trust's interest in XYZ, thus avoiding further losses from this investment.

One month after Settlor died, Claire wrote to Bank disclaiming all of her interest in the trust.

1. To whom should the trust assets be distributed? Explain.

2. Is Bank liable for losses on the investment in XYZ stock? Explain.

Negotiable Instruments Question

Employee was Lawyer's bookkeeper. Employee's responsibilities included paying Lawyer's bills, receiving payments from Lawyer's clients, posting those payments to the proper client accounts, and depositing checks and cash into Lawyer's business account at Bank. Employee did not have authority to sign or indorse checks on behalf of Lawyer. If a check required a signature or an indorsement, Employee secured Lawyer's signature.

Employee recently disappeared. Shortly thereafter, Lawyer discovered that Employee had been stealing from Lawyer for several weeks. Although the amounts taken or misapplied by Employee were usually quite small, in two cases the amounts were rather substantial.

In one case, Employee entered into an agreement to purchase a car from Dealer, falsely telling Dealer that the car was for Lawyer's business. Employee and Dealer agreed that Employee would pay the $10,000 price by check and that the car would be delivered once the check had cleared.

Employee prepared a check for $10,000 drawn on Lawyer's business account and payable to the order of "Dealer." She included the check among a group of checks that she gave Lawyer to sign. Lawyer, who was pressed for time, signed all the checks without carefully examining them, including the check to Dealer.

Employee delivered the check to Dealer. However, by the time Dealer presented the check for payment, Lawyer had discovered Employee's fraud and instructed Bank to dishonor the check. Bank followed the instruction and dishonored the check, which was then returned to Dealer. The car is still in Dealer's possession.

In the second case, Employee forged Lawyer's signature on the back of a $5,000 check from a third party payable to the order of Lawyer. Employee then cashed the check at Checkco, a check-cashing service. Checkco subsequently obtained payment of the check from the bank on which it was drawn.

Dealer has demanded payment of the $10,000 check from Lawyer.

Lawyer has demanded that Checkco pay him $5,000.

1. Is Lawyer liable to Dealer on the $10,000 check? Explain.

2. Is Checkco liable to Lawyer for $5,000? Explain.

February 2010
Analyses

Secured Transactions Analysis

(Secured Transactions II.G., IV.A.)

Legal Problems:

(1)(a) When a contract provides that title to sold goods will not pass until payment has been made, what rights in the goods do seller and buyer have?

(1)(b) Does a secured party who has a security interest in the debtor's inventory have a security interest in raw materials that the debtor will use to manufacture its products?

(1)(c) What interest does a secured party with a security interest in goods have when the debtor receives goods pursuant to a contract providing that title to the goods does not pass to the debtor until they are paid for?

(1)(d) As between a lender with a security interest in inventory and an unpaid seller of the goods constituting inventory who has delivered the goods to the buyer but retained title to them until they are paid for, who has priority?

(2) Does a secured party with a security interest in a debtor's inventory have a security interest in goods that the debtor has contracted to buy but in which the debtor has no rights?

DISCUSSION

Summary

Copperco's interest in the copper sheet that has been delivered to Kitchenware is "limited in effect to a reservation of a security interest." UCC § 1-201(b)(35). Thus, Kitchenware is the owner of that copper sheet and Copperco has a security interest in it. The delivered copper sheet became part of Kitchenware's inventory and thus, Bank's security interest attached to it and was perfected. Copperco's security interest in the copper sheet is unperfected. As a result, Bank's security interest in the delivered copper sheet has priority over Copperco's security interest.

With respect to the second installment of copper sheet, the security agreement with Bank will create an enforceable security interest in that sheet only if Kitchenware "has rights in" the sheet. Because, under the Copperco-Kitchenware contract, Kitchenware has no rights in the second installment of copper sheet, Bank's security interest did not attach to that installment and only Copperco has an interest in it.

Point One(a) (30%)

Copperco's reservation of title to the delivered goods is ineffective except as retention of a security interest; Copperco's security interest is unperfected.

The sales contract between Copperco and Kitchenware provided that Copperco would retain title to the copper sheet until it received full payment for it. Under the Uniform Commercial Code, such "retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under Section 2-401 is limited in effect to a reservation of a 'security interest.'" UCC § 1-201(b)(35). *See also* UCC § 2-401(1). Thus, Kitchenware owns the copper sheet, and Copperco has a security interest in it. Copperco has neither retained possession of the copper sheet nor filed a financing statement with respect to it, so Copperco's security interest is unperfected. *See* UCC § 9-308 *et seq.*

[NOTE: An applicant might note that Copperco's security interest is a purchase-money security interest. This statement is correct, but it does not change the analysis because only a purchase-money security interest *in consumer goods* is perfected without filing or possession by the secured party.]

Point One(b) (10%)
The copper sheet constitutes inventory, so it is covered by Bank's security interest.

Bank has a security interest in Kitchenware's "inventory." The copper sheet is inventory of Kitchenware because it constitutes "raw materials, work in process, or materials used or consumed" in Kitchenware's business. UCC § 9-102(a)(48)(D).

Point One(c) (20%)
Bank has a perfected security interest in the delivered copper sheet.

As noted in Point One(a) above, once the copper sheet was delivered to Kitchenware, Kitchenware became the owner of the sheet even though the contract provided that Copperco retained title. At that point, Kitchenware had rights in the delivered copper sheet, and Bank's security interest in inventory attached to it. *See* UCC § 9-203(b) (security interest attaches when value is given, security agreement has been signed, and debtor has rights in the collateral), § 9-204(a) (security interest may attach to after-acquired collateral). Bank filed a financing statement with respect to its security interest, so its security interest in the copper sheet is perfected. *See* UCC § 9-308 *et seq.*

Point One(d) (20%)
Bank's perfected security interest in the delivered copper sheet is superior to Copperco's unperfected security interest.

As noted above, Bank and Copperco both have security interests in the delivered copper sheet. Bank's security interest in the copper sheet was perfected by filing. Copperco's interest, on the other hand, was not perfected at all. As between the perfected and an unperfected security interests, Bank's perfected interest has priority. UCC § 9-322(a)(2).

Point Two (20%)
Because Kitchenware did not have rights in the undelivered copper sheet, Bank's security interest in it did not attach.

One of the elements of an enforceable and attached security interest is that the debtor have "rights in the collateral." *See* UCC § 9-203(b)(2). Thus, Bank has a security interest in the

undelivered copper only if Kitchenware has rights in it. Under the terms of the contract between Copperco and Kitchenware, Kitchenware obtained no rights (even rights that are short of title) in the undelivered copper (and UCC § 2-401 does not limit Copperco's rights to a security interest because the goods were neither shipped nor delivered to Kitchenware). Thus, Kitchenware had no interest in the copper sheet. Accordingly, Bank's security interest did not attach to the undelivered copper sheet. Thus, as between Copperco and Bank, only Copperco has an interest in the undelivered copper sheet.

[NOTE: An applicant might argue that Kitchenware had some rights in the undelivered copper sheet because, when the copper sheet was identified to the contract by Copperco (when Copperco designated it for delivery to Kitchenware), this gave Kitchenware a "special property" in the copper sheet, *see* UCC § 2-501, and Bank's security interest could attach to that set of rights in the sheet. *See* UCC § 9-203(b)(2), cmt. 6 (limited rights in collateral are sufficient for attachment even if the rights are less than full ownership). However, that "special property" would not give Kitchenware (or Bank) any right to claim the goods from Copperco in the absence of payment of the contract price. *See* UCC §§ 2-502, 2-511. Moreover, Article 9 states expressly that a seller with a security interest created by retention of title under § 2-401 "has priority over a conflicting security interest created by the debtor" in any case where the debtor has not yet obtained possession of the goods. UCC § 9-110(4). Here, Copperco has at least a security interest in the goods under § 2-401 (*see* Point One(a), above). Because the goods were never in Kitchenware's possession, Copperco's security interest will be superior to Bank's interest, which was created by the debtor, Kitchenware. *See* UCC § 9-110. An applicant who makes these points should receive some credit.]

Real Property Analysis

(Real Property II.B.; V.B., D.1)

Legal Problems:

(1) Did Bob take the land subject to a power-line easement when the easement was not recorded but the power lines were visible?

(2) Did Bob take the land subject to a gas-line easement when the easement was not recorded and the gas line was not visible but Bob had actual knowledge of the gas-line easement?

(3) If Bob took the land subject to the power-line easement, may he obtain damages from Owen based on the Owen-to-Abe warranty deed's covenant against encumbrances?

DISCUSSION

Summary

Under the state recording statute, a subsequent purchaser for value takes the purchased property free of prior unrecorded interests unless the purchaser has actual or inquiry notice of those interests. Both Abe and Bob had inquiry notice of the power-line easement, as the power lines were clearly visible. Had they looked, they would have discovered the power lines and been aware that they should make further inquiry regarding the possibility of an existing easement. Thus, Abe and Bob were on notice of any interest the electric company actually had that they could have ascertained by asking the electric company, and they take subject to that interest.

Abe had no notice of the underground gas-line easement, since it was not visible and it was not on the record. Thus Abe took the property free and clear of the gas-line easement. While Bob had actual knowledge of the gas-line easement, because of the shelter doctrine, Bob takes the land free of that easement. Because Bob is a remote grantee, he cannot recover damages from Owen for the power-line easement based on the covenant against encumbrances in the Owen-to-Abe deed.

Point One (40%)

Both Abe and Bob acquired the land subject to the unrecorded power-line easement. Because the power lines were visible, Abe and Bob were on inquiry notice of the easement.

In this state, a "conveyance of real property is not valid against any subsequent purchaser who, without notice, purchases said real property in good faith and for valuable consideration." Notice may be actual, constructive, or inquiry. JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW § 24.04[D] (2d ed. 2007). Constructive notice comes from information that is on the public land records; inquiry notice arises from facts discernible through visual inspection of the premises or the applicable recorded instruments. *Id.* § 24.06. Some jurisdictions and authors equate constructive and inquiry notice.

Here, because Abe paid Owen for the land, he is a subsequent purchaser for value. Abe did not have actual notice of the power-line easement and, because that easement was never

recorded, he did not have constructive notice of it based on the recorded instruments. However, because the power lines were discernible from visual inspection, Abe had inquiry notice of the power-line easement. Therefore, under the relevant statute, Abe took subject to the power-line easement. *See* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 11.10, at 882 (3d ed. 2000).

The same analysis applies to Bob, who also takes subject to the power-line easement.

Point Two (30%)

Abe did not take the land subject to the unrecorded and invisible gas-line easement because he had no actual, constructive, or inquiry notice of it. While Bob had actual knowledge of the gas-line easement, because of the shelter doctrine, he takes free and clear of that easement.

The gas-line easement was never recorded. Thus neither Abe nor Bob acquired constructive notice of this easement from the land records. Abe had no actual notice of it, either. In contrast to the power-line easement, the gas-line easement was not discernible through visual inspection; the gas lines were underground, and the surface of the land had been restored to its pre-installation condition. Therefore, Abe had no inquiry notice of the gas-line easement. Thus, under the state recording statute, Abe took free of the gas-line easement.

At first blush, it would appear that Bob took the land subject to the gas-line easement because, in contrast to Abe, he had actual notice of it. However, under the "shelter doctrine," when a bona fide purchaser (here, Abe) acquires title free of a prior encumbrance, he can convey that title to a subsequent purchaser (here, Bob) free of that encumbrance. In order to ensure that the bona fide purchaser has an unlimited right to alienate his land in the future, the shelter doctrine applies even when the subsequent purchaser has actual notice of the prior, unrecorded encumbrance. *See* STOEBUCK & WHITMAN, *supra*, § 11.10 at 889.

Point Three (30%)

Bob cannot obtain damages from Owen for breach of the covenant against encumbrances because Bob is a remote grantee. However, some jurisdictions do not follow the common law rule. In those jurisdictions, a remote grantee may sue on the covenant against encumbrances.

Owen conveyed the land to Abe with a full covenant and warranty deed that made no mention of encumbrances. A full-covenant deed includes a covenant against encumbrances, i.e., a warranty that, at the time of conveyance, there are no outstanding third-party rights that negate the title the grantor purports to convey. That covenant is inconsistent with the fact that Abe and later Bob took subject to the power-line easement. (*See* Point One.) Abe clearly had a cause of action against Owen for breach of the covenant against encumbrances. The issue is whether Bob may also sue Owen.

Under the common law, the covenant against encumbrances is a "present covenant," breached, if at all, if there is an encumbrance at the time of the conveyance to Abe. Furthermore, the covenant does not run with the land. Therefore, it cannot benefit a remote grantee like Bob. *See* STOEBUCK & WHITMAN, *supra*, § 11.13 at 911; HERBERT HOVENKAMP & SHELDON F. KURTZ, THE LAW OF PROPERTY 617 (5th ed. 2001).

Some jurisdictions do not follow the common law rule. *See, e.g., In re Estate of Hanlin*, 133 N.W. 140 (Wis. 1907). In those jurisdictions, a remote grantee may sue on the covenant against encumbrances. *See* UNIFORM LAND TRANSACTIONS ACT § 2-312. Even in those jurisdictions, a remote grantee with notice of the easement may not sue on the theory that with

such notice the grantee (1) never relied on the covenant or (2) bargained for a reduction in the purchase price to take account of the easement. *See Ford v. White*, 172 P.2d 822 (Or. 1946). Courts are divided on whether the covenant against encumbrances is breached when an unrecorded easement is ascertainable through visual inspection. Some courts say yes; others disagree, arguing that the grantee can sue even though the easement is visible because, if the warranty is in the deed, the grantee can reasonably assume that an easement is no longer valid when the grantor makes no exception for it when conveying title.

Family Law Analysis

(Family Law III.D., E., J.)

Legal Problems:

(1) Did Harry's behavior constitute fraud or overreaching sufficient to invalidate the settlement agreement?

(2) Would a divorce obtained on grounds of adultery significantly enhance Wendy's prospects of obtaining a monetary award?

(3)(a) Is Harry's law degree marital property subject to division at divorce?

(3)(b) Can Wendy obtain alimony (spousal support)?

DISCUSSION

Summary

Courts generally will invalidate a settlement agreement resulting from fraud, overreaching, or duress if it results in a settlement that is substantively unfair. Harry's preparation of the agreement, his failure to advise Wendy to seek independent counsel, and his biased account of Wendy's legal rights will likely lead the court to conclude that the agreement should be invalidated if the court also concludes that Wendy should have obtained an award. A divorce obtained on grounds of adultery will not likely give Wendy a significant advantage in obtaining an award. In only about half of the states is fault a factor in alimony determination or property division, and even in those jurisdictions in which fault is relevant, it rarely plays a major role in judicial decision making. Wendy is not entitled to a cash award based on the value of Harry's law license, and the facts do not reveal any other assets that might provide the basis for such an award. Given that state law does not authorize claims for reimbursement alimony, it is unclear whether Wendy can obtain an alimony award.

Point One (30%)

The settlement agreement will be invalidated if the court finds that (1) it was procured by fraud, duress, or overreaching, and (2) it is substantively unfair. A court will likely find that Harry's conduct in drafting and negotiating the agreement satisfies the first part of this test. It is unclear whether the court will conclude that the agreement is substantively unfair to Wendy.

In most states, a settlement agreement resulting from fraud, overreaching, or duress may be set aside if it is substantively unfair. *See* JOHN DEWITT GREGORY, PETER N. SWISHER & SHIRLEY L. WOLF, UNDERSTANDING FAMILY LAW 112 (3d ed. 2005). *See also* UNIF. MARRIAGE AND DIVORCE ACT (UMDA) § 306(b) (written settlement agreement is binding on the court unless unconscionable). A few courts have also held that spouses have fiduciary obligations toward each other that continue, when one spouse is unrepresented by counsel, during the negotiation of a settlement agreement. *See, e.g., Crawford v. Crawford*, 524 N.W.2d 833 (N.D. 1994).

Here, Wendy was unrepresented and Harry, an attorney, failed to advise her to seek independent legal counsel. Although a lack of independent legal counsel will not by itself invalidate a settlement agreement, courts will generally examine the circumstances that led a spouse to forgo counsel or waive marital rights. Harry also advised Wendy that a court would "definitely not" impose any post-marital obligations on him, which is probably untrue. Taken together, these facts suggest fraud and overreaching.

However, if Harry's conduct did not result in an agreement substantively unfair to Wendy, the agreement should not be invalidated. The agreement is not unfair as to Harry's law degree. (*See* Point Three(a).) It might be unfair as to alimony. (*See* Point Three(b).)

[NOTE: Some applicants may state that the court can ignore the settlement agreement because the divorce is not yet final. This is incorrect, and an applicant who resolves the issue in this way should not receive credit.]

Point Two (20%)

Obtaining a divorce on grounds of adultery is unlikely to significantly improve Wendy's prospects of obtaining alimony or a cash award representing her share of marital property.

Even if Wendy is able to obtain a divorce on grounds of adultery, it is unlikely to give her a financial advantage. About a third of the states have eliminated fault-based divorce grounds. In these states, Wendy could not obtain a divorce on grounds of adultery; she could obtain only a no-fault divorce.

Although most states permit consideration of *financial* misconduct, only about half permit consideration of *marital* misconduct, such as adultery, in either property division or alimony determination. Of the group of states that permit consideration of marital misconduct, about half restrict its use to alimony determination. And while a claimant's marital fault was once, in many states, a bar to an alimony award, in virtually all states that today permit consideration of fault in alimony decision making, it is simply one factor among many. *See* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 46–53 (2002) (describing state-by-state survey). Some appellate courts in states that permit consideration of marital misconduct have required trial courts to consider fault only when egregious. *See O'Brien v. O'Brien*, 489 N.E.2d 712, 719 (N.Y. 1985) (fault excluded except in "egregious cases that shock the conscience"); *O'Loughlin v. O'Loughlin*, 458 S.E.2d 323, 326 (Va. Ct. App. 1995) (party's fault relevant to award determination when fault had an economic impact on marriage). Some states have explicitly ruled that adultery is not sufficiently egregious to have an impact on alimony. *See In re Marriage of Sommers*, 792 P.2d 1005, 1009 (Kan. 1990) ("It is difficult to conceive of any circumstances where evidence of marital infidelity would be a proper consideration in the resolution of the financial aspects of a marriage."); *Stevens v. Stevens*, 484 N.Y.S.2d 708 (App. Div. 1985). In other states, there is older case law permitting consideration of adultery or similar misconduct, but virtually no modern cases do so. *See* AM. LAW INST., *supra*. Commentators reviewing the case law have thus concluded that "the current judicial trend in many states today . . . [is] to ignore or severely limit the ultimate effect of fault-based statutory divorce factors except in serious or egregious circumstances." Peter Nash Swisher, *The ALI Principles: A Farewell to Fault—But What Remedy for the Egregious Marital Misconduct of an Abusive Spouse?*, 8 DUKE J. GENDER L. & POL'Y 213, 227 (2001).

Thus, in most states, proving Harry's adultery is unlikely to significantly enhance Wendy's prospects of obtaining either a property-distribution or an alimony award. In some states, however, this factor might play a role in the court's decision.

Point Three(a) (10%)
Harry's law degree is not marital property subject to division at divorce, and the facts do not show that there are any other significant assets.

The states, by an overwhelming margin, have rejected the claim that a professional degree or license is property subject to division at divorce; the notable exception is New York. *See* HARRY D. KRAUSE, LINDA D. ELROD, MARSHA GARRISON & J. THOMAS OLDHAM, FAMILY LAW CASES, COMMENTS, AND QUESTIONS 788 (6th ed. 2007). *See also O'Brien v. O'Brien*, 489 N.E.2d 712 (N.Y. 1985). Wendy thus has no property interest in Harry's degree, and a court could not grant her a cash award in compensation for such an interest. The facts also fail to reveal any other assets that could be classified as marital property. Thus, a cash award to Wendy representing a share of marital property would be inappropriate.

Point Three(b) (40%)
It is not clear whether Wendy will receive alimony.

If the court invalidates the settlement agreement, Wendy could seek an alimony award. But permanent or long-term alimony is seldom awarded except in the case of a long marriage and a significant, long-term gap between the husband's and wife's economic prospects. *See* GREGORY ET AL., *supra*, at 307–08, 411. It is virtually certain that Wendy could not obtain such an award, given the short duration of the marriage and the possibility that Wendy could pursue a career that would generate an income equal to or higher than Harry's since Wendy is still young and without children.

In a state, like this one, that does not permit reimbursement alimony, Wendy could seek a short-term, "rehabilitative" alimony award to complete her college education. In some states a spouse must establish that she lacks the capacity for self-support as a precondition to obtaining a rehabilitative award. *See, e.g.*, UMDA § 308(a) (court may not award alimony unless spouse (1) "lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment . . . ."). Wendy has no property, but she is capable of self-support. Under a standard like that of the UMDA, she would be ineligible for alimony unless her employment was not "appropriate." Some courts have thus refused to award alimony to a wife capable of self-support even when she supported her husband's professional education. *See, e.g., McDermott v. McDermott*, 628 P.2d 959 (Ariz. App. 1981) (schoolteacher wife who supported husband through graduate school not eligible for alimony because she could support herself); *Morgan v. Morgan*, 383 N.Y.S.2d 343 (App. Div. 1976) (overturning alimony award to wife who had supported husband's legal education and planned to finish college and go to medical school because she was capable of self-support).

Most of these decisions are old; courts today typically view capacity for self-support as only one factor among many in awarding rehabilitative alimony. Here, Wendy's contributions to the couple's support and to Harry's education and Harry's ability to contribute to Wendy's future support would weigh in her favor. But the process of alimony determination is highly discretionary, and several factors—Wendy's youth, the short duration of the marriage, the fact that the marriage produced no children, Harry's probably modest salary as a public defender—would all weigh against Wendy's claim for rehabilitative alimony. *See* GREGORY ET AL., *supra*, at 312–14.

In sum, Wendy's prospects of obtaining an alimony award are quite uncertain.

[NOTE: Spousal support and spousal maintenance are alternative terms for alimony. An applicant should not be penalized for using one of these terms instead of alimony. The applicant's conclusion should be given less weight than his or her command of the relevant legal principles and use of the facts. A number of jurisdictions now authorize "reimbursement" or "restitutional" alimony to compensate one spouse for significant contributions to the other's education or career. *Id.* at 411–13. Given Wendy's support of Harry during law school, Wendy would have a strong claim to this form of alimony, but it is not authorized in the state where her claim was brought.]

Torts Analysis

(Torts I.A.; II.A., B.1., B.2. & F.1.)

Legal Problems:

(1) What must Penny establish in a battery action against Dennis?

(2) What must Penny establish in a negligence action against Dennis?

(3) What must Penny establish in an action against the Flies based on the team's employment relationship with Dennis?

(4) What must Penny establish in a negligence action against the Flies?

(5) If Penny succeeds in her action against either Dennis or the Flies, can she recover for damages for the neurological harm that resulted from a preexisting condition?

DISCUSSION

Summary

Penny does not have a viable battery action against Dennis because Dennis neither intended, nor knew with substantial certainty, that the ball he hit out of the Park would strike anyone. Penny does not have a viable negligence action against Dennis because there is no reasonable means by which Dennis could have avoided hitting Penny. Because Penny does not have a viable claim against Dennis, she has no viable claim against the Flies based on the team's employment of Dennis even though Dennis was acting within the scope of his employment. However, Penny might have a viable negligence action against the Flies based on the team's failure to attach netting to the fence adjoining Oak Street. The fact that the Flies have conformed to customary standards for minor league baseball fence construction is relevant but not determinative. If the jury finds that the Flies' failure to install netting along the Oak Street fence was negligent, Penny could recover for harm suffered as a result of her adverse reaction to medication even though this harm resulted from a preexisting condition.

Point One (25%)

Dennis did not commit a battery when the ball he hit struck Penny. Therefore Penny does not have a viable battery action against Dennis.

In a battery action, the plaintiff must show that the defendant *intentionally* caused a harmful or offensive bodily contact. A defendant intentionally causes such a contact if he "acts with the desire to bring about that harm" or engages "in action knowing that harm is substantially certain to occur." RESTATEMENT (THIRD) OF TORTS § 1, cmt. d. In this case, Dennis neither desired to bring about a harmful contact between the baseball and Penny nor, in light of his location inside the Park, could he have known that such a contact would or was substantially certain to occur. As a result, Penny does not have a viable battery claim against Dennis.

Point Two (25%)
Dennis was not negligent in hitting the ball that struck Penny over the Oak Street fence. Therefore Penny does not have a viable negligence claim against Dennis.

In a negligence action, the plaintiff must show that the defendant owed the plaintiff a duty to conform his conduct to a standard necessary to avoid an unreasonable risk of harm to others, that the defendant's conduct fell below the applicable standard of care, and that the defendant's conduct was both the cause in fact and the proximate cause of the plaintiff's injuries.

In determining whether Dennis's conduct fell below the standard of care, the jury would measure that conduct against the actions of a reasonable, prudent person engaged in a like activity. A reasonable, prudent person takes appropriate precautions to avoid foreseeable risks; in measuring whether a particular precaution was warranted, the jury weighs the burden of taking such precautions against the gravity of the risk and the likelihood that it will eventuate. *See* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 150–51 (7th ed. 2004); *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

Here the burden of taking the precaution against the risk is high. The only meaningful precautions that Dennis might have taken were not hitting the ball at all or trying to hit it with less than maximum force. Either precaution would generally be inconsistent with Dennis's job as a professional baseball player, which includes the obligation to hit the ball and to hit a home run if possible. For Dennis, the cost of taking precautions could mean the loss of his career.

The gravity of the risk created by his hitting the ball cannot be determined easily. Being hit with an errant baseball could cause harm ranging from minimal bruising to far more serious injury. The likelihood of the harm occurring is low—in 40 years only 30 balls had previously been hit into Oak Street.

Thus Dennis was not negligent in hitting the ball that caused Penny's injury.

Point Three (10%)
Penny does not have a viable claim against the Flies based on the team's employment of Dennis.

An employer is vicariously liable for the tortious actions of his employee that are within the scope of the tortfeasor's employment. *See* RESTATEMENT (SECOND) OF AGENCY §§ 219, 229; RESTATEMENT (THIRD) OF AGENCY § 2.04. In this case, there is no question that Dennis was acting within the scope of his employment; he was a baseball player engaged in hitting a baseball. But Penny does not have a viable tort action against Dennis because Dennis's conduct was not tortious. Therefore, the Flies are not vicariously liable for his conduct.

Point Four (25%)
Penny may have a viable negligence action against the Flies based on the team's failure to attach netting to the Oak Street fence despite the fact that the fence conforms to customary standards within professional baseball.

Just as a jury would measure Dennis's conduct against the actions of a reasonable, prudent person engaged in a like activity, it would measure the Flies' conduct in constructing and maintaining the Oak Street fence against that of a reasonably prudent ballpark owner. And while Dennis had no means of avoiding the injury to Penny other than not hitting the ball, the Flies could have added netting to the Oak Street fence, and that netting would have prevented Penny's injury.

Custom is relevant in a negligence action, but it is not determinative. *See The T.J. Hooper*, 53 F.2d 107 (S.D.N.Y. 1931). Thus, even though the Flies' conduct conformed to the industry standard, Penny may succeed in her negligence action if she can establish that the cost of adding netting to the fence was relatively modest in relation to the risk of injuries from balls exiting the Park onto Oak Street. Given the changed character of the street, the increasing number of balls hit onto the street in recent years, and the widespread adoption of netting in another country, it is possible that Penny may succeed in making such a showing.

Point Five (15%)

Because a tort defendant "takes his victim as he finds him," Penny could recover for harm suffered due to her adverse reaction to medication.

A tort defendant takes his victim as he finds him. The plaintiff with an "eggshell skull" who suffers damage greatly in excess of those that a normal victim would suffer thus is entitled to recover fully for his injuries. *See* Epstein, *supra,* at 476–77. Because Penny's sensitivity to the prescribed medication was a preexisting condition, if Penny succeeds in her lawsuit against the Flies, she could recover for all injuries suffered as a result of that sensitivity.

Corporations Analysis

(Corporations V.A.; VI.A.; IX.)

Legal Problems:

(1) Does Smith have a right to inspect Omega's corporate books and records to determine whether $35 per share is a fair price for his shares?

(2) Is Smith required to make a demand on the corporation prior to bringing a suit to compel a dividend?

(3) Is a suit to compel the payment of a dividend likely to be successful?

DISCUSSION

Summary

Smith has a right to inspect corporate books and records to determine the value of his shares because this purpose is reasonably related to Smith's interest as a shareholder. Smith is not required to make a demand upon the corporation prior to bringing a suit to compel the payment of a dividend because such a suit attempts to vindicate an individual right of Smith as a shareholder. It is not a suit by Smith as a representative of Omega to vindicate a corporate right. However, a suit to compel the payment of a dividend is unlikely to be successful because, even if funds are legally available to pay dividends, Smith can compel the payment of a dividend only by showing that the decision to withhold dividends was made in bad faith.

Point One (25%)

As a shareholder, Smith has a right to inspect corporate books and records for a proper purpose. Determining the value of Smith's shares for purpose of sale is a proper purpose.

A shareholder has a right to inspect corporate books and records for a proper purpose. MODEL BUSINESS CORP. ACT (MBCA) § 16.02(b) & (c) (1984); DEL. GEN. CORP. § 220(b). A proper purpose is a purpose reasonably related to a person's interest as a shareholder. DEL. GEN. CORP. § 220(b). The determination of the value of one's own shares for purposes of sale is a proper purpose. *CM & M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982); *Matter of Smilkstein v. J. Smilkstein & Sons, Inc.*, 223 N.Y.S.2d 561, 563 (N.Y. Sup. Ct. 1961). The fact that Smith has not definitely decided to sell does not prevent the valuation from being a proper purpose. *CM & M Group, Inc.*, 453 A.2d at 792–93 (involving shares in a closely held corporation); *Macklowe v. Planet Hollywood, Inc.*, 1994 WL 560804 (Del. Ch., Sept. 29, 1994) (involving shares in a closely held corporation; no present intention to sell or concrete steps to sell shares required in order for valuation of shares to be a proper purpose).

In contrast to a publicly traded corporation, a closely held corporation has no market that continuously values its shares. The fact that Omega is a closely held corporation reinforces the conclusion that valuing the shares is a proper purpose for inspection. Thus, "[w]hen a minority shareholder in a closely held corporation whose stock is not publicly traded needs to value his or

her shares in order to decide whether to sell them, normally the only way to accomplish that is by examining the appropriate corporate books and records." *Macklowe*, 1994 WL 560804 at *4.

In sum, Smith has a right to inspect Omega's corporate books and records because this purpose is reasonably related to Smith's interest as a shareholder.

[NOTE: An applicant might receive extra credit for recognizing that in order to exercise his inspection rights, Smith must comply with procedural requirements, which generally include making a written demand for inspection and allowing the corporation a certain length of time (typically five days) to respond.]

Point Two (30%)

A suit to compel the payment of a dividend is a suit seeking to enforce an individual right of the shareholder and not a suit in a representative capacity seeking to enforce a right of the corporation. Therefore, no demand on the corporation is required prior to bringing suit.

A shareholder is generally required to make a demand on the corporation to take remedial action prior to bringing a derivative suit. *See* MBCA § 7.42 (requiring a demand in all cases); Del. Chancery Court Rule 23.1 (requiring complaint to allege demand or reason for failure to make demand). However, a shareholder is not required to make a demand on the corporation prior to bringing suit where the shareholder brings a suit in his or her individual capacity to enforce an individual right of the shareholder. The important question, then, is whether a suit to compel the payment of a dividend is a suit to enforce a right of the corporation or, conversely, a suit to enforce an individual right of the shareholder.

A suit to compel the payment of a dividend is not a suit to enforce a right of the corporation. It is a suit to enforce a right of the individual shareholder, that is, the shareholder's right to share in the net profits of the corporation. *Doherty v. Mutual Warehouse Co.*, 245 F.2d 609, 612 (5th Cir. 1957); *Knapp v. Bankers Securities Corp.*, 230 F.2d 717, 721–22 (3d Cir. 1956) (noting also that the right to dividends is an incident of the ownership of stock). Consequently, there is no requirement that Smith make a demand on the corporation prior to bringing suit to compel the payment of a dividend.

[NOTE: In some jurisdictions, a derivative suit may be appropriate and graders are encouraged to ascertain local law on this issue. If an applicant approaches this issue solely from the perspective of the shareholder bringing a derivative suit, then the grader should also expect some analysis of demand futility. Presumably, Baker and Jones, having made the decision not to pay a dividend, are unlikely to agree to have the corporation sue the directors for failure to declare a dividend.]

Point Three (45%)

The decision as to whether to distribute corporate earnings as dividends or to retain those earnings in order to expand the business is a matter that is generally within the business judgment of the corporate directors. Smith's suit to compel the payment of a dividend is unlikely to be successful because, in order to succeed, Smith would be required to prove that dividends were withheld in bad faith.

While directors have fiduciary duties, the business judgment rule protects them from liability for breach of their fiduciary duties. The business judgment rule is a presumption that in making business decisions, the directors act on an informed basis, in good faith, and in the honest belief that the action being taken is in the best interests of the corporation. *Aronson v.*

Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). The decisions regarding whether to declare a dividend and the amount of any dividend declared are generally matters within the business judgment of the directors. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 682 (Mich. 1919).

To prevail in a suit to compel the payment of a dividend, a shareholder must prove that there are funds legally available for the payment of a dividend and that the directors acted in bad faith in their refusal to pay. *Gay v. Gay's Super Markets, Inc.*, 343 A.2d 577, 580 (Me. 1975); *Zidell v. Zidell, Inc.*, 560 P.2d 1086, 1089 (Or. 1977) (plaintiff must show bad faith, fraud, breach of fiduciary duty, or abuse of discretion on the part of the directors); *Gottfried v. Gottfried*, 73 N.Y.S.2d 692, 695 (N.Y. Sup. Ct. 1947). "The essential test of bad faith is to determine whether the policy of the directors is dictated by their personal interests rather than the corporate welfare." *Gottfried*, 73 N.Y.S.2d at 695.

Usually the plaintiff-shareholder will attempt to prove bad faith by establishing various "earmarks of bad faith." These earmarks include "[i]ntense hostility of the controlling faction against the minority; exclusion of the minority from employment by the corporation; high salaries, or bonuses or corporate loans made to the officers in control; the fact that the majority group may be subject to high personal income taxes if substantial dividends are paid; [and] the existence of a desire by the controlling directors to acquire the minority stock interests as cheaply as possible." *Id.* Here, there may be several earmarks of bad faith. Baker and Jones seemed hostile toward Smith, telling him to "go away and let us run the show." They refused to disclose their salaries. Further, it could be argued that Baker and Jones were trying to acquire Smith's shares as cheaply as possible. The facts do not establish whether $35 per share is a fair price.

The earmarks "are not, however, invariably signs of improper behavior by the majority." *Zidell*, 560 P.2d at 1089. If these earmarks are not the "motivating causes" of the board's dividend decision, they do not constitute bad faith. *Gottfried*, 73 N.Y.S.2d at 695. In a number of cases, courts have recognized that a good-faith decision to retain corporate earnings for business expansion is an appropriate exercise of business judgment. *Gay*, 343 A.2d at 580; *Gottfried*, 73 N.Y.S.2d at 700–01. In judging the decision of the board of a closely held corporation, a court may also consider that "[d]irectors of a closely held, small corporation must bear in mind the relatively limited access of such an enterprise to capital markets." *Gay*, 343 A.2d at 582.

In sum, a suit to compel the payment of a dividend is unlikely to be successful because, even if funds are legally available to pay dividends, Smith could succeed only by showing that the decision to withhold dividends was made in bad faith or, in other words, was dictated by the personal interests of the directors rather than the corporate welfare. It is unlikely that he can do this when a proper motive for withholding the payment of dividends exists, as it does here.

Federal Civil Procedure Analysis

(Federal Civil Procedure I.A.1.; IV.C.)

Legal Problems:

(1) Does a federal district court have diversity jurisdiction over an action between a plaintiff domiciled in one state and three defendants who are domiciled in another state when one of the defendants is a permanent resident alien and not a U.S. citizen?

(2) Does a federal district court have diversity jurisdiction over a case that arises out of a surrogacy agreement but does not seek a divorce, alimony, or child custody decree?

(3) Do the Federal Rules of Civil Procedure permit a plaintiff to join three defendants in a single action when her claims against the defendants, although based on different contracts, all seek recovery for expenses generated by a single occurrence?

DISCUSSION

Summary

The federal district court has jurisdiction to adjudicate Surrogate's claims against the defendants because there is complete diversity among all of the parties and the amount-in-controversy requirement is met. The domestic relations exception to diversity jurisdiction is not implicated by these facts because Surrogate does not seek a divorce, alimony, or child custody decree, and a state court already has determined legal parentage. Surrogate properly joined all three defendants in a single action because her claims against them arise out of the same transaction or occurrence (the birth and hospitalization of the baby) and involve a common question of law or fact.

Point One (35%)

The federal district court has diversity jurisdiction to hear these breach-of-contract claims because complete diversity of citizenship exists between the plaintiff and all of the defendants, and the amount-in-controversy requirement is met.

Surrogate is suing Insureco for breaching the terms of the insurance policy, in which it agreed to insure Surrogate and her dependent children. She is suing Husband and Wife for breaching the surrogacy agreement, in which they agreed to assume full financial and legal responsibility for any child resulting from the implantation of their embryo. These claims arise under state contract law and do not raise any federal questions. Therefore, federal court jurisdiction is proper only if the case satisfies the requirements of 28 U.S.C. § 1332, the diversity statute.

Section 1332 grants federal district courts original jurisdiction of all civil actions with an amount in controversy in excess of $75,000 if the plaintiff and defendant are "citizens of different States." 28 U.S.C. § 1332(a). In addition, the "diversity" between the parties on either

side of the case must be "complete." *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806). In other words, no plaintiff may be a citizen of the same state as any of the defendants. *See* 13E CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3605 (2009).

On these facts, there is complete diversity. Plaintiff Surrogate is deemed to be a citizen of State B because she is domiciled there. *Id.* § 3611 at 464–65. Defendant Husband, similarly, is a citizen of State A, where he is domiciled. Surrogate and Husband are diverse.

Surrogate is also diverse from Insureco. Under the diversity statute, "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ." 28 U.S.C. § 1332(c)(1). *See also* 13F WRIGHT ET AL., *supra*, §§ 3623–3624. Thus, Insureco is a citizen of both State A and State C and is therefore diverse from Surrogate, a State B citizen.

Even though Wife is not a U.S. citizen, § 1332 provides that "an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled." 28 U.S.C. § 1332(a). Since Wife has been admitted for permanent residence, she is deemed to be a citizen of State A, where she is domiciled. 13E WRIGHT ET AL., *supra*, § 3604 & n. 14. Thus, she is also diverse from Surrogate.

Because the plaintiff, Surrogate, is a citizen of only State B and none of the defendants is a citizen of State B, complete diversity exists.

Surrogate alleges that each defendant is obliged by contract to pay the $500,000 hospital bill. She seeks a court order compelling payment of that bill. She thus raises a claim against each defendant that exceeds the $75,000 amount-in-controversy threshold. *See* JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 49–50 (4th ed. 2005) (in cases where plaintiff seeks equitable relief, the amount in controversy is the value to the plaintiff of what is sought to be obtained); *Burns v. Massachusetts Mut. Life Ins. Co.*, 820 F.2d 246, 248 (8th Cir. 1987).

Point Two (30%)

Under the domestic relations exception, federal courts do not have authority to issue divorce, alimony, and child custody decrees. Here, the district court would retain jurisdiction to adjudicate the plaintiff's claims, because they raise contractual questions.

The federal courts have long declined to exercise jurisdiction over domestic relations issues. More than a century ago, the Supreme Court of the United States announced that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593–94 (1890). Although the domestic relations exception is not grounded in the Constitution, the Supreme Court has concluded that such a long-established exception to diversity jurisdiction should be retained, absent a Congressional decision to repudiate it. *See Ankenbrandt v. Richards*, 504 U.S. 689, 695, 700–01 (1992) (stating that "[w]ith respect to such a longstanding and well-known construction of the diversity statute, and where Congress made substantive changes to the statute in other respects, we presume, absent any indication that Congress intended to alter this exception, that Congress 'adopt[ed] that interpretation' when it reenacted the diversity statute," quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (internal citations and footnote omitted)).

Nonetheless, the mere fact that a case involves domestic relations (as the current problem arguably does) does not mean that there is no diversity jurisdiction over that case. According to one leading treatise, the domestic relations exception applies only to cases that are primarily marital disputes. *See* 13E WRIGHT ET AL., *supra*, § 3609. This conclusion was reinforced in

Ankenbrandt, in which the Supreme Court limited the scope of the domestic relations exception, stating that it "encompasses only cases involving the issuance of a divorce, alimony, or child custody decree." 504 U.S. at 704. There, the Court held that a federal district court had diversity jurisdiction to adjudicate a tort claim brought by the mother of two children on their behalf against their father and his companion, alleging sexual and physical abuse, because the suit did not seek a divorce, alimony, or child custody decree. *Id. See generally* CHEMERINSKY, FEDERAL JURISDICTION § 5.3, at 302–03 (4th ed. 2003); 13E WRIGHT ET AL., *supra*, §§ 3609 & 3609.1.

On the facts of this question, the domestic relations exception does not apply. No one is seeking a divorce or alimony decree. And there is no dispute over custody of the baby. To the contrary, Husband and Wife already have obtained a state court declaration that they are the baby's parents and are entitled to sole custody; Surrogate's suit does not seek to alter that judicial custody determination. All Surrogate seeks is specific performance of Husband and Wife's contractual obligation to assume financial responsibility for the baby.

Finally, while Surrogate's claim against Insureco raises the issue of whether the baby is Surrogate's "natural child" within the meaning of the insurance policy, any determination of that issue would affect only Insureco's financial responsibility to cover the baby's hospital bills. Resolution of the issue would not affect the custody of the child.

Therefore, this case does not appear to fall within the domestic relations exception, and the district court should exercise its diversity jurisdiction and adjudicate Surrogate's claims. *See Mid-South Ins. Co. v. Doe*, 274 F. Supp. 2d 757 (D.S.C. 2003). As the Supreme Court held long ago, a federal court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821), *cited with approval in Marshall v. Marshall*, 547 U.S. 293, 298–99 (2006) (rejecting a broad interpretation of the probate exception to federal jurisdiction and requiring lower courts to exercise jurisdiction).

Point Three (35%)

Surrogate properly joined Husband, Wife, and Insureco as defendants because her claims against each of them arose out of the same transaction, occurrence, or series of transactions or occurrences and involve questions of law or fact common to all defendants.

The Federal Rules of Civil Procedure embody a liberal and flexible joinder policy. Rule 20(a), which governs permissive joinder of parties, permits the plaintiff to join multiple defendants whenever two conditions are met: (1) "any right to relief is asserted against [the defendants] jointly, severally, or in the alternative, with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences" and (2) "any question of law or fact common to all defendants [will] arise in the action." FED. R. CIV. P. 20(a). *See generally* 7 WRIGHT ET AL., *supra*, § 1651 *et seq*. Both of these conditions must be satisfied. *Id.* § 1653, at 403–04. Rule 20 is designed to "promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits." *Id.* § 1652, at 395 (footnotes omitted). The Rule 20 requirements should be read as broadly as possible whenever doing so is likely to promote judicial economy. *Id.* § 1653, at 415.

In determining whether claims against the three defendants arise out of the same transaction or occurrence, courts often employ the logical-relationship test, under which "all logically related events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence." *Id.* § 1653, at 409 (footnote omitted). Emphasizing the liberality and flexibility of this standard, one leading treatise notes that "courts

are inclined to find that claims arise out of the same transaction or occurrence when the likelihood of overlapping proof and duplication in testimony indicates that separate trials would result in delay, inconvenience, and added expense to the parties and to the court." *Id.* § 1653, at 411–12. The inclusion of the language "in the alternative" was specifically intended to permit a plaintiff to join multiple defendants when she or he "is entitled to relief from someone, but the plaintiff does not know which of two or more defendants is liable under the circumstances set forth in the complaint." *Id.* § 1654, at 418–19.

Here, Surrogate's claims against all three defendants arise out of the same event—the baby's birth and hospitalization. In addition, certain factual questions will be common to both claims, including the circumstances of the birth and the terms of the surrogacy agreement between Surrogate and Husband and Wife, which are facts important both to Surrogate's claim against Husband and Wife and to Insureco's defense that the baby is not Surrogate's "natural child." Thus, joinder is appropriate in this case.

[NOTE: An applicant who demonstrates knowledge of the joinder rule and the ability to apply the rule to the facts of the problem in a sensible way should receive some credit, even if the applicant concludes that joinder is improper in this case. However, an applicant who concludes that joinder is improper should also note that dismissal of the action is not an appropriate remedy for improper joinder. The appropriate remedy is to sever the claims and allow Surrogate to proceed separately against the defendants. FED. R. CIV. P. 21.]

Evidence Analysis

(Evidence I.A.4.; II.A., C.1. & 3.)

Legal Problems:

(1) Should the court exclude Witness's opinion that Driver was speeding?

(2) Should the court exclude Spouse's testimony as to Pedestrian's character for being cautious and risk-averse?

(3) Should the court exclude evidence of Pedestrian's habit of lowering her cell phone or ending a call when crossing a street?

(4)(a) Should the court admit evidence of Pedestrian's memory loss?

(4)(b) If the court does admit evidence of Pedestrian's memory loss, should it then also admit the evidence of Pedestrian's other injuries?

DISCUSSION

Summary

Witness's proffered testimony that Driver was speeding is relevant to the issues of Driver's negligence and causation. Although it is an opinion, it is admissible because non-experts may offer opinions on relevant, non-technical issues, rationally based on their personal perceptions.

The court should exclude Spouse's testimony that Pedestrian is cautious and risk-averse. Evidence of character traits is not admissible to prove action in conformity with those character traits in civil cases.

Pedestrian's testimony that she always lowers her cell phone and checks for traffic before entering intersections is admissible evidence of a habit and may be offered to prove that she acted in conformity with that habit on the day in question.

Proof of Pedestrian's concussion and memory loss is relevant and admissible to show that Pedestrian is not a reliable witness and that the facts to which Pedestrian is testifying are therefore "less probable" than they would otherwise be.

However, even if the court admits evidence of Pedestrian's concussion, it should not admit evidence of her other injuries. Because the parties have stipulated the extent of injury and the resulting damages, evidence of those injuries is irrelevant and likely to unfairly prejudice the jury.

Point One (20%)

The court should allow Witness to offer an opinion on the speed of Driver's car.

To be admissible, evidence must be relevant. FED. R. EVID. 402. Relevant evidence is any evidence that tends "to make the existence" of a "fact that is of consequence to the determination

of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Witness's testimony is relevant to the determination of the action because the fact that Driver was speeding, if true, would make it more likely that Driver was acting negligently and was the cause of the accident. Under Rule 403, relevant evidence can be excluded under certain circumstances, but there are no facts in this question to suggest an appropriate ground for exclusion under this rule. *See* FED. R. EVID. 403 (relevant evidence may be excluded if it is unduly prejudicial, confusing, cumulative, a waste of time, or a source of undue delay in the proceedings).

However, Witness's testimony is in the form of an opinion. Rule 701 places restrictions on non-expert opinion evidence. A witness who is not testifying as an expert may offer an opinion only if

(a) the opinion is "rationally based on the [witness's] perception" of what happened;

(b) the opinion helps determine "a fact in issue"; and

(c) the opinion is "not based on scientific, technical, or other specialized knowledge" that is governed by Rule 702.

FED. R. EVID. 701.

In this case, Witness's testimony meets all three requirements. First, Witness saw Driver's car as it approached the intersection and was able to perceive its speed. In addition, Witness was able to observe Driver's speed relative to that of other cars around it, and Witness observed that Driver's car was moving noticeably faster than surrounding cars. These perceptions provide a rational and logical basis for Witness's opinion that the car was speeding.

Second, there is no question that whether Driver was speeding is a fact relevant to Pedestrian's claim. If Driver was speeding, that fact would make it more likely that Driver was driving negligently and that Driver's negligence caused the collision.

Finally, Witness is not an "expert in disguise" who is attempting to sneak in an opinion based on scientific or engineering principles. Witness's opinion that Driver was speeding is a commonsense conclusion based on direct observations. No specialized training, experience, or education is necessary to form a valid opinion on such a basis.

[NOTE: How much weight the jury should give this opinion is an issue for the jury and does not affect admissibility.]

Point Two (25%)

<u>The court should not admit Spouse's testimony regarding Pedestrian's character trait of being cautious and risk-averse.</u>

Spouse's proposed testimony that Pedestrian is very cautious and risk-averse is testimony about Pedestrian's character. The purpose of offering the testimony is to suggest that Pedestrian would have acted consistently with that character on the day in question and would have checked before entering the intersection. If true, that would tend to establish that Pedestrian was not negligent. The evidence is therefore relevant.

However, Federal Rule of Evidence 404(a) restricts the use of character evidence, even when such evidence is relevant. Rule 404(a) provides that "evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion," except in three situations that apply exclusively to criminal trials. Here, Spouse's testimony that Pedestrian generally is cautious and risk-averse is relevant precisely because it suggests that on the day of the collision Pedestrian was acting in a cautious and risk-averse manner. This is exactly what Rule 404(a) forbids, and the testimony is inadmissible.

Point Three (25%)
The court should admit Pedestrian's testimony about Pedestrian's cell phone usage habits.

Habit evidence is admissible to prove that a person acted in conformity with that habit. FED. R. EVID. 406. This is true even if the only evidence of a habit is Pedestrian's own testimony. Rule 406 specifically authorizes the use of habit evidence "whether corroborated or not and regardless of the presence of eyewitnesses." Pedestrian's testimony will provide sufficient background information to establish that she actually has a habit of lowering her cell phone and looking both ways when crossing a street. Pedestrian claims to have acted in conformity with this habit when entering the intersection, which is relevant to Pedestrian's defense against Driver's claim that Pedestrian was contributorily negligent. Therefore, this evidence is admissible.

Point Four(a) (15%)
The court should admit the evidence of Pedestrian's memory loss.

Pedestrian's concussion is relevant, albeit indirectly, to determining who is liable for the collision. Pedestrian intends to testify at trial about what happened, but the concussion has erased some of her memory. Evidence of memory loss is relevant because it has a tendency to suggest to the jury that Pedestrian's testimony concerning the events related to the collision is less reliable. The evidence of memory loss may make the facts to which Pedestrian testifies "less probable." FED. R. EVID. 401. Rule 403 is not a basis to deny Driver's motion because it would not be "unfairly prejudicial" to Pedestrian to allow Driver to benefit from Pedestrian's inability to recall what happened. *Cf. Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("[T]he cross-examiner is . . . permitted to delve into the witness'[s] story to test the witness'[s] perceptions and memory . . . .").

Point Four(b) (15%)
The court should exclude the evidence of Pedestrian's other injuries.

Rules 401–403 also establish that evidence of Pedestrian's fractures is not relevant and not admissible. The parties have stipulated to these injuries and have agreed on the value of the compensation due to Pedestrian if Driver is responsible for these injuries. Therefore, the fact that Pedestrian suffered these additional injuries does not, by itself, tend to prove any fact of consequence in dispute that will aid in the determination of who caused the collision. Therefore, such evidence is a "waste of time" under Rule 403. It is also "unfairly prejudicial in the sense that the evidence is unnecessary and might cause the jury improperly to sympathize" with Pedestrian without advancing the factual inquiry at all. *See, e.g., Miller v. New Jersey Transit Authority Rail Operations*, 160 F.R.D. 37, 42 (D.N.J. 1995) (bifurcating damages phase of trial from liability necessary because "the severity of Plaintiff's injuries would prejudice the defendants so severely if issues of liability and damages were not bifurcated that the defendants would not receive a fair trial").

[NOTE: To the extent that Driver's introduction of evidence of Pedestrian's memory loss includes evidence of the severity of Pedestrian's injuries, Pedestrian can argue, and the judge could find, that the parties' stipulation has been violated. If the stipulation is no longer in effect, this could open the door to admission of evidence of Plaintiff's other injuries, subject to Federal Rules of Evidence 401 and 403.]

Trusts Analysis

(Trusts I.C.1., I.1.; II.A., C.; III.B.)

Legal Problems:

(1) Did the class of "Settlor's surviving children" remain open following the creation of the trust so that Doris shares in the gift?

(2) Does the share of Alan, who predeceased Settlor, pass to Alan's child or Settlor's surviving children?

(3) Did Claire effectively disclaim her remainder interest in the trust, and, if so, to whom does her disclaimed interest pass?

(4) Did Bank breach its obligation to invest trust assets prudently by investing, at Settlor's direction and acquiescence, 90% of the portfolio in the stock of a closely held corporation and by maintaining this investment despite the stock's depreciation?

DISCUSSION

Summary

Doris is eligible to take a share of trust assets because the class of "Settlor's surviving children" did not close until Settlor's death. In all states, Ben and Doris would receive a share of the assets as surviving children of Settlor. Alan, who predeceased Settlor, would lose his share as would Claire, because her disclaimer is effective and precludes her from sharing in the estate. In most states Ben and Doris would each take one-half of the trust assets because Claire is deemed to have predeceased Settlor because of the disclaimer. However, in states that have adopted Uniform Probate Code § 2-707 or a like statute, trust assets would be divided into four equal shares, and the children of Alan and Claire would take, by representation, the shares their respective parents would have received. Because Settlor directed the investment in XYZ and acquiesced in its retention by Bank, Bank is probably not liable for losses on that investment.

Point One (20%)

Doris is entitled to share in the trust remainder because the class of "Settlor's surviving children" did not close until Settlor's death.

If a gift is made to a class of persons, such as a named person's children, the class closes (i.e., additional persons may no longer join the class) when the named person dies or the gift becomes possessory. *See* WILLIAM M. MCGOVERN, JR., AND SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES § 10.3 at 429 (3d ed. 2004); RESTATEMENT (THIRD) OF PROPERTY (WILLS AND OTHER DONATIVE TRANSFERS) § 15.1, cmt. e.

Here, Settlor's death closed the class of Settlor's "surviving children" under either test. Thus, all of Settlor's children, including Doris, who was born before the class closed, are eligible to share in the gift.

Point Two (20%)
The share that would have passed to Alan had he survived Settlor passes to Ben and Doris, the surviving members of the class, unless the state has adopted a survivorship rule like Uniform Probate Code § 2-707. If the Uniform Probate Code applies, Alan's share passes to his child.

When a remainderman (such as Alan) predeceases the life tenant, the trust assets are distributed based on the directives contained in the trust instrument. Here the assets pass to Settlor's other "surviving children" (i.e., Ben, Claire, and Doris) as the trust instrument specifically provided that, upon Settlor's death, the trust property should be distributed to Settlor's surviving children. (But see Point Three with respect to Claire's disclaimer of her interest.)

In states that have adopted Uniform Probate Code § 2-707 or a like statute, the outcome is different. Under § 2-707, if a gift is made in trust to a class of persons described as "children," a deceased child's descendants take the deceased child's share by representation. The use of the word "surviving," as here, does not change that result. *See* UNIF. PROBATE CODE § 2-707(b)(3). Thus, if the Uniform Probate Code or a like statute applies, Alan's share would pass to Alan's child.

[NOTE: The following states have enacted a form of Uniform Probate Code § 2-707: Alaska, Arizona, Colorado, Hawaii, Massachusetts, Michigan, North Dakota, New Mexico, and Utah.]

Point Three (30%)
Claire effectively disclaimed her interest in the trust. Under most state laws, her interest goes to those persons to whom it would have passed had she predeceased Settlor. In this case, the interest would pass to Ben and Doris, the remaining members of the class of "Settlor's surviving children." However, in states that have adopted a survivorship rule like Uniform Probate Code § 2-707, Claire's interest would pass to her child.

Almost all states have enacted disclaimer statutes that permit beneficiaries of wills and trusts to disclaim their interests in the estate or trust property. In most states, a disclaimer is not effective unless it is in writing and is made, for a testamentary transfer, within nine months of the decedent's death or, for a future interest in a nontestamentary transfer, within nine months after the future interest would become "indefeasibly vested." *See generally* UNIF. PROBATE CODE § 2-801(b) (1969). Both requirements were met in this case, with the result that Claire's disclaimer is effective. Claire's disclaimer would also be effective under the newest version of the Uniform Probate Code, which permits a disclaimer at any time prior to acceptance of the interest. *See id.* § 2-113.

When the holder of a future interest effectively disclaims that interest, the disclaimant is deemed to have predeceased the life tenant. Thus, Claire is deemed to have predeceased Settlor. *See, e.g., id.* § 2-1106 cmt. example 4(b). Under the common law, Claire's disclaimed share would pass to Ben and Doris, the surviving class members. However, under § 2-707 or a like statute, Claire's child would take Claire's share notwithstanding the express survivorship contingency in the trust instrument. *See id.* § 2-1106 cmt. example 4(b). (*See* Point Two.)

[NOTE: The following states have enacted a form of Uniform Probate Code § 2-707: Alaska, Arizona, Colorado, Hawaii, Massachusetts, Michigan, North Dakota, New Mexico, and Utah.]

Point Four (30%)

Bank may have breached its duties to invest prudently and diversify trust investments. However, whether Bank is liable for these breaches depends upon whether acting pursuant to the directions of the settlor of a revocable trust excuses Bank from its duties to diversify and act prudently.

A trustee is under a duty to "invest and manage trust assets as a prudent investor would." UNIF. PRUDENT INVESTOR ACT § 2. The obligation to invest and manage prudently normally requires the trustee to diversify trust investments. *Id.* § 3. A trustee is also expected to consider the trust's "needs for liquidity . . . and preservation or appreciation of capital." *Id.* § 2(c)(7).

If the trust here had been irrevocable, there is almost no doubt that Bank would be found to have breached its duties. First, by investing 90% of the trust assets in one stock, Bank failed to diversify. Second, Bank failed to preserve trust capital. Bank was aware that XYZ was declining in value and was suspicious of mismanagement by its directors, but Bank nonetheless retained the investment. XYZ was also a closely held stock. Although such an investment is not explicitly proscribed by the Uniform Act, it was disfavored in some earlier versions of the prudent investor rule. The commitment of 90% of trust assets to such an investment thus may have conflicted with the trustee's obligation to preserve liquidity and capital.

While a strong case can be made that Bank acted imprudently, Bank may not be liable because it acted in accordance with Settlor's express direction and continued acquiescence. Acting in accordance with a settlor's directives is inadequate to absolve a trustee from liability when a trust is irrevocable because the trustee's obligations are owed to trust beneficiaries. But when, as here, there were no income beneficiaries other than Settlor and Settlor held the power to revoke the trust, Settlor could be treated as the effective owner, thus absolving Bank of liability to Settlor and all other trust beneficiaries.

Uniform Trust Code § 603 specifically provides that, with respect to a revocable trust, a trustee's duties are "owed exclusively to" the settlor. Moreover, Uniform Prudent Investor Act § 3 provides that a trustee shall diversify trust investments unless the trustee "reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying," and Uniform Prudent Investor Act § 2 directs the trustee to "consider[] the purposes, terms, . . . and other circumstances of the trust" in managing its assets. Under the Restatement of Trusts, the terms of a trust include the "intentions of the settlor manifested in any way that admits of proof." RESTATEMENT (THIRD) OF TRUSTS § 90 (1992 § 227), cmt. b. This approach reflects the view that the settlor of a revocable trust has an interest in trust assets that is the practical equivalent of ownership. In addition, trustees are not generally liable for "consented to" acts and can defend against charges of imprudence by proving a waiver.

Given these principles and the fact that Settlor directed Bank to invest in XYZ and was aware of the situation at XYZ, but told Bank that he expected things would turn around, an argument can be made that Bank is not liable for the imprudent investment in XYZ.

Negotiable Instruments Analysis

(Negotiable Instruments IV.A., B., D.; V.B.)

Legal Problems:

(1)(a) Is Dealer entitled to enforce the $10,000 check against Lawyer?

(1)(b) Does Lawyer have a defense to payment of the check to Dealer?

(1)(c) Is Lawyer's defense of ordinary fraud available against Dealer, the holder of an instrument who received it in exchange for a promise that has not yet been performed?

(2) When a check with a forged indorsement is transferred to a check-cashing service, is the original payee of the check entitled to recover from the check-cashing service when the forgery was committed by an employee to whom the payee had given responsibility for handling the check?

DISCUSSION

Summary

Dealer is a holder of the $10,000 check that was dishonored and can enforce the check against Lawyer. However, Lawyer signed the check only because of Employee's fraud, and Lawyer therefore has a defense to payment that can be asserted against anyone who is not a holder in due course. Dealer is not a holder in due course because Dealer did not give value for the check—Dealer never delivered the car to Employee. Thus, although Dealer can enforce the check, Dealer will be subject to Lawyer's defense of fraud in the inducement.

Checkco is not liable to Lawyer for taking the $5,000 check with the forged indorsement because Employee was entrusted by Lawyer with responsibility for the check and, therefore, for these purposes, Employee's forgery is effective as the indorsement of Lawyer.

[NOTE: Because the facts of this question include the collection of checks by banks, UCC Article 4 (Bank Deposits and Collections), which is not included in the Negotiable Instruments specifications for the MEE, is implicated. However, the issues raised by this question are Article 3 (Negotiable Instruments) issues, and reference to UCC Article 4 is not necessary to resolve them.]

Point One(a) (20%)

Dealer is entitled to enforce the check against Lawyer because Dealer is a holder of the check.

The $10,000 check is payable to the order of Dealer and is in Dealer's possession. Dealer is accordingly a holder of the check, UCC § 1-201(b)(21), and is "a person entitled to enforce" it. UCC § 3-301. Lawyer signed the check as drawer and the check has been dishonored. Therefore Lawyer is obliged to pay the check to a person entitled to enforce it. UCC § 3-414. Consequently, Dealer has a *prima facie* claim to payment from Lawyer.

Point One(b) (25%)
Lawyer has a personal defense of fraud in the inducement.

Lawyer has a defense to payment. Lawyer signed and issued the check because of Employee's fraudulent act of including the check among a group of checks intended to pay Lawyer's ordinary business expenses. Under UCC § 3-305, this fraud is a defense to Lawyer's obligation to pay the check. *See* UCC 3-305(a)(2) & cmt. 2 ("the obligation of a party to pay an instrument" is subject to any defense that would be available to the party in an action to enforce "payment under a simple contract," including defenses of fraud, misrepresentation, and mistake). Dealer, as a person entitled to enforce Lawyer's check, will be subject to this defense unless Dealer is a holder in due course. *See* UCC §§ 3-305(a), 3-305(b) (in general, the right to enforce an instrument is subject to both real and personal defenses, but a holder in due course is subject only to the so-called "real defenses," which do not include ordinary fraud).

[NOTE: Some applicants may erroneously argue that this defense is good even against a holder in due course because there was fraud in the factum—Lawyer did not know what he was signing. But UCC § 3-305(a)(1) allows a fraud defense to be asserted against a holder in due course only if the fraud induced the obligor to sign the instrument without a "reasonable opportunity" to learn its terms. Here Lawyer knew he was signing a check and had an opportunity to learn its terms—he could have read it.]

Point One(c) (25%)
Dealer is not a holder in due course because he did not give value for the check.

A holder in due course is a holder who took the instrument for value, in good faith, and without notice of, *inter alia*, any defenses to it. UCC § 3-302(a). Although Dealer does not appear to have acted in bad faith or to have had notice of Lawyer's defense, Dealer has not given "value" for the instrument within the meaning given to that term in Article 3 of the UCC.

Here Dealer took the negotiable instrument (the check) as payment for the car. However, Dealer has not delivered the car. When a negotiable instrument "is issued or transferred for a promise of performance," the promisor gives value only "to the extent the promise has been performed." UCC § 3-303(a)(1). Thus, because Dealer did not perform its promise—delivering the car—it did not take the check for value.

Because Dealer did not take the check for value, Dealer is not a holder in due course. Dealer, as a mere holder, is therefore subject to Lawyer's defense. Lawyer does not have to pay $10,000 to Dealer.

Point Two (30%)
Even though Checkco took the stolen check, it is not liable to Lawyer because Lawyer had entrusted responsibility for the check to Employee, and Employee's fraudulent indorsement of the check in Lawyer's name therefore is treated as an effective indorsement.

The check that was transferred to Checkco was originally made payable to the order of Lawyer. While the check appeared to carry Lawyer's indorsement, the indorsement had been forged by Employee. Normally, the forged indorsement would be ineffective, Employee would not be a holder of the check or a person entitled to enforce it, and Checkco's action of taking the check by transfer from Employee would be a conversion of that check for which Checkco would

be liable to Lawyer. UCC § 3-420(a). *See also* UCC §§ 1-201(b)(21) (definition of holder), 3-301 (definition of person entitled to enforce).

In this case, however, the result is different. According to the facts, Employee had the authority to process checks and to deposit those checks in Lawyer's business account. This constitutes "responsibility" for those checks. *See* UCC § 3-405(a)(3). Because the fraudulent indorsement of Lawyer's signature on the instrument was perpetrated by Employee, a person to whom Lawyer entrusted "responsibility with respect to the instrument," the indorsement is effective as Lawyer's indorsement. UCC § 3-405. Inasmuch as the indorsement was effective, Employee was a holder of the check and, thus, a person entitled to enforce it. As a result, Checkco did not obtain transfer of the check from a person not entitled to enforce it and, accordingly, Checkco's action did not constitute conversion and Checkco is not liable to Lawyer for the amount of the check.

[NOTE: Lawyer would have a claim to recover some part of the loss from Checkco if Checkco "fail[ed] to exercise ordinary care" in taking the instrument from Employee and that failure contributed to the loss. *See* UCC § 3-405(b). There are no facts in the problem to suggest a lack of care by Checkco, but some applicants may note the possibility that Lawyer could recover some portion of the value of the check from Checkco if Lawyer proved that Checkco failed to exercise ordinary care.]

[NOTE: References to UCC § 1-201 are to the current official text. In states in which former Article 1 is still in effect, citations will be slightly different. There is no difference in substance.]

Applicant Identification

THE MPT

MULTISTATE PERFORMANCE TEST

Acme Resources, Inc. v. Black Hawk et al.

Read the instructions on the back cover.
Do not break the seal until you are told to do so.

NATIONAL CONFERENCE OF BAR EXAMINERS

Acme Resources, Inc. v. Black Hawk et al.

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Peterson, Michaels & Williams
Attorneys at Law
1530 Lakeside Way
Franklin City, Franklin 33033

M E M O R A N D U M

To: Applicant
From: Conrad Williams
Date: July 24, 2007
Re: *Black Hawk et al. v. Acme Resources, Inc.* (Black Eagle Tribal Court);
Acme Resources, Inc. v. Black Hawk et al. (U.S. Dist. Ct. for the Dist. of Franklin)

We represent Robert Black Hawk and seven other members of the Black Eagle Indian Tribe (the Tribe) in an action in Black Eagle Tribal Court (Tribal Court) against Acme Resources, Inc. (Acme). Acme's mining activities, specifically the extraction of coal bed methane, have caused our clients' water wells to begin to run dry. In the Tribal Court action we are seeking damages and an injunction ordering Acme to cease its operations on the Black Eagle Indian Reservation.

The coal bed methane underlies private land on the Reservation owned in fee simple by Patrick Mulroney, who is not a member of the Tribe. While Mulroney owns the surface of the land, the underlying minerals are owned by the Tribe. The Tribe granted Acme the right to extract the methane from under Mulroney's land in exchange for a royalty. At the same time, Mulroney granted Acme the right to use his land to build the infrastructure that is necessary for mining.

In response to our complaint in Tribal Court, Acme filed an answer denying liability and also denying the jurisdiction of the Tribal Court. No further proceedings have occurred in Tribal Court. Instead, Acme filed a separate federal action in U.S. District Court for the District of Franklin seeking both a declaratory judgment that the Tribal Court lacks jurisdiction in this matter and an injunction against prosecution of our Tribal Court action. (See attached complaint.)

I plan to respond to Acme's complaint by filing a motion with the federal court: (1) for summary judgment on the ground that the Tribal Court has jurisdiction; or, in the alternative (2) to stay or dismiss Acme's federal action on the ground that the Tribal Court should be permitted to

consider its jurisdiction over the matter. (See attached draft motion and affidavits of Robert Black Hawk and Jesse Bellingham, Ph.D.)

Please draft the argument sections of the brief in support of both points. Each distinct point in the argument should be preceded by a subject heading that encapsulates the argument it covers and succinctly summarizes the reasons the court should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual statement of an abstract principle. For example, improper: The Police Did Not Have Probable Cause to Arrest Defendant. Proper: The Fact That Defendant Was Walking Alone in a High-Crime Area at Night Without Photo Identification Was Insufficient to Establish Probable Cause for His Arrest.

The argument under each heading should analyze applicable legal authority and state persuasively how the facts and the law support our clients' position. Authority supporting our clients' position should be emphasized, but contrary authority should also generally be cited, addressed, and explained or distinguished. Be sure to address the grounds asserted in Acme's complaint; do not reserve arguments for reply or supplemental briefs. No statement of facts is necessary, but be sure to incorporate the relevant facts into your argument.

Transcript of Interview with Robert Black Hawk

May 18, 2007

Williams: Good afternoon, Mr. Black Hawk. What can I do for you?

Black Hawk: My neighbors and I are at the end of our ropes. We are all members of the Black Eagle Tribe and we are in bad shape. Our wells are running dry.

Williams: Do you know why?

Black Hawk: You bet we do. Two years ago, Acme Resources came onto our Reservation with promises of jobs and riches. Acme wanted to develop a huge coal bed methane field under the Reservation. The easiest access to the field is by way of Patrick Mulroney's land. None of us tribal members wanted it because we had heard of water problems associated with the development of coal bed methane.

Williams: I know that methane is a primary source of natural gas and that coal bed methane is simply methane found underground in coal seams. How does developing coal bed methane affect your water wells?

Black Hawk: Well, I read up on this. Both groundwater and methane flow through fractures in the coal seams—in fact, coal seams are often aquifers. To extract the methane, water is pumped out of the coal seam. As the water pressure decreases, the methane separates from the groundwater and can be piped out. Developing coal bed methane involves extracting huge quantities of groundwater to reduce the water pressure enough to release the methane gas in the coal seam. Since my neighbors and I all farm and ranch on land surrounding Mulroney's place, we were worried about our wells running dry because of the drop in water pressure.

Williams: And your worries came true.

Black Hawk: No kidding. We're running out of water for our livestock and our crops. We're going to go broke because our land just won't support us without water. A geologist who looked at it says that all wells on the Reservation are likely to be affected eventually. We tried to tell the Tribal Council before it voted on the Acme agreement, but the promises of easy money from Acme carried the day. Under the deal, the Tribe is getting a 20 percent royalty on all methane production.

Williams: So you want to see what we can do for you?

Black Hawk: Yes. We really are in a tough spot. Word about the water problem has spread around the Reservation and we believe the vast majority of our fellow tribal members have second thoughts about what the Tribal Council did. We have a Tribal Court and the judge is a fair man. He knows the history of our Tribe and tribal ways. We think that if he and a tribal jury could hear about our problems caused by Acme's extraction of the coal bed methane, we could win.

Williams: Well, I've litigated some in Tribal Court. I know there is no federal statute or treaty addressing the Tribal Court's civil jurisdiction. Your Tribe's constitution and code have some provisions in them about protecting the environment. Maybe that could be a hook for us. I'm somewhat worried about the Tribal Council approving the deal. Can you tell me what your losses have been?

Black Hawk: We neighbors got together with a farm finance guy from Franklin City. He estimates our losses to date to be $1.5 million, and they aren't done yet.

Williams: What about this Patrick Mulroney?

Black Hawk: Well, he's a non-Indian—not a member of our Tribe. Mulroney owns fee land within the Reservation that his family bought from Tribe members about a hundred years ago. Anyway, I'm surprised he went along with the Acme deal because he must be losing his water, too. But he's getting a lot of money from Acme and he's been talking for years about selling and moving somewhere warmer. With the money from the deal, he may not care anymore.

Williams: Okay. Let's get your neighbors in to discuss filing an action in Tribal Court to see what we can do.

Black Hawk: Great. I'll get in touch with everybody and call you.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF FRANKLIN

Acme Resources, Inc.,	)	**Case No. CV 103-07**
Plaintiff,	)	
	)	**COMPLAINT**
v.	)	
	)	
Robert Black Hawk, Stewart Marsh, Irene Martin,	)	
James Davis, Mary Gray, Katherine White Horse,	)	
Lester Stewart, and James Black Hawk,	)	
Defendants.	)	

Plaintiff Acme Resources, Inc., alleges:

1. This action involves the federal question of whether the Black Eagle Tribal Court can exercise jurisdiction over Acme Resources, Inc. (Acme), in an action brought by members of the Black Eagle Indian Tribe arising out of a controversy involving the development of coal bed methane underlying fee land owned by Patrick Mulroney, who is not a member of the Tribe.
2. This court has jurisdiction under 28 U.S.C. § 1331.
3. Defendants are all members of the Black Eagle Indian Tribe and brought an action against Acme in Black Eagle Tribal Court seeking damages and an injunction to stop Acme from developing the coal bed methane underlying Mulroney's land.
4. The Black Eagle Tribal Court lacks jurisdiction over Acme in the tribal court action because Acme is not a member of the Tribe. *Montana v. United States* (U.S. 1981).

Wherefore, Acme Resources, Inc., prays the Court enter judgment:

1. Declaring that the Black Eagle Tribal Court lacks jurisdiction over Acme in the tribal court action;
2. Enjoining the defendants from prosecuting the tribal court action; and,
3. Awarding Acme its costs and any other appropriate relief.

Dated: July 9, 2007

Respectfully submitted,

Frank Johnson
Frank Johnson
Franklin Bar #1012
Counsel for Acme Resources, Inc.

Draft

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF FRANKLIN

Acme Resources, Inc.,	)	**Case No. CV 103-07**
Plaintiff,	)	
	)	**MOTION FOR**
v.	)	**SUMMARY JUDGMENT,**
	)	**OR TO STAY OR**
Robert Black Hawk, Stewart Marsh, Irene Martin,	)	**DISMISS**
James Davis, Mary Gray, Katherine White Horse,	)	
Lester Stewart, and James Black Hawk,	)	
Defendants.	)	

The above-named defendants move the Court as follows:

1. To grant the above-named defendants summary judgment on the ground that there exists no genuine issue of material fact that the Black Eagle Tribal Court has jurisdiction over plaintiff Acme Resources, Inc., and the action pending before it under *Montana v. United States* (U.S. 1981), and that the defendants are entitled to judgment as a matter of law; or, in the alternative,
2. To dismiss or stay this action on the ground that Acme has failed to exhaust its remedies in the Black Eagle Tribal Court as required by *National Farmers Union Ins. Cos. v. Crow Tribe* (U.S. 1985).

This motion is supported by the affidavits of Robert Black Hawk and Jesse Bellingham, the pleadings on file, and a brief filed contemporaneously herewith.

Dated: July ____, 2007

Respectfully submitted,

_____
Conrad Williams
Franklin Bar # 1779
Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF FRANKLIN

Acme Resources, Inc.,	)	**Case No. CV 103-07**
Plaintiff,	)	
	)	**AFFIDAVIT OF**
v.	)	**ROBERT BLACK HAWK**
	)	**IN SUPPORT OF**
Robert Black Hawk, Stewart Marsh, Irene Martin,	)	**DEFENDANTS' MOTION**
James Davis, Mary Gray, Katherine White Horse,	)	**FOR SUMMARY**
Lester Stewart, and James Black Hawk,	)	**JUDGMENT, OR TO**
Defendants.	)	**STAY OR DISMISS**

County of Custer)
) ss:
State of Franklin)

Upon first being duly sworn, Robert Black Hawk says:

1. I am a member of the Black Eagle Tribe, a federally recognized Indian tribe.
2. I farm and ranch a 3,000-acre tract of land on the Black Eagle Reservation.
3. My land abuts land owned in fee simple by Patrick Mulroney. All of Patrick Mulroney's land is within the Black Eagle Reservation. Two years ago, Mulroney granted Acme Resources, Inc., permission to use his land to explore for and develop coal bed methane.
4. The Black Eagle Tribe leased the minerals under Mulroney's land to Acme, and Acme began developing the coal bed methane.
5. Within six months of the commencement of Acme's coal bed methane operation under Mulroney's land, the water wells on my land began to run dry. My neighbors have told me that their wells are also running dry.
6. I cannot economically use my land to grow crops and feed my cattle without water, and there is no other source of water reasonably available to me.

Dated: July 23, 2007

Robert Black Hawk

Robert Black Hawk

Signed before me this 23rd day of July, 2007

Jane Mirren

Jane Mirren
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF FRANKLIN

Acme Resources, Inc.,	)	**Case No. CV 103-07**
Plaintiff,	)	
	)	**AFFIDAVIT OF JESSE**
v.	)	**BELLINGHAM, Ph.D.,**
	)	**IN SUPPORT OF**
Robert Black Hawk, Stewart Marsh, Irene Martin,	)	**DEFENDANTS' MOTION**
James Davis, Mary Gray, Katherine White Horse,	)	**FOR SUMMARY**
Lester Stewart, and James Black Hawk,	)	**JUDGMENT, OR TO**
Defendants.	)	**STAY OR DISMISS**

County of Custer)
) ss:
State of Franklin)

Upon first being duly sworn, Jesse Bellingham says:

1. I am a geologist and have a Ph.D. in geology from the University of Franklin.
2. I was employed by Beta Resources in its mineral exploration department for twenty years before I began my own forensic geology firm, Bellingham Geologic Consulting.
3. I was engaged by the defendants to conduct a study to determine the cause of the water wells running dry on the Black Eagle Reservation and have completed my study.
4. Coal bed methane development requires the extraction of huge quantities of water from the land. Based on my investigation of (a) the records of the water produced from the defendants' land over the last ten years, (b) geological studies of the area, and (c) my knowledge and experience with coal bed methane development, it is my professional opinion that coal bed methane development activity by Acme Resources, Inc., is causing the defendants' wells to run dry.
5. Due to the nature of the groundwater system underlying the Black Eagle Reservation, my professional opinion is that it is likely all wells on the Reservation will run dry over the next five years if Acme's coal bed methane development continues.

Dated: July 23, 2007

Jesse Billingham

Jesse Bellingham, Ph.D.

Signed before me this 23rd day of July, 2007

Jane Mirren

Jane Mirren

Notary Public

LIBRARY

Article IV, Black Eagle Tribal Constitution

Section 1

The land forms part of the soul of the Black Eagle Tribe. The land of the Black Eagle Reservation shall be preserved in a clean and healthful environment for the benefit of the Tribe and future generations. The Tribal Council shall have power to enforce, by appropriate legislation, the provisions of this section.

Black Eagle Tribal Code

§ 23-5 Protection of Reservation Environment

(1) Recognizing that a clean and healthful environment is vital to the economic security of the Black Eagle Tribe, no person shall pollute or otherwise degrade the environment of the Black Eagle Reservation.

(2) Any person harmed by a violation of subsection (1) may bring a civil action in Black Eagle Tribal Court for damages and other appropriate relief against the person responsible for the violation.

AO Architects v. Red Fox et al.

United States Court of Appeals (15th Cir. 2005)

The question in this appeal is whether a tribal court may exercise civil jurisdiction over a nonmember of the tribe in a wrongful death action arising from injuries on nonmember fee land.[1]

The Church of Good Hope, composed of tribal members, owns a parcel of land in fee simple on the Red River Indian Reservation in the State of Columbia. The Church built a meeting hall designed by AO Architects, a firm with offices in Columbia City, Columbia. The Church acted as its own general contractor for the project. AO was not asked to, and did not, supervise the construction. The meeting hall served the Church. However, from time to time the Red River Tribe leased the hall for general tribal meetings in which tribal leaders were elected and other tribe business was conducted.

After a very heavy snowfall in January 2003, the meeting hall's roof collapsed during a general tribal meeting. Five tribe members were killed and many more were injured. The families of those killed brought wrongful death actions in tribal court against AO Architects alleging negligence in the design of the meeting hall roof. Before responding to the complaint filed in tribal court, AO filed a complaint in federal district court claiming that the tribal court did not have jurisdiction over it or the action pending in tribal court. The district court granted a preliminary injunction to AO Architects against further proceedings in the tribal court. The tribe members appealed. For the reasons set forth below, we vacate the preliminary injunction and remand for further proceedings consistent with this opinion.

Standard of Review

Whether a tribal court may exercise civil jurisdiction over a nonmember of the tribe is a federal question. *National Farmers Union Ins. Cos. v. Crow Tribe* (U.S. 1985). We review questions of tribal court jurisdiction and exhaustion of tribal court remedies *de novo*. A district court's order regarding preliminary injunctive relief is reviewed for abuse of discretion.

Governing Law

Analysis of Indian tribal court civil jurisdiction begins with *Montana v. United States* (U.S. 1981). In *Montana*, the United States Supreme Court held that, although the tribe retained power to limit or forbid hunting or fishing by nonmembers on land still owned by or held in trust for the tribe, an Indian tribe could not regulate hunting and fishing by non-Indians on non-Indian-owned fee land within the reservation. In what is often referred to as *Montana*'s "main rule," the Court stated that, absent express

[1] The terms "nonmember fee land" and "non-Indian fee lands" refer to reservation land acquired in fee simple by persons who are not members of the tribe.

authorization by federal statute or treaty, the inherent sovereign powers of an Indian tribe do not, as a general proposition, extend to the activities of nonmembers of the tribe.

The Court acknowledged, however, that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* The Court set out two instances in which tribes could exercise such sovereignty: (1) "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements"; and (2) "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id.*

In *Strate v. A-1 Contractors* (U.S. 1997), the Court held that a tribal court had no jurisdiction to hear a personal injury lawsuit between non-tribal members arising from a car accident that occurred on a state highway running through a reservation. The road upon which the accident took place, although on tribal land, was subject to a right-of-way held by the State of North Dakota. The Court determined that this right-of-way rendered the stretch of road "equivalent, for nonmember governance purposes, to alienated, non-Indian land." The Court declined to comment on the proper forum when an accident occurs on a tribal road within a reservation.

Strate also considered whether either of the two *Montana* exceptions conferring tribal court jurisdiction applied. In determining that the case was not closely related to any consensual relationship between a nonmember and the tribe or a tribe member, the Court noted that the event at issue was a commonplace state highway accident between two non-Indians. Therefore, even though it occurred on a stretch of highway running through the reservation, it was "distinctly non-tribal in nature." *(Cf. Franklin Motor Credit Co. v. Funmaker* (15th Cir. 2005), also finding no consensual relationship under *Montana* because there was no "direct nexus" between the lease entered into by Franklin Motor Credit and the tribe and the subsequent products liability claim against Franklin Motor Credit by a tribe member injured while driving one of the leased vehicles.)

Turning to the second *Montana* exception for activities that directly affect the tribe's political integrity, economic security, or health and welfare, the Court in *Strate* also concluded that the facts did not establish tribal civil jurisdiction. The Court recognized that careless driving on public highways running through the reservation would threaten the safety of tribal members. However, if the assertion of such broad public safety interests were all that *Montana* required for jurisdiction, the exception would swallow the rule. Instead, the

exception must be interpreted with its purpose in mind, which was to protect tribal self-government and control of internal relations. "Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" *Strate* (quoting *Montana*).

Exhaustion of Tribal Remedies

In *National Farmers*, the Supreme Court applied a tribal exhaustion doctrine requiring that a party exhaust its remedies in tribal court before seeking relief in federal court. This doctrine is based on a "policy of supporting tribal self-government and self-determination," and thus a federal court should ordinarily stay its hand "until after the tribal court has had a full opportunity to determine its own jurisdiction." *Id.* In other words, the tribal court should be given the first opportunity to address its jurisdiction and explain the basis (or lack thereof) to the parties. In such cases, the proceedings in federal court are stayed (or dismissed without prejudice) while the tribal court determines whether it has jurisdiction over the matter.

The Supreme Court has emphasized that the exhaustion doctrine is based on comity. The comity doctrine reflects a practice of deference to another court and is not a jurisdictional prerequisite. Thus, where it is clear that a tribal court lacks jurisdiction, the exhaustion doctrine gives way for it would serve no purpose other than delay. *See Strate*. In the present case, tribe members allege that there has been no exhaustion of tribal remedies because AO Architects commenced this federal action without affording the tribal court the opportunity to consider the jurisdictional issues.

Disposition

Here, the accident occurred on nonmember fee land, and AO Architects is not a member of the tribe. This would suggest under *Montana*'s main rule that the tribal court would lack jurisdiction. Moreover, on the record before us, it appears that AO Architects did not perform any services on the reservation, and that its contract was with a nonmember of the tribe, the Church of Good Hope.

Yet AO Architects must have known that it was designing a building for use of large gatherings on the reservation, and it may well have known that the facility would be used by the tribe for general meetings involving governance functions. The consequences of AO Architects' actions in designing the building would certainly be felt on the reservation. We are mindful of the two exceptions to *Montana*'s general rule against extending a tribe's civil jurisdiction to nonmembers of the tribe in the absence of express Congressional authorization or any treaty provision granting a tribe jurisdiction.[2] As discussed above, those exceptions are that a tribe may have jurisdiction over (1) nonmembers who enter into consensual relationships with the

[2]The parties concede that no federal statute or treaty bears on the question before us.

tribe or its members, or (2) activities that directly affect the tribe's political integrity, economic security, or health and welfare. Either or both of the exceptions may have application here.

The record comes to us on appeal from a preliminary injunction. The proceedings were abbreviated, and we are uncertain on the record before us whether the tribal court would have jurisdiction under either of the *Montana* exceptions and whether AO Architects must first exhaust its tribal court remedies before seeking relief in federal court.

Therefore, we vacate the preliminary injunction and remand to the district court to develop a record and reach a reasoned conclusion on these issues of jurisdiction and exhaustion. We express no opinion on these questions.

Vacated and remanded.

NOTES

INSTRUCTIONS

1. You will have 90 minutes to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

3. You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

4. The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

5. Your response must be written in the answer book provided. If you are taking this examination on a laptop computer, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should be sure to allocate ample time (about 45 minutes) to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

7. This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

THE MPT

MULTISTATE PERFORMANCE TEST

Acme Resources, Inc. v. Black Hawk et al.

POINT Sheets

NATIONAL CONFERENCE OF BAR EXAMINERS

The MPT point sheets describe the factual and legal points encompassed within the lawyering task to be completed. They outline the possible issues and points that might be addressed by an applicant. They are provided to the user jurisdictions for the sole purpose of assisting graders in grading the examination by identifying the issues and suggesting the resolution of the problem contemplated by the drafters. Point Sheets are not official grading guides. Examinees can receive a range of passing grades, including excellent grades, without covering all the points discussed in the point sheets. User jurisdictions are free to modify the point sheets. Grading the MPT is the exclusive responsibility of the jurisdiction using the MPT as part of its admissions process.

Point Sheet

Acme Resources, Inc. v. Black Hawk et al.

Acme Resources, Inc. v. Robert Black Hawk et al.

DRAFTERS' POINT SHEET

This performance test requires applicants, as associates in a law firm, to draft a persuasive brief in a federal court action contesting whether an Indian tribal court may exercise civil jurisdiction over a nonmember of the tribe.

Applicants' law firm represents Robert Black Hawk and seven other members of the Black Eagle Indian Tribe (collectively, "tribe members" or "Black Hawk et al."). The tribe members have filed a lawsuit in tribal court against a mining company, Acme Resources, Inc. (Acme), for damages caused by Acme's extraction of coal bed methane from under reservation land. The process used to develop the coal bed methane has depleted the water table, causing many of the tribe members' wells to begin to run dry, leaving them without water for their livestock or crops. A geologist predicts that all wells on the Reservation will go dry in five years if Acme's methane extraction continues.

In response to the Tribal Court complaint, Acme filed an answer denying liability and jurisdiction. At the same time, Acme commenced an action in federal court requesting a declaratory judgment that the Tribal Court has no jurisdiction over Acme and seeking an injunction against prosecution of the Tribal Court action. Applicants' task is to analyze the law relating to Tribal Court jurisdiction and draft the argument section of a brief in support of a motion for summary judgment in the federal action or to dismiss or stay the federal action to allow the Tribal Court to consider its jurisdiction first.

The File contains: (1) a memorandum from the supervising attorney describing the assignment; (2) a transcript of an interview with the client, Robert Black Hawk; (3) a copy of Acme's complaint filed in U.S. District Court; (4) a draft motion for summary judgment or, in the alternative, to dismiss or stay; (5) an affidavit signed by Robert Black Hawk; and (6) an affidavit by a geologist who has studied the cause of the Reservation water table depletion.

The Library contains excerpts from the Black Eagle Tribal Constitution and Tribal Code, and a Fifteenth Circuit opinion relating to tribal court jurisdiction.

The following discussion covers all the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. Grading is entirely within the discretion of the user jurisdictions.

I. Format and Overview

The supervising attorney's memo requests that applicants draft two arguments: that the court should grant summary judgment to the defendant Tribe members because there is no genuine issue of material fact that the Tribal Court has jurisdiction over Acme; and that, as an alternative basis for relief, the district court should stay or dismiss (without prejudice) Acme's action in federal court to allow the Tribal Court to consider the question of its jurisdiction.

The memorandum provides the template for applicants' argument section of the brief in support of the draft motion. Jurisdictions will have to decide how to weigh the subjective component of "persuasiveness." One guide is that an applicant's work product is not considered responsive to the instructions if it is in the form of an objective memo that takes the on-the-one-hand/on-the-other-hand approach. The argument section of the brief should be broken into its major components with well-crafted headings that summarize applicants' arguments. The arguments should weave the law and facts together into a persuasive statement of the argument, citing to the appropriate authorities and including contrary authorities that are to be addressed, explained, or distinguished. Applicants are instructed that a statement of facts is not necessary.

Applicants should argue that under the two *Montana* exceptions to the general rule against tribal court jurisdiction over nonmembers, the Black Eagle Tribal Court has jurisdiction over Acme. Acme entered into a "consensual relationship" with the Tribe through the lease agreement giving Acme the right to mine the methane gas under the Reservation. Acme's methane operations also threaten the Tribe's economic security by depleting its water supply. Thus, the district court should grant defendants' summary judgment motion. Further, applicants should argue that the Tribal Court has not yet had an opportunity to rule on the jurisdictional issue, and under the exhaustion rule of *National Farmers Union,* the district court should stay or dismiss the federal action to allow the Tribal Court to address the jurisdiction issue first.

II. The Facts

Applicants are to incorporate the relevant facts into the argument sections of their briefs, emphasizing those facts favorable to tribe members' position.

- The eight defendants, Black Hawk et al., are all members of the Black Eagle Tribe (the Tribe) and operate farms and ranches within the Black Eagle Reservation.

- Black Hawk et al. are neighbors of Patrick Mulroney, a nonmember of the Tribe who owns fee land within the Reservation.
- Acme, a mining company, is not a member of the Black Eagle Tribe.
- Mulroney granted a permit to Acme to use his land for the infrastructure necessary to explore for coal bed methane under his land. Acme pays Mulroney a royalty in exchange for access to his land.
- The Tribe owns the mineral rights to the methane under Mulroney's land. It leased to Acme the right to extract the methane in exchange for a 20 percent royalty for the Tribe.
- Acme's methane development requires pumping out huge quantities of groundwater. Within six months of the development of the coal bed methane field, the wells of Mulroney's neighbors, Black Hawk et al., began to run dry.
- Black Hawk and his co-defendants cannot survive economically without water to run their farms and ranches, and there is no other water reasonably available.
- Geologist Jesse Bellingham, Ph.D., defendants' expert, states that all Reservation wells will run dry within five years if the coal bed methane development continues.
- The Black Eagle Constitution recognizes the importance of preserving the Reservation's environment, and the Black Eagle Tribal Code authorizes a civil action by a party aggrieved by another's degradation of the environment.
- Black Hawk et al. brought an action in Black Eagle Tribal Court against Acme for damages and injunctive relief. Acme denied both liability and the Tribal Court's jurisdiction. No further proceedings have been held in tribal court.
- Acme filed an action in federal court seeking declaratory relief and an injunction against prosecution of the tribal court action.
- No federal statute or treaty addresses the Black Eagle Tribal Court's civil jurisdiction.

III. Legal Issues

Applicants must address two issues:

- Whether there is any genuine issue of material fact as to whether the Tribal Court has jurisdiction over the action pending before it and whether summary judgment should be entered in favor of Robert Black Hawk et al., and

- Whether the district court action should be dismissed or stayed because Acme failed to exhaust tribal court remedies before seeking relief in federal court.

Applicants might appropriately frame the questions in any number of ways, but should recognize the jurisdiction and exhaustion of tribal remedies issues.

IV. Argument

To formulate a good argument, applicants must digest the legal authority contained in *AO Architects v. Red Fox et al.*, the Fifteenth Circuit decision, and the cases cited therein as well as the File materials. *AO Architects* summarizes the governing United States Supreme Court precedent regarding tribal court jurisdiction. The following argument headings are suggestions only and should not be taken by the graders as the only acceptable ones.

A. Because Acme Entered Into a Consensual Relationship With the Black Eagle Tribe, and Because Its Mining Poses a Threat to the Tribe's Economic Security, There Is No Genuine Issue of Material Fact as to Whether the Tribal Court Has Jurisdiction Over Acme and, Therefore, Black Hawk Et Al. Are Entitled to Summary Judgment.

- Absent express authorization by Congress or a treaty provision authorizing jurisdiction over nonmembers, a tribal court may not exercise civil jurisdiction over a nonmember. *Montana v. United States*, 450 U.S. 544 (1981).
- There are two exceptions to this general rule: (1) the consensual relationship exception; and (2) the security of the tribe exception. If the controversy arises out of a consensual relationship between the nonmember and the tribe or its members, or if the nonmember's conduct directly threatens the political integrity, economic security, or health and welfare of the tribe, the tribal court may exercise jurisdiction over the nonmember. *Id.*

Applicants should argue that, although Acme is not a member of the Tribe and is engaged in activities on the surface of land held in fee simple by another nonmember (Mulroney), the controversy arises out of a consensual relationship (the lease agreement) and also threatens the economic security of the tribe (no water to raise crops or livestock). Applicants should use the facts in the File to argue that both *Montana* exceptions apply, and should distinguish *Strate* and *Funmaker*, cases cited in *AO Architects* in which the court declined to find a consensual

relationship or tribal security exception, and thus found that the tribal court had no jurisdiction over nonmembers.

The Acme/Tribe Lease Constitutes a Consensual Relationship and Therefore the Tribal Court Has Jurisdiction Under the First *Montana* Exception.

- The first *Montana* exception confers civil jurisdiction over a nonmember where the nonmember has a consensual relationship with the tribe through commercial dealings. *AO Architects,* citing *Montana.*
- The Tribe/Acme lease satisfies this commercial dealing requirement: it is a direct business relationship between the Tribe and Acme. It gives Acme a sustained (as opposed to fleeting) presence within the Reservation, and it has significant (as opposed to minimal) financial and environmental implications for Tribe members and the Tribe as a whole.
    - The Acme/Tribe relationship is thus distinguishable from a "commonplace" reservation highway accident between two nonmembers that the *Strate* court rejected as an insufficient basis for conferring tribal jurisdiction.
- In *Franklin Motor Credit Co. v. Funmaker* (cited in *AO Architects*), the 15th Circuit Court of Appeals noted that tribal court jurisdiction will not be conferred under the consensual relationship exception unless there is a "direct nexus" between the underlying business relationship and the subject of the lawsuit against the nonmember.
    - Thus, in *Funmaker*, the court rejected tribal court jurisdiction over a car dealership's financing company in a products liability suit brought by a tribe member who was injured while driving a vehicle leased by the tribe and financed by the finance company.
- Here, by contrast, there is a "direct nexus" between Acme and the Tribe.
    - The Tribe and Acme entered into a lease agreement giving Acme the right to extract methane from mineral reserves belonging to the Tribe and located within the Reservation in exchange for a 20 percent royalty payment to the Tribe on all methane produced.
    - The subject of the Tribe members' lawsuit is the harm allegedly caused by Acme's methane mining.

- Applicants might anticipate that Acme will attempt to argue that the consensual relationship at issue, Acme's lease of the mineral rights, is a consensual relationship with the Tribe, and not with one Black Hawk et al., the parties suing Acme.
- However, the applicable case law does not suggest that there must be a direct match between the parties involved in the consensual relationship and the parties to the suit in tribal court. The key is that there be a consensual relationship with the tribe or its members and that there be a connection between the facts giving rise to the litigation in tribal court and that relationship. *See Funmaker.*

Acme's Mining Activities Threaten the Tribe's Economic Security by Depleting the Reservation Water Supply, Thereby Satisfying the Second *Montana* Exception.

The second *Montana* exception permits a tribal court to exercise civil jurisdiction over a nonmember of the tribe where the nonmember's conduct "on fee lands within [the tribe's] reservation . . . threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *AO Architects* (quoting *Montana*). It is important that applicants recognize that a conclusory reference to the negative effect of Acme's activities on the Tribe is not sufficient. Rather, applicants are expected to identify the particular interest(s) of the Tribe (e.g., its economic security) that are at risk from Acme's extraction of coal bed methane.

- Black Hawk et al. have identified a real and substantial risk to the Tribe's economic security: if Acme's mining activities continue, it is likely that within five years all the wells on the Reservation will run dry. (*See* Bellingham Aff.)
- The fact that the wells of eight Tribe members with ranches and farms abutting Patrick Mulroney's land (the site of Acme's methane extraction) began running dry within six months of the start of Acme's mining operations shows the immediate impact that the mining has had and the potential magnitude of the risk. (*See* Black Hawk Aff.)
- The Black Eagle Tribal Constitution, article IV, § 1, stresses the importance of the environment to the Tribe: "The land of the Black Eagle Tribal Reservation shall be preserved in a clean and healthful environment for the benefit of the Tribe and future generations."

- The Tribal Code reiterates this concern for the environment and creates a cause of action in Tribal Court for any person harmed by those who "pollute or otherwise degrade the environment of the Black Eagle Reservation." Tribal Code § 23-5.
- Obviously, depleting the water table in order to extract coal bed methane degrades the environment of the Reservation.
- Moreover, without a stable and plentiful water supply, Tribe members will be unable to raise crops or livestock, in the absence of securing an alternate water supply that is economical and practical. Thus, the lack of water will directly threaten the Tribe's economic security.
- The specific risk here (which threatens the entire Tribe and is directly related to Acme's conduct) stands in sharp contrast to the interest in preventing careless driving on a reservation's public highways at issue in *Strate*, where the Supreme Court refused to find jurisdiction, reasoning that such a broad public safety interest, such as preventing auto accidents, would swallow the rule of *Montana*.
- Applicants may also argue that the Tribe's health and safety and welfare are threatened by Acme's depletion of the water table through its methane mining.
    - While Black Hawk's affidavit and interview focus on the threat to the Tribe's economic security (inability to support crops and livestock), applicants could reasonably argue that tribal health and safety may also eventually be at risk, especially given Bellingham's prediction that *all* wells will run dry in five years. In short, the Tribe could end up without adequate water for basic health and sanitation as a result of Acme's mining.
- Astute applicants might note that Acme could argue that even if the Tribe eventually has to find another source of water, for the term of Acme's lease, the Tribe will receive a royalty of 20 percent of all methane production. Presumably, that is a significant amount (in his interview notes, Black Hawk states that ". . . the promises of easy money carried the day").
- Applicants should contend that the royalty income from Acme cannot offset the permanent damage to the Reservation and the Tribe's long-term economic security if there is no water available on the Reservation.

- The fact that Acme's mining operation is based on land owned in fee simple by Patrick Mulroney, a nonmember of the Tribe, does not deprive the Tribal Court of jurisdiction.
- Acme is extracting coal bed methane that belongs to the Tribe and the aquifer being depleted by Acme's activities serves all the wells on the Reservation.
- The probability, as stated in the Bellingham Affidavit, that *all* the wells on the Reservation will run dry within five years, counters the argument that the economic security of the entire Black Eagle Tribe (as opposed to only the eight tribe members involved in the current litigation) is not at stake.
- Applicants could argue that the fact that the Tribal Council granted Acme a mining concession does not affect defendants' rights, as the Tribal Constitution and Tribal Code addresses threats to the Reservation's environment and provides an independent basis for Tribe members' standing to bring suit.
- In sum, contrary to what Acme alleges in its complaint, it is clear that the Tribal Court has jurisdiction because both exceptions to *Montana*'s main rule apply. Therefore, the court should grant summary judgment to Black Hawk et al.

B. The Tribal Exhaustion Doctrine of *National Farmers Union* Requires the District Court to Dismiss or Stay Acme's Federal Action on the Grounds That the Tribal Court Has Not Been Afforded an Opportunity to Consider Its Own Jurisdiction.

Applicants' argument discussing the exhaustion rule should mention the following points:

- *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985), announced a tribal exhaustion requirement: a tribal court should ordinarily first be given an opportunity to consider its jurisdiction before a party may seek relief in federal court. *See AO Architects.*
- The exhaustion rule is a prudential rule and is to be applied as a matter of comity (deference) unless it is clear that the tribal court lacks jurisdiction over the action involving the nonmember.
- Here, the Black Eagle Tribal Court has not had an opportunity to consider and rule on whether it has jurisdiction over Acme.

- Acme has answered the complaint in Tribal Court, but no further proceedings have been held there.

- Applicants should argue that the Black Eagle Tribal Court has jurisdiction over the action before it because both *Montana* exceptions apply, and therefore Black Hawk et al. are entitled to summary judgment on that issue. In addition, applicants should state that if the court determines that it is unclear whether the Tribal Court has jurisdiction, the court should, consistent with the principle of comity discussed in *AO Architects* and *National Farmers Union*, dismiss or at least stay the action to give the Tribal Court an opportunity to consider the question.

EXHIBIT F

INDEX

EXHIBIT G

SIGNIFICANT MISSOURI LAW DISTINCTIONS
BUSINESS ASSOCIATIONS

General and Business Corporation Law of Missouri (Chapter 351) Missouri has enacted the GBCL. Missouri law initially followed Illinois law, but more recently has tended to pattern itself after provisions of Delaware law.

1. **Corporate Formation**

   a. **Articles of Incorporation**--to form a de jure corporation, Articles of Incorporation must be filed with the Missouri Secretary of State, along with the required fee. The Missouri Secretary of State website (www.sos.mo.gov) has standard forms available online. The person or entity who forms the corporation is the incorporator.

      (1) **Mandatory provisions**-Section 351.055

         a. The Articles of Incorporation must include the name of the corporation, and that name must include the word "corporation," "company," "incorporated," or end with an abbreviation of one of these words.

         b. The Articles of Incorporation must identify the registered agent and office for the corporation for purposes of receiving service of process and communications from the Secretary of State. The registered agent must reside in Missouri. Section 351.370

         c. The Articles of Incorporation must identity the number of shares authorized to be issued, the par value of the shares, and the

classification of shares (if shares are to be divided in classes).

NOTE: single shareholder corporations are permitted in Missouri.

d. The Articles of Incorporation must identify the incorporator.

e. The Articles of Incorporation must state the corporation's purpose.

f. The Articles of Incorporation must provide for the corporation's duration, which can be "perpetual."

(2) **Optional provisions**

a. The Articles of Incorporation may limit personal liability for directors to the corporation or its shareholders, subject to statutory constraints on the limitation. Section 351.055.2(3); see also section 351.345

b. Corporations may opt out of cumulative voting, but must do so in the Article of Incorporation. Section 351.245(3)

c. Provisions required to modify statutory default provisions. For example, section 351.290 provides that By-Laws are to be amended by the corporation's shareholders unless the Articles of Incorporation place this power with the Board of Directors.

d. The Articles of Incorporation can include any other provisions not desired by the incorporator that are not inconsistent with the law.

e. If preemptive rights are to be limited, the limitations may be noted in the Articles of Incorporation.

f. The Articles of Incorporation (or the Bylaws) may indicate the number of directors (one or more), and each director's term of service.

b. **Annual registration requirement-**a corporation must file an annual report, each year. It is due in the month of incorporation, except as provided in Section 351.122. Section 351.120. Failure to timely file an annual report will result in administrative dissolution of the corporation. Section 351.484(4)

c. **Bylaws**--are adopted initially by the Board of Directors, and are subject to amendment by a vote of the shareholders (unless Articles of Incorporation provide for amendment by directors) and may "contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation." Section 351.290.1

Bylaws are intended to deal with the relative relationship between the officers, directors and shareholders. Though Bylaws can address any subject, good bylaws will contain provisions relating to procedures for shareholders' and directors' meetings; any committees; the titles, terms and powers of officers and the means for election and removal of same; the number of directors; to terms and powers of the directors and the means for election and removal of same; provisions for amendment of the bylaws; and provisions for custody and inspection of corporate records. This is not an exhaustive list.

Bylaws are not filed with the Missouri Secretary of State.

d. **Piercing the corporate veil**--validly formed de jure corporation can be ignored, and personal liability can be imposed on shareholders. There leading case in

Missouri discussing the elements to be proven to pierce the corporate veil is *Collet v. American National Stores, Inc.*, 708 S.W.2d 273 (Mo. App. 1986); *Real Estate Investors Four, Inc. v. American Design Group Inc.*, 46 S.W.3d 51, 56 (Mo. App. E.D. 2001).

2. **Corporate Operation**

a. **Shareholder Meetings**

(1) Annual-must be held, as primary purpose is to elect directors. Section 351.225(2)

(2) Special-may be held to conduct business requiring shareholder approval if duly noticed by the Board of Directors or any other person authorized by the Articles of Incorporation or the Bylaws. Section 351.225(3). Notice of special meetings must include time, place and purpose for which the meeting is being called. Section 351.230

(3) Notice-generally must be sent no less than 10 days or more than 70 days before meeting. Section 351.230

(4) Quorum-unless otherwise provided in the Articles of Incorporation or by laws, a quorum is a majority of the outstanding shares entitled to vote. Section 351.265

(5) Unanimous Written Consent--shareholders may act without a formal meeting by written consent of all shareholders entitled to vote on the matter. Section 351.273

b. **Board of Director Meetings**

(1) Initial-an initial meeting is required for organizational purposes as soon as possible after the corporation is formed.

(2) Annual-though not required, annual meetings are common to conduct the election of officers and such other routine business as may be appropriate. Section 351.225

(3) Special-may be called in accordance with the provisions of the bylaws subject to due notice. Section 351.225(3) and 351.230

(4) Notice-notice requirements for annual and/or special meetings are set by the bylaws. Section 351.225(3) and 351.230

(5) Quorum-a majority of the full board of directors constitutes a quorum, though a higher number can be set by the Articles of Incorporation or the bylaws generally, or as to particular matters to be determined. Section 351.325

(6) Unanimous Written Consent-any action required to be taken by the directors at a formal meeting may be taken by unanimous consent in writing without a meeting. Section 351.273; section 351.340

c. **Officers and Agents**

(1) Required Officers-Missouri corporations must have a President and a secretary, and any other officers required by the Bylaws. Unless prohibited by the Articles of Incorporation or the Bylaws, the same person may hold two or more offices. Section 351.360

(2) Registered Agent--Missouri corporations must have a designated registered agent. The registered agent can be an individual who resides in

the state, or a corporation authorized to do business in the state with a business office that is the same as the registered office. Section 351.370; section 351.375. Failure to have a viable registered agent for more than thirty days is a basis for administrative dissolution of the corporation by the Missouri Secretary of State. Section 351.484(5)

3. **Major differences between Missouri Corporation law and Delaware Corporation law**--these are some, but not all of the significant differences between the Delaware Code and the Missouri Code.

   a. **Director and Officer indemnity-**a shareholder approved indemnity provision can expand the scope of indemnity beyond that authorized by statute with the only limit being the inability to indemnify for fraud, deliberate dishonesty or willful misconduct. Indemnity provisions can cove amounts paid in settlement and incurred expenses. In Missouri, unless the shareholder approved indemnity provision provides otherwise, expenses advanced for an indemnified officer or director must be repaid unless the officer, director, agent, or employee is ultimately determined to have been entitled to indemnity pursuant to the requirements set forth in section 351.355. Under the Delaware code, such payments need only be returned if the officer or director is ultimately found to be liable. Section 351.355.5; section 351.355.7; DEL. CODE ANN. tit. 8, section 145(e).

   b. **Shareholder action without board approval**-Amendments of the Articles of Incorporation can be submitted directly to shareholders in Missouri without being

first authorized by the board of Directors as is required in Delaware. Section 351.090.2(1); DEL. CODE ANN. tit. 8, section 242(b)(1).

c. **Shareholder action by written consent**-all shareholders entitled to vote must sign unanimous written consents in lieu of a meeting, where in Delaware only the minimum number of shareholders necessary to take action at an actual meeting need to sign such a consent. Section 351.273; DEL. CODE ANN. tit. 8, section 228

d. **Major corporate events requiring a vote**-in Missouri, a two thirds majority of the outstanding shares entitled to vote must approve mergers, consolidations, the sale of all or substantially all assets, dissolutions, or reductions in capital, where only a simple majority is required in Delaware. Sections 351.425, 351.400(3), 351.464.5, 351.195.1(3); DEL. CODE ANN. tit 8, sections 251(c), 271(a), 275(b), 244.

e. **Appraisal rights**-Delaware only requires appraisals for certain mergers. Missouri requires appraisals for mergers or consolidation, upon the sale of all or substantially all assets, not in the regular course of business, and for certain share acquisitions involving control of the corporation. Sections 351.405, 351.407.6 and 351.455; DEL. CODE ANN. tit. 8, section 262(b).

4. **Dissolution**

a. **Voluntary dissolution-statutory procedure**

(1) The incorporator can dissolve the corporation if no stock has been issued, and no business has been commenced by filing Articles of Dissolution, with certain requirements, with the secretary of state. Section 351.462.

(2) The shareholders can agree to dissolve the corporation if all shareholders consent in writing. Section 351.466; section 351.468.

(3) The Board of Directors can adopt a resolution and submit and recommend the same to the shareholders for a vote by a two-thirds majority (or higher as required by the Articles of Incorporation). Section 351.464.

(4) Any dissolution requires the filing of Articles of Dissolution with the Secretary of State, and a wind up of corporate affairs.

b. **Involuntary dissolution**

(1) By administrative action of the Secretary of State for failing to comply with various statutory requirements. Section 351.484.

(2) By action of the Attorney General as permitted by Section 351.494.

(3) By shareholder action via application to the court for liquidation in the event of deadlock. Section 351.494(2), section 351.467--for two shareholder corporations.

(4) By a creditor via judicial proceedings to dissolve if the creditor's claim has been reduced to a judgment or the corporation has admitted in writing that a debt is owed and the corporation is insolvent. Section 351.494(3).

5. **Special Business Forms**

a. **LLC's**-Sections 347.010 - .187. Owners are called members. Entity is taxed like a partnership unless request is made to be taxed as a corporation. Members enjoy limited liability for "corporate" obligations, much like shareholders in a traditional corporation. Members adopt an Operating Agreement to address governance issues. Formation requires the filing of Articles of Organization with

the Secretary of State, though no annual reports are thereafter required. An LLC may have one or more members.

b. **Professional Corporations**--Section 356.031. This is the form of a general corporation that may be formed by licensed professionals.

c. **Foreign Corporations**--Section 351.572, section 351.576; section 351.574. A corporation formed in another state that registers to do business in the State of Missouri. A foreign corporation may not transact business in the state until it obtains a certificate of authority from the secretary of state.

d. **Statutory Close Corporations**--Section 351.750, et. seq. A corporation whose stock is held by a small number of shareholders may elect to run the corporation like a partnership by eliminating the board of directors.

e. **Not for Profit Corporations**--Chapter 355. Corporate entities created and operated under this chapter of the Missouri statutes have a near exclusive purpose to be nonprofit, and may not have shareholders or pay dividends. Formation, management and operation of not for profit corporations can be very different form general corporations, and the separate statutory provisions addressing not for profits should be carefully studied.

f. **General Partnerships**--Uniform Partnership Law, Chapter 358.

g. **Limited Partnerships**--Uniform Limited Partnership Law, Chapter 359.

SIGNIFICANT MISSOURI LAW DISTINCTIONS
CIVIL PROCEDURE

I. JURISDICTION OVER THE PERSON AND OVER THINGS

A. Personal Service on Individuals

1. Transient Jurisdiction – Personal jurisdiction may be secured by serving a defendant with a summons within the territorial limits of Missouri.

2. Domicile – A state may assert personal jurisdiction over a defendant if the defendant is domiciled in the state. Thus, Missouri can assert personal jurisdiction over a domiciliary defendant even if that defendant is outside the state at the time served.

3. Consent – Alternatively, jurisdiction could be executed pursuant to a party's consent, or by the making of a general appearance.

4. Implied or Inferred Consent – Because limitations on territorial presence, states have attempted to infer consent to jurisdiction from certain acts of the defendant within the state that have created a cause of action. For example, under the Nonresidence Motorist Statute [Mo.Ann.Stat.§506.210], use of the state's highways is deemed consent to personal jurisdiction over the defendant in actions arising out of such use and to the appointment of the secretary of state as a nonresident's agent for accepting process in lawsuits that arise out of her use of the highways.

   Note: These statutes have been upheld as consistent with due process, but it is now recognized that the true basis of jurisdiction is not consent in these cases but fundamental fairness.

B. Service on Corporations

1. Missouri Corporations and Registered Foreign Corporations – Personal jurisdiction over domestic corporations and foreign corporations registered to do business in Missouri is obtained by serving a copy of the summons and petition on the registered agent or any other agent authorized or required by law to receive service of process, or any officer or managing or general agent of the corporation found anywhere in the state: or by leaving the copies at any of the defendant's business offices with the person in charge there. [Rule 54.13].

   a. Examples of "Agents"

      The manager of a branch office and a general sales agent have been held to be managing or general agents of corporations, so that

leaving a copy of the summons with them constituted service on a corporation. The duties of these individuals indicate an appreciation of the necessity of transmitting important papers to responsible officers.

b. Those Not Considered Agents

The following have been held not to be managing or general agents: a watchman of mining property, a clerk-typist or receptionist, and an insurance salesperson who maintained an office in her residence but lacked authority to issue or sign policies for the insurer and was paid on a commission basis.

C. Service on Partnerships – Personal service on a general partnership requires individual service on each partner.

D. Service on Municipal, Governmental or Quasi-Public Bodies – Personal jurisdiction over a public or quasi-public corporation or body is obtained by serving: (i) the clerk of the county court (in the case of a county); (ii) the mayor, city clerk, or city attorney (in the case of a city); or (iii) the chief executive officer (in the case of any other public body). [Rule 54.13].

II. OUT-OF-STATE SERVICE (Long Arm Jurisdiction)

A. Procedure for Service

1. Manner of Service – Service of summons in long arm cases is to be made in the same manner as service within the state. [Rule 54.14(b)].

2. Who May Serve – Service may be made by a person or that person's deputy authorized to serve legal process in the foreign state, or by a person appointed by the court in which the action is pending. [Rule 54.14(a)].

3. Returns – Whether service is made by a private person or by an officer of a foreign state who is legally authorized to serve summons, return must be by affidavit and it must state the time, manner, and place of service. [Rule 54.20(b)].

B. Out-of-State Service on Domiciliaries and Residents

1. Requirements for Domicile or Residency

Out of state service on any person, or her executor, administrator, or other legal representative, has the same effect as service within the state as long as the person was domiciled in or a resident of Missouri: (i) at the time the cause of action accrued in Missouri; (ii) at the time the action was

commenced; or (iii) at the time process was served. If any of these conditions is met, the court acquires personal jurisdiction of the defendant. [Rule 54.07].

2. Personal Representative Stands in Decedent's Shoes

A personal representative stands in the litigational shoes of a decedent who is subject to the jurisdiction of Missouri courts.

3. Domicile Distinguished from Residence

Domicile must be distinguished from residence; residence is the place where a person happens to be living, whether or not she intends to make it her permanent home.

4. Questionable Constitutionality

Missouri's long arm statute authorizing in personam jurisdiction by service out of state on persons who are or were merely residents of Missouri may not be constitutional.

C. Long Arm Statute – Missouri authorizes out of state personal service on defendants for the purpose of subjecting them to the personal jurisdiction of the court, where the defendant:

1. Is a domiciliary or a resident of Missouri;

2. Does certain acts in the state in person or through an agent;

3. Has lived in a lawful marriage within Missouri, if the other party to the lawful marriage continues to live in Missouri, or if the third party has provided support of the spouse or to the children of the marriage and is a resident of Missouri; and

4. Has engaged in sexual intercourse in the state at or about the time a child was conceived.

Note: The mere fact that Missouri rules allow service outside the state for in personam jurisdiction does not mean that Missouri's assertion of in personam jurisdiction in a particular case is constitutional. That determination requires a second analysis that embraces the requirements of *International Shoe*.

D. Acts By Which Persons Submit to Jurisdiction of Missouri Courts Through the Long Arm Statute

1. Transaction of any business within Missouri;

2. Making or acceptance of any contract in Missouri;

3. Commission of tortuous act in Missouri;

4. Ownership, use, or possession of Missouri real estate;

5. Contracting to insure any person, property or risk located in Missouri at time of contracting; and

6. Maintenance of marital domicile in Missouri.

III. SUBJECT MATTER JURISDICTION

A. Subject matter jurisdiction, in contrast to personal jurisdiction, is not a matter of the state court's power over the person, but the court's authority to render judgment in a particular case. Subject matter jurisdiction of the state's court is governed directly by the State Constitution.

B. In general, subject matter jurisdiction is not subject to waiver and be raised at any time, even on appeal.

C. If a matter is not jurisdictional but rather a procedural matter required by a statute or rule or an affirmative defense of the sort listed in the affirmative defense rule, it generally may be waived if not raised timely. For example, under McCraken v. Wal-Mart Stores, East, LP, 298 S.W.3d 473 (MO 2009) the issue of whether a statutory employee under the Workers' Compensation Act is not a matter of subject matter jurisdiction subject to a motion to dismiss, and a failure to raise the Workers' Compensation Act applicability as an affirmative defense may constitute a waiver of that defense, just as it the with other affirmative defenses.

IV. VENUE

A. Procedure for Challenging Improper Venue

1. Motions to Transfer – Challenges to venue may not be asserted by a pre-answer motion under Rule 55.27 or as an affirmative defense in defendant's answer. Instead, they must be asserted by a motion to transfer venue pursuant to Rule 51.045. Such a motion must be filed within 60 days after service on the party seeking transfer. Failure to file a timely motion waives objections to venue. If a timely motion to transfer venue is filed, the venue issue is not waived by any other action in the case.

2. Decisions on Motions to Transfer

a. Grant of Motion – IF the issue is determined in favor of transfer (or if no reply is filed), the court will transfer the entire case to a county of proper venue, unless separate trials have been ordered for separate claims. If separate trials have been ordered, the court will transfer only that part of the civil action in which the movant is involved.

b. Automatic Grant of Motion If Court Fails to Rule – A motion to transfer based on claim of improper venue will automatically be granted if the court fails to rule on the motion within 90 days after the motion's filing. However, this time period can be waived in writing by all parties.

3. Relationship Between Motion to Transfer Venue and Motion for Change of Venue Based on Population – A motion to transfer venue does not deprive a party of any right the party may have to move to change venue under Rule 51.03 if the case is transferred to a county having 75,000 or fewer inhabitants. In that situation, a motion to change may be filed within the later of the time permitted by Rule 51.03 or 10 days after being served with notice that the case has been docketed in the transferee court. The right to change venue due to population may have been eliminated with respect to tort claims.

4. Effect of Motion to Transfer on Time for Filing an Answer – Unlike a pre-answer motion under Rule 55.27, a motion to transfer venue does not extend the time for filing an answer.

B. General Rules for Proper Venue

1. Non-Tort Cases – The following rules apply only if there is no count alleging tort. They apply whether the defendants are individuals, not-for-profit corporations, or for-profit corporations. The former "corporate defendants only" venue statute and the former special venue statute for not-for-profit corporations have been repealed. These non-tort rules also apply to limited liability partnerships, and they probably also apply to limited liability companies.

a. All Defendants Residing in the Same County in Missouri

1. One Defendant – If there is only one defendant and that defendant resides in Missouri, venue is proper in the county in which (i) that defendant resides; and (ii) the plaintiff resides and the defendant may be found and served with process.

2. Multiple Defendants – If there are multiple defendants, and all reside in the same Missouri county, venue is proper in that county. In that situation, venue is probably also proper in the county in which the plaintiff resides if all the defendants are found and served with process therein.

b. Several Defendants Residing in Different Counties – If there are several defendants and they reside in different counties, venue is proper in any county in which any of the defendants reside.

c. Several Defendants – Mixed residents and nonresidents – If there are several defendants and they reside in different counties, venue is proper in any county in which any of the defendants reside.

d. All Defendants Nonresidents of Missouri – If all defendants are nonresidents of Missouri, venue is proper in any Missouri county.

2. Tort Cases – See Outline Significant Missouri Law Distinctions, Torts.

C. Special Venue Rules for Particular Types of Defendants or Plaintiffs

1. Defendant LLPs – The statute creating LLPs in Missouri provided that suits against LLPs would be governed by the general venue rules. However, in non-tort cases, venue of a suit against an LLP is broader, given that LLPs may have multiple residences (every county in which the LLP has an agent or office for doing its customary business, as well as the counties in which its registered agent and registered office are located.)

2. Plaintiff or Defendant Counties – If any of the plaintiffs is a county, the following venue rules apply:

a. If there is no count alleging a tort, the case may be commenced and prosecuted to final judgment in the county in which the defendant or defendants reside or in the county in which the plaintiff county is located, if at least one defendant can be found and served in that county. If the suit is based on contract, the suit can also be brought in the county in which the plaintiff county is located or in the county in which any party to the contract resides.

b. If there is any count alleging a tort, venue in suits by counties is probably governed by general tort venue rules.

D. Change of Venue

1. By Agreement – In any civil action, if all parties agree in writing to a change of venue, the court must transfer venue to the county within the

state unanimously chosen by the parties. If any parties who are added to the cause of action after the date of the transfer do not consent to transfer, the case must be transferred to such county in which venue is appropriate under the general rules based on the amended pleadings.

2. For Cause – A change of venue for cause may be ordered in any civil action triable by a jury if: (i) the opposite party has an undue influence over the inhabitants of the county; or (ii) the inhabitants of the county are prejudiced against the applicants.

   The application must be filed at least 30 days before the trial date or within 10 days after a trial date is fixed, whichever date is later. IF granted, venue will be changed to some other county convenient to the parties where the cause does not exist. [Rule 51.04].

3. As a Matter of Right in Counties of 75,000 or Fewer Inhabitants

   a. General "Small County Change of Venue" Rule - Pursuant to Rule 51.03, a change of venue as a matter of right to some other county convenient to the parties will be ordered in a civil action triable by jury pending in a county having 75,000 or fewer inhabitants. The application must be filed not later than 10 days after his answer is due to be filed, or 10 days after the return date of the summons if an answer is not required, and he need not allege any cause for the change.

V. CHANGE OF JUDGE

If the trial judge is interested or prejudiced, is related to either party, or has been counsel in the cause, an application is not required. The judge is considered disqualified to preside over the action and is under a duty to disqualify herself. [Rule 51.07]. However, a motion to disqualify will usually be made. The motion will state the reason the judge ought to disqualify herself, e.g. bias, prejudice, etc. If the judge refuses to disqualify herself, relief may be sought by way of extraordinary writ praying for the appellate court to direct the judge to disqualify herself.

VI. STATUTES OF LIMITATIONS

A. One-Year Savings Statute

If a plaintiff files suit within the statute of limitations, and the suit is dismissed without prejudice, the Missouri "savings statute" permits the plaintiff to re-file within one year after the dismissal. The savings statute extends, but does not shorten, the applicable statute of limitations – if a dismissal occurs before the expiration of the statute of limitations, the plaintiff has either one year under the

savings statute or the remainder of the statute of limitations period, whichever period is longer, in which to refile. The savings statute applies to voluntary and involuntary dismissals without prejudice. The savings statute can only be used once.

B. Tolling the Statute

1. Absence of a Resident Defendant – If a defendant is a resident of the state, his absence from the state will toll the statute of limitations in two situations:

   a. He is absent at the time the cause of action accrues in which case the statute of limitations does not begin to run until he returns to the state; or

   b. He is a resident of the state at the time the cause of action accrues, and he subsequently leaves the state and establishes a residence in another state.

   c. Wrongful Death Actions – A different tolling provision applies in wrongful death actions: If the defendant is absent from the state, the statute of limitations is suspended during the period the defendant is absent. This special wrongful death tolling rule applies even if the defendant was never a resident of Missouri. However, this tolling provision does not apply if the defendant can be served – even outside of the state – by use of the long arm statute, or if the defendant can be served within the state.

2. Injunction – The statutory period does not run while the action is stayed by injunction or statutory prohibition.

3. Concealment – The statutory period does not run while the defendant absconds or conceals himself, or while he, by any other improper act, prevents the commencement of the action.

VII. PLEADINGS

Fact pleading v. Federal Notice Pleading – Fact pleading requires that the pleader state his cause of action with greater specificity than that required under the federal "notice" pleading. IF the allegations are too general, a pleading is "conclusionary"; if too specific, it is "evidentiary." The pleader should state ultimate facts that logically support, on application of a rule of law, the liability of the defendant. Each averment of a pleading must be simple, concise, and direct. No technical forms of pleadings are required.

VIII. DEPOSITIONS

Depositions May Be Used at Trial for Any Purpose.

Any part of a deposition that is admissible under the rules of evidence applied as though the deponent were testifying in court may be used against any party who was present or represented at the taking of the deposition or who had proper notice thereof. Depositions may be used in court for any purpose.

IX. JURY PRACTICE

A. Instructions

1. Given to Jury Before Closing Argument

In Missouri, unlike most states and the federal system, instructions are given to the jury before the closing argument.

2. Approved Instructions Are Mandatory

If there is an approved MAI instruction applicable to the case that the appropriate party requests or the court decides to submit, the approved instruction must b given to the exclusion of any other on the same subject.

a. Deviation from MAI – If there is a deviation from an applicable MAI instruction that does not need modification under the facts of a particular case, the deviation is error and is presumptively prejudicial error.

X. APPEALS

A. Points Relied Upon

1. The brief must contain the points relied on, each of which must:

a. Identify the trial court ruling or action that the appellant challenges;

b. State concisely the legal reasons for the appellant's claim of reversible error; and

c. Explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.

2. Supporting Authorities

The petitioner must, immediately, following each point relied on, include a list of cases, not to exceed four, and the constitutional, statutory, and regulatory provisions or other authority on which the petitioner principally relies. It is no longer necessary to list all authorities or permissible to list more than four cases. Failure to cite authorities in support of a point will be deemed to be an abandonment of the issue. Similarly, failure to develop the point in the appellant's brief will be deemed an abandonment of the issue. If an issue one of first impression and no authorities exist, the appellant should state that fact.

SIGNIFICANT MISSOURI LAW DISTINCTIONS
ESTATES

An individual has no right, constitutionally or otherwise, to transfer his or her estate at death. Accordingly, all such "rights" are statutory, and there are probably no laws more unique to each state than the laws governing wills and the transmission of property at an individual's death. Since 1975, however, state lawmakers have more frequently looked to the Uniform Probate Code for guidance when revising statutes pertaining to wills and estates, including Missouri when the probate code was entirely rewritten in 1980.

The Missouri probate code is set forth in Chapters 472, 473, 474 and 475 of the Revised Statutes of Missouri. In addition, §461.300, RSMo, allowing recovery of nonprobate assets for payment of claims and allowances, is deemed to be a part of the probate code.

I. WILLS

A. Execution of Will

1. Missouri law differs from most other states by not requiring the following:

   a. No requirement will be signed by testator at end, or at any other particular place. Just "signed by the testator". (§474.320) Witnesses, on the other hand, must "subscribe" their names to the will.

   b. No requirement testator sign will in the presence of witnesses, nor that witnesses sign in each other's presence. Each witness must, however, sign in presence of testator and testator must advise/verify to witness that testator did sign.

   c. No requirement will be dated.

   d. No requirement will have an attestation clause.

2. Missouri does have some variations with respect to execution of a will:

   a. Testator must request witnesses to witness will. This request may be inferred from facts and circumstances.

   b. Witnesses must be aware document is a will ("publication"). This, too, may be inferred.

B. Presentment (§473.050)

1. If a will is "presented" within the time limits set forth in §473.050.3, then the will may be admitted and an administration of the estate had at any time thereafter. (§473.050.4)

2. The term "presented" means delivery of the will to the appropriate probate division together with an appropriate document seeking admission of the will within the time limits set forth in §473.050.3. (§473.050.2)

II. INTESTATE SUCCESSION (§474.010)

The primary distinction between Missouri and most other states is the length to which the statute goes to avoid an escheat. If the decedent has no spouse or descendants, then estate to ancestors (without limit) or their descendants if related in the ninth degree. If that does not work, then to heirs of predeceased spouse(s), in the same manner.

III. PROBATE PROCEDURAL RULES

A. Civil Rules Not Applicable – Mostly

1. Only 11 of the Rules of Civil Procedure are specifically applicable to proceedings in the probate division. (Rule 41.01(b))

2. In addition, the civil rules do not apply in an "adversary probate proceeding," unless:

   a. The probate code does *not* contain a "provision prescribing practice, procedure or pleading applicable" (§472.141.1(1)); or

   b. The court on its own motion or motion of an interested party orders the civil rules to apply. If such an order is made, it must specify the applicable rules (§472.141.1(2)); or

   c. A probate code provision specifically makes the civil rules applicable (§472.141.1(1)).

B. Adversary Probate Proceeding

1. This is a defined term. §472.140.2.

2. In addition, the probate division judge may determine a probate proceeding is an adversary proceeding. *Id.*

IV. NONPROBATE TRANSFERS – RECOVERY

Missouri "invented" the nonprobate transfer law and still has the most comprehensive statutory provisions on the matter. One of the unique Missouri law provision is the recovery statute, §461.300, which is treated as a part of the probate code.

A. When Recovery Available

1. The purpose of the recovery statute is to provide funds for payment of specified debts and obligations of a decedent when the probate estate is insufficient.

2. The debts and obligations for payment of which recovery may be had are:

   a. Statutory allowances (§§474.250, 474.260 and 474.290);

   b. Claims remaining unpaid; and

   c. Expenses of administration, although recovery is not allowed if the deficiency is solely attributable to such expenses. (§461.300.1)

B. Recoverable Transfers

1. Transfers made pursuant to the provisions of the nonprobate transfer law (§§461.003-461.081) may be recovered.

2. Also recoverable are "any other transfer of a decedent's property other than from the administration of the decedent's probate estate":

   a. If the property would have been available to satisfy a debt of the decedent immediately prior to decedent's death; and

   b. Only to the extent of the decedent's contribution to the value of the property. (§461.300.10(4))

C. Procedure

1. The personal representative has the first right to initiate a recovery action ("accounting"). (§461.300.2)

2. A "qualified claimant" (§461.300.10(3)) may force initiation of the action by making a "written demand" upon the personal representative to initiate recovery proceedings. If the personal representative does not do so within 30 days after *receipt* of the written demand, then any qualified claimant may begin proceeding. (§461.300.2)

3. A recovery action must be commenced within 18 months after the decedent's date of death. Id. This period may be shortened, however, to 16 months, e.g., if written demand is not received by personal representative until the last day of the 16th month, the next month is a 30 day month, and the personal representative does not commence action, then time will expire before a qualified claimant can initiate proceedings.

D. Parties, Contribution

1. It is not necessary to name all nonprobate transferees as parties – one is sufficient. Filing of the accounting petition "freezes" all recoverable transfers, and later discovered transferees can be joined. (§461.300.4)

2. Each transferee joined as a party is liable for a prorata share of the value of the property received by that transferee to provide for payment of the shortfall of estate assets. (§461.300.1) **NOTE:** Recovery of the transferred asset itself is not necessary, nor contemplated, as the transferee is liable for "value" of transferred property. *Id.*

E. Personal Representative – Extended Liability

1. If demand is made upon the personal representative to initiate recovery proceeding and he or she does not, then the personal representative must provide full information on all recoverable transfers known to him or her. (§461.300.2)

2. If the personal representative does not provide full information, then the 18 month period for bringing an action is tolled with respect to transfers made to the personal representative. (§461.300.4)

SIGNIFICANT MISSOURI LAW DISTINCTIONS
EVIDENCE

I. MISSOURI EVIDENCE

Missouri is one of only twelve states that have not adopted a variation of the Uniform Rules of Evidence. Many of the fundamental precepts of evidence in Missouri, such as Missouri's hearsay rule and most of the hearsay exceptions, are matters of common law. In addition, constitutional provisions, statutes, and Supreme Court Rules address, either expressly or indirectly, evidence issues. Rules promulgated in accordance with the Supreme Court of Missouri's authority to prescribe practice and procedure in the courts supersede statutory provisions inconsistent with the rules. Mo. Const. Art., § 5; Rule 41.02

II. AUTHENTICATION REQUIREMENTS FOR WRITTEN RECORDS

Admission of Business Record Based on Custodian of Records Affidavit.

Any record or copies of records reproduced in the ordinary course of business shall be admissible as a business record, subject to procedural and substantive objections, in any court in Missouri upon an affidavit of a qualified custodian stating that the records were kept in the ordinary course of business as explained in RSMo § 490.680.

III. EVIDENCE REGARDING THE VALUE OF MEDICAL TREATMENT

RSMo 490.715

With respect to evidence regarding the "value of medical treatment," §490.715(2) creates "a rebuttable presumption that the dollar amount necessary to satisfy the financial obligation to the health care provider represents the value of the medical treatment rendered." However, upon motion of the party, the value of treatment rendered may be determined by the court outside the hearing of the jury based on additional evidence.

IV. OPINION TESTIMONY BY EXPERT WITNESS

RSMo 490.065

The statute governs the admissibility of expert testimony in civil cases. If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

V. SPECIAL RULES FOR CERTAIN CATEGORIES OF WITNESSES PURSUANT TO CHAPTER 491

A. Rape Shield Statute – RSMo § 491.015

In prosecutions related to sexual conduct, opinion and reputation evidence of the complaining witness' prior sexual conduct is inadmissible except where such specific instances are:

(1) Evidence of the sexual conduct of the complaining witness with the defendant to prove consent where consent is a defense to the alleged crime and the evidence is reasonably contemporaneous with the date of the alleged crime; or

(2) Evidence of specific instances of sexual activity showing alternative source or origin of semen, pregnancy or disease;

(3) Evidence of immediate surrounding circumstances of the alleged crime; or

(4) Evidence relating to the previous chastity of the complaining witness in cases, where, by statute, previously chaste character is required to be proved by the prosecution.

B. Child Victim Witness Protection – RSMo § 491.680

1. In any criminal prosecution under Chapters 565, 566 or 568 involving an alleged child victim, upon motion of the prosecuting attorney, the Court may order that an in-camera videotaped deposition of the testimony of the alleged child victim be made for use as substantive evidence at preliminary hearings and at trial.

2. The court may also exclude the defendant from the videotape deposition proceedings in which the child is to testify. Where any such order of exclusion is entered, the child shall not be excused as a witness until the defendant has had a reasonable opportunity to review the videotape deposition in private with his counsel and to consult with his counsel; and until his counsel has been afforded the opportunity to cross-examine the child following such review and consultation.

3. The attorney for the defendant shall have at least two opportunities to cross-examine the deposed alleged child victim: once prior to the preliminary hearing and at least one additional time prior to the trial.

C. Admissibility of Criminal Convictions for Impeachment Purposes – RSMo 491.050

Any person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal convictions may be proved to affect his credibility in a civil or criminal case and, further, any prior pleas of guilty, pleas of nolo contendere, and findings of guilty may be proved to affect his credibility in a criminal case. Such proof may be either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer.

VI. DEPOSITION TESTIMONY AS EVIDENCE

Depositions May Be Used at Trial for Any Purpose.

Any part of a deposition that is admissible under the rules of evidence applied as though the deponent were testifying in court may be used against any party who was present or represented at the taking of the deposition or who had proper notice thereof. Depositions may be used in court for any purpose.

SIGNIFICANT MISSOURI LAW DISTINCTIONS
FAMILY LAW

Missouri family law is an area primarily established by statutes contained in Chapters 451-455 of the revised statutes. This covers requirements for marriage, dissolution of marriage, adoption, enforcement of child support orders and adult abuse. There are also court decisions interpreting these statutes, mostly regarding issues of property division and maintenance in a dissolution action.

I. Marriage - Chapter 451 RSMo

A. Prohibited marriages

1. Marriages between (1) ascendants and descendants; (2) brothers and sisters; (3) nieces, nephews, aunts, and uncles; (4) first cousins are prohibited. Section 451.020.

2. Marriages involving a person who lacks mental capacity to enter into a marriage contract is prohibited. Section 451.020.

3. Same sex marriages are prohibited and are not recognized even if lawfully contracted in another state. Section 451.022.

4. A person under the age of 18 must have parental consent and under 15 must have court approval. Section 451.090.

B. Void/Voidable distinction

A void marriage is one prohibited by statute and cannot be ratified. A voidable marriage can be ratified. A voidable marriage is one that is valid until one of the parties establishes grounds for annulment in a proceeding for declaration of invalidity of marriage.

II. Dissolution of Marriages - Chapter 452 RSMo

A. Institution of Action

1. Section 452.310 sets forth what must be contained in a petition for dissolution of marriage. The petition must be verified.

2. The petition is not "filed" unless summons is issued or respondent files a notarized entry of appearance or an attorney files an entry of appearance. Thus, do not send the clerk the petition and ask to "hold" summons. Section 452.311.

3. The standard for granting a dissolution is that the marriage is irretrievably broken and there is no likelihood the marriage can be preserved. Section

452.305. Grounds need not be proven unless the spouse denies the marriage is irretrievably broken, then the petitioner must prove statutory grounds. Section 452.320.

4. Venue is proper where either the petitioner or the respondent resides. Section 452.300.

5. There is a jurisdictional residency requirement that either spouse be a Missouri resident for more than 90 days preceding the filing of the petition. Section 452.305.

6. There is a waiting period of 30 days after the filing of the petition before a dissolution can be granted. Section 452.305.

B. Property Issues

1. Separation agreements are authorized if the Court finds the agreement is not unconscionable and the terms are binding on the Court except for child custody, support, and visitation issues. Section 452.325.

2. Property is classified as marital property or non-marital property. The statute defines non-marital property, which is generally property acquired before marriage or acquired during marriage as a gift or inheritance. Section 452.330.

3. Marital property is divided based upon statutory factors set forth in Section 452.330, including the conduct of the parties during the marriage. Non-marital property can be transmuted to marital property.

4. The Court is required to divide all property and all debts of the marriage. Case law gives the trial judge fairly broad discretion in dividing the property.

C. Maintenance

A party may be granted maintenance provided they lack sufficient property, including marital property, to provide for their reasonable needs and are unable to support themselves through proper employment. The statute, § 452.335 RSMo, sets forth the factors which the Court may consider in determining the amount and duration of maintenance. A maintenance order may be modifiable or non-modifiable. Case law gives the trial judge broad discretion in awarding maintenance.

D. Child Custody

1. Custody of children is determined upon the best interests of the child. Custody under § 452.375 RSMo means "joint legal custody," "sole legal custody," "joint physical custody" or "sole physical custody." It is public policy of the state as set forth in the statute to see that both parents get frequent, continuing, and meaningful contact with the children.

2. The statute sets forth the factors the Court can consider in custody awards.

3. Each parent, individually or jointly, must submit a parenting plan covering a variety of custody and visitation issues specified in § 452.310.

4. Child custody orders may be modified on a showing of a substantial and continuing change of circumstances such that the arrangements are no longer in the child's best interest.

5. Either parent seeking to relocate outside of the state must have the consent of the other spouse or seek prior approval of the Court. § 452.377 RSMo.

6. Several counties have standard visitation plans that the Court usually follows where the parties do not agree.

E. Child Support

The factors the Court can consider in ordering child support are set forth in Section 452.340. The presumed amount of child support is determined by Supreme Court Rule 88.01.

1. The amount of child support is determined using "Form 14," which is based on the parties' gross income and a chart per Supreme Court Rule 88. The parties must submit a Form 14. The Court is required to follow the Form 14 amount unless the Court specifically finds after consideration of all relevant factors, the amount is unjust or inappropriate.

2. In determining the child support amount under Form 14, a Court can impute income to a spouse who is voluntarily under-employed.

3. The Court is required to make an order as to which parent provides health insurance for the child and the amount of that health insurance is considered in Form 14.

4. Under Form 14, the amount of child support can be reduced by a small percentage based on the amount of visitation.

5. Child support ends when the child reaches 18, unless the child is a full-time student and then support continues to age 21. There are specific

requirements that must be followed for the child support to continue while the child is in college. Section 452.340.

III. Enforcement of Child Support - Chapter 454

By statute, the Missouri Division of Family Services is authorized to enforce child support actions. The division may file an action against a punitive father to establish paternity and set a child support amount. In addition to the usual mechanisms to enforce money judgments, the agency has added powers to lien certain property, lawsuits, and workers' compensation claims. Section 454.514-454, 519. The agency also has the power to suspend the obligor's driver's license.

IV. Adult Abuse - Chapter 455

A. Chapter 455 may order a protection to prevent harassment and abuse. An ex parte order of protection may be obtained by filing of a petition meeting the statutory requirements.

1. Abuse involves more than physical contact or the threat of it. It includes forms of harassment and stalking. Section 455.010.

2. The Court is required to hold a hearing 15 days after the petition is filed and may continue the order of protection from 180 days to 1 year. Section 455.040.

3. Orders of protection may include temporary orders of child custody. Section 455.045.

SIGNIFICANT MISSOURI LAW DISTINCTIONS
MISSOURI ADMINISTRATIVE LAW

I. Missouri Administrative Procedure Act – Chapter 536

A. Applicability to state agencies (exclusions)

1. MAPA is generally applicable to Missouri state agencies (eg. Department of Social Services, Gaming Commission, etc.).

2. A few specialized agencies, such as the Workers' Compensation Board, are exempt from MAPA because they are already covered by detailed procedures.

B. Applicability to local government agencies

1. MAPA may also apply to local government agencies, including those that get their authority from a city, county, or other local government (eg. city police department, school board, etc.).

C. "Agency"

1. MAPA defines an agency as any administrative office or body [with the authority to] make rules or adjudicate contested cases (Mo. Rev. Stat. § 536.010(1)).

2. MAPA Excludes any traditional branch of government (eg. courts, legislature, governor).

II. Obtaining Information

A. Discovery Rules (Mo. Rev. Stat. §§ 536.073(1), 536.077)

1. Agency subpoena power

(a) Board subpoena power for investigatory purposes is generally authorized by the agency's enabling statute.

2. Power to issue discovery rules (Mo. Rev. Stat. § 536.073.2)

(a) MAPA gives agencies created by the constitution or state statute power to issue rules permitting any form of discovery allowed in a civil action.

(b) An agency discovery order that: (i) requires a physical or mental examination; (ii) authorizes examination of real estate without consent of the owner; or (iii) imposes contempt sanctions may not be enforced except by order of the circuit court after notice and hearing.

B. Administrative Searches

1. Investigation must be authorized by law, which requires not only statutory authority, but also compliance with constitutional protections. All criminal law warrant exceptions are recognized as exceptions for administrative searches. A warrant is not required to search intensively regulated businesses.

C. Sunshine Law (Mo. Rev. Stat. § 610.011.2)

1. Public governmental body

(a) This applies to all legislative or administrative bodies of the state and its political subdivisions, along with all departments, divisions, and functional units of those governments, the governing boards of all state-funded colleges and universities, and committees under the direction of such entities.

(b) It also includes quasi-public governmental bodies whose primary purpose is to carry out activities for governmental bodies or to perform certain public functions.

2. Open meetings (Mo. Rev. Stat. § 610.022.3)

(a) Unless closure is specifically authorized, all meetings are required to be open to the public.

3. Notice of meetings (Mo. Rev. Stat. § 610.020)

(a) Any meeting at which any public business is discussed or decided must be subject to reasonable advance notice of the time, date, place, and tentative agenda.

4. Open records (Mo. Rev. Stat. § 610.024(1))

(a) Any public records retained by a public governmental body are to be open to the public for inspection, unless the record is specifically exempted from disclosure.

5. Closed meetings and records (Mo. Rev. Stat. § 610.021)

(a) The Sunshine Law contains a number of subject matter-based discretionary exceptions to its general rule of broad public access, which permit closure of applicable records and meetings.

III. Administrative Hearing

A. Right to hearing

1. Contested case (Mo. Rev. Stat. § 536.010(4))

(a) A contested case is one in which a proceeding before an agency in which legal rights, duties, or privileges of specific parties is required by law to be determined after a trial-type hearing. The law mandating the hearing may be a statute, procedural due process, or the agency's own rules.

(b) Procedural due process—a party is entitled to a hearing as a matter of constitutional due process when:

- The agency action will be based on disputed, material adjudicative facts, not legislative facts;

- The action may adversely affect an individual's liberty or property interests (*Goldberg v. Kelly*, 397 U.S. 254 (1970)). Examples include:

  - Driver's license revocation (*Bell v. Burson*, 402 U.S. 535 (1971)).

  - Parole revocation (*Morrissey v. Brewer*, 408 U.S. 471 (1972)).

  - Loss of teacher tenure (*Perry v. Sindermann*, 408 U.S. 593 (1972)).

  - Suspension from public school (*Goss v. Lopez*, 419 U.S. 565 (1975)).

  - Social security disability payment termination (*Mathews v. Eldridge*, 424 U.S. 319 (1976)).

(c) Trial-type hearing

- The maximum hearing that due process may require. Much like a judicial trial without a jury, usually with notice, some discovery, right of counsel, oral hearing, confrontation, cross-examination, right to present evidence and make argument, impartial tribunal, decision on the record, written findings of fact and conclusions of law, and judicial review.

(d) Balancing test

- In determining the constitutional requirements as to the nature and timing of a hearing, the courts generally balance three factors: (i) the private interest that will be affected by the official action; (ii) the risk of an erroneous deprivation of such interest through the procedures used; and (iii) the government's interest, including the fiscal and administrative burdens that a particular procedural requirement would entail.

(e) Timing

- When immediate adverse affects may result from the governmental action, the issue is whether the parties affected are entitled to a hearing before the government can act or whether a hearing after the action is sufficient.

B. Hearing Procedures

1. Commencing the contested case (Mo. Rev. Stat. § 536.063(1)

(a) Any individual or agency seeking agency action or an agency decision may institute a proceeding.

2. Notice (Mo. Rev. Stat. § 536.067)

(a) Parties and other interested persons are entitled to notice that a contested case has been commenced and notice of the hearing.

3. Presentation of evidence (Mo. Rev. Stat. §§ 536.070(2), (3)

(a) Parties to administrative hearings have a right to present evidence orally, to cross-examine opposing witnesses, and to rebut evidence against them.

IV. Judicial Review

B. Review of Contested Case

1. To file in court for direct review of an agency's decision, the aggrieved party must file a petition in circuit court within 30 days after delivery of notice of the agency's final decision.

2. Aggrieved party

(a) A party is aggrieved when an administrative decision prejudicially affects his personal or property rights or interests.

3. Petition for review in circuit court

(a) AHC Tax Decisions

- A plaintiff must file a petition in the court of appeals or the supreme court within 30 days after mailing or delivery of a final decision.

(b) Enforcement review

- A party (most often the agency) may seek judicial review to enforce an agency order against a non-complying party.

B. Review of Non-contested case (Mo. Rev. Stat. § 536.150)

1. When an agency decision determining the legal rights, duties, or privileges of any person is not subject to agency review, the MAPA provides that the decision is reviewable by means of suit for injunction, certiorari, mandamus, prohibition, or any other appropriate action.

C. Rulemaking

1. Judicial review of rules is available exclusively in the circuit court via an action for declaratory judgment on the validity of any rule or threatened application thereof.

D. Standing issues

1. Missouri taxpayer standing

(a) A Missouri taxpayer has standing to challenge allegedly illegal action when the agency action: (i) involves a direct expenditure of funds generated through taxation; (ii) results in an increased levy of taxes; or (iii) results in a pecuniary loss.

E. Exhaustion of administrative remedies

No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. Farm Bureau Town & Country Ins. Co. v. Angoff, 909 S.W.2d 348 (Mo. Banc 1995); Mo. Rev. Stat. § 536.100.

F. Scope of review

1. Constitutional review

(a) For constitutional claims, the court will make its own independent determination of whether a constitutional right was affected, and will give no deference to the administrative agency.

2. Jurisdictional review

(a) For jurisdictional challenges, the court will make its own independent determination regarding the statutory interpretation issue of agency power, and will give some deference to the administrative agency decision.

3. Procedural review

(a) For procedural challenges, the court will make its own independent determination as to whether an agency has followed proper procedure in its decision making, and will give little or no deference to the agency decision.

4. Merits review

(a) Contested case

- Findings of fact – When reviewing agency findings of fact, the court will use the substantial evidence test.

- Discretionary decisions – Other discretionary decisions are subject to the abuse of discretion test.

(b) Non-contested case

- The court uses a substituted judgment or de novo scope of review in reviewing all non-contested cases. The court will make its own determination and give the agency no deference.

(c) Rulemaking

- When reviewing agency rulemaking, the court will use an abuse of discretion scope of review, which affords significant deference to the agency.

SIGNIFICANT MISSOURI LAW DISTINCTIONS
MISSOURI COURTS

Missouri Court System

1. **Supreme Court**

a. **Composition**--seven judges. Judges elect one member to serve as chief justice every two years. Generally sits en banc.

b. **Jurisdiction**--

i. Original--Supreme Court has original jurisdiction to determine remedial writs, quo warrant, writs of prohibition and mandamus. Has original jurisdiction over matters involving the discipline of attorneys, and contested statewide elections. Is permitted by its supervisory authority over all Missouri courts to establish rules of practice.

ii. Appellate

a. The Supreme Court has exclusive appellate jurisdiction over cases involving: (i) the validity of a treaty or statute of the United States; (ii) the validity of a Missouri statute of provision of the Missouri constitution; (iii) the construction of the revue laws of the State; (iv) the title to any state office; and (v) punishments imposing death.

b. The Supreme Court will hear appeals of cases first heard by the court of appeals if an application for transfer to the Supreme Court filed by a party is sustained by either the court of appeals or the Supreme Court.

c. The Supreme Court must hear appeals of cases transferred to it by the court of appeals where a dissenting judge certifies the opinion contrary to a previous opinion of the supreme court or the court of appeals.

2. **Appellate Courts**

a. **Composition**--there are three districts of the Missouri Court of Appeals--the Western, Eastern and Southern Districts. The Western District has 11 judges. The Eastern District has 13 judges. The Southern District has 7 judges. Districts may sit en banc, but typically sit in division panels of three judges.

b. **Jurisdiction**--the court of appeals may issue and determine original remedial writs. General appellate jurisdiction extends to all appeals from the inferior courts within the counties in each district, unless a matter is within the exclusive jurisdiction of the Supreme Court.

3. **Circuit Courts**

a. **Composition**--the State of Missouri is divided into 45 judicial circuits, with each circuit comprised of one county, or in some cases more than one contiguous county.

b. **Jurisdiction**--circuit courts have jurisdiction over all cases and matters, civil and criminal.

i. Associate Circuit Judges--hear civil cases involving claims of less than $25,000, and other cases as set by statute, such as unlawful detainer actions. May also hear any case if so assigned by the presiding judge of the Circuit.

ii. Circuit Judges--may hear all types of cases. Though some circuit courts may be designated as "family court" or a "probate court," these are not separate courts, but are merely recognized divisions of the Circuit Court.

iii. Commissioners--

4. **Selection of Judges**

a. **Merit Selection--the "Non-Partisan Court Plan."** During the 1930s, the public became increasingly dissatisfied with the increasing role of politics in judicial selection and

judicial decision-making. Judges were plagued by outside influences due to the political aspects of the election process, and dockets were congested due to time the judges spent campaigning.

In November 1940, voters amended the Missouri constitution by adopting the "Nonpartisan Selection of Judges Court Plan," which was placed on the ballot by initiative petition. The adoption of the plan by initiative referendum resulted from a public backlash against the widespread abuses of the judicial system by the "Boss Tom" Pendergast political machine in Kansas City and by the political control exhibited by ward bosses in St. Louis.

The Missouri nonpartisan court plan, commonly called the Missouri Plan, since has served as a national model for the selection of judges and has been adopted in more than 30 other states.

The nonpartisan plan provides for the selection of judges based on merit rather than on political affiliation. Initially, the nonpartisan plan applied to judges of the Supreme Court; the court of appeals; the circuit, criminal corrections and probate courts of St. Louis city; and the circuit and probate courts of Jackson County. In 1970, voters extended the nonpartisan plan to judges in St. Louis County, and three years later, voters extended the nonpartisan plan to judges in Clay and Platte counties. These changes are reflected in the Missouri Constitution, as amended in 1976. (Sections 25(a)-(g) of Article V of the Missouri Constitution).

The Kansas City Charter extends the nonpartisan selection plan to Kansas City municipal court judges as well. Under the constitution, other judicial circuits may adopt the plan upon approval by a majority of voters in the circuit. Most recently, in November 2008, Greene County voted to extend the nonpartisan plan to its judges.

Under the Missouri Nonpartisan Court Plan, a nonpartisan judicial commission reviews applications, interviews candidates and selects a judicial panel. For the Supreme Court and Court of Appeals, the Appellate Judicial Commission makes the selection. It is composed of three lawyers elected by the lawyers of The Missouri Bar (the organization of all lawyers licensed in this state), three citizens selected by the governor, and the chief justice, who serves as chair. Each of the geographic districts of the Court of Appeals must be represented by one lawyer and one citizen member on the Appellate Judicial Commission.

Each of the circuit courts in Clay, Greene, Jackson, Platte and St. Louis counties and St. Louis city has its own circuit judicial commission. These commissions are composed of the chief judge of the court of appeals district in which the circuit is located, plus two lawyers elected by the bar and two citizens selected by the governor. All of the lawyers and citizens must live within the circuit for which they serve the judicial commission.

Regardless of the commission handling the applications, the constitutional process of filling a judicial vacancy is the same. With any vacancy, the appropriate commission reviews applications of lawyers who wish to join the court and interviews the applicants. It then submits the names of three qualified candidates – called the "panel" of candidates – to the Missouri governor.

Normally, the governor will interview the three candidates and review their backgrounds before selecting one for the vacancy. If the governor does not appoint one of the three panelists within 60 days of submission, the commission selects one of the three panelists to fill the vacancy.

The nonpartisan plan also gives the voters a chance to have a say in the retention of judges selected under the plan. Once a judge has served in office for at least one year, that judge

must stand for a retention election at the next general election. The judge's name is placed on a separate judicial ballot, without political party designation, and voters decide whether to retain the judge based on his or her judicial record. A judge must receive a majority of votes to be retained for a full term of office. The purpose of this vote is to provide another accountability mechanism of the nonpartisan plan to ensure quality judges. If a judge retires or resigns during or at the end of his or her term, a vacancy is created, which will be filled under the Missouri Nonpartisan Court Plan as described above.

To inform voters about the performance of nonpartisan judges, judicial performance evaluation committees, made up of both lawyers and non-lawyers, evaluate objective criteria including decisions written by judges on the retention ballot as well as surveys completed by lawyers and jurors who have direct and personal knowledge of the judges. The judges are rated according to judicial performance standards, including whether they: administer justice impartially and uniformly; make decisions based on competent legal analysis and proper application of the law; issue rulings and decisions that can be understood clearly; effectively and efficiently manage their courtrooms and the administrative duties of their office, including whether they issue decisions promptly; and act ethically and with dignity, integrity and patience. The results of these judicial performance evaluations then are distributed to the public via the media, the League of Women Voters and the Internet.

The success of the plan in selecting qualified judges is evident from the fact that, since its adoption, the public has not voted any appellate judge out of office, and only two circuit judges have been voted out of office. Judge Marion D. Waltner of Jackson County was voted out in 1942. The other, Judge John R. Hutcherson of Clay County, was voted out in 1992 after receiving failing reviews from lawyers in the judicial evaluation survey.

b. Elections In Circuits that have not adopted the Non-Partisan Court Plan, circuit judges are elected to fill available seats.

SIGNIFICANT MISSOURI LAW DISTINCTIONS
REAL PROPERTY

Unlike many areas of the law, the laws governing real property, at least in common law jurisdictions, tend to be uniform to a great degree. This results from the common law states all having initially adopted the same provisions of English law as a starting point. Accordingly, there are only a few areas of real property law which are unique to Missouri.

The statutory provisions governing real property in Missouri are set forth in Chapters 441-448 of the Revised Statutes of Missouri.

I. TENANCY BY THE ENTIRETY ("T/E")

A. Creation

1. There is currently no statutory provision defining a T/E or the method to create such a tenancy.

2. A true T/E can only exist between a husband and wife. Note, however, there is case law which states that multiple trustees of a trust hold title by the entirety.

3. A conveyance to a man and woman in fact married to each other creates a tenancy by the entirety, even if the deed fails to state the two are husband and wife. It is not necessary the deed recite "as tenants by the entirety," nor to recite the tenancy includes a right of survivorship.

4. A conveyance of property owned by husband *or* wife, or by husband and wife other than as a T/E, made by husband and wife directly to themselves as husband and wife effectively creates a T/E. (§442.025, RSMo)

5. The four unities must be observed, that is:

a. Unity of title – the estate is created by one instrument;

b. Unity of interest – the interests of husband and wife must be of the same duration;

c. Unity of time – the interests of husband and wife must vest at the same time; and

d. Unity of possession.

6. Recitations in the deed that negate a T/E, e.g., to husband and wife, as tenants in common and not as tenants by the entirety, are effective.

7. Personal property may be held by husband and wife in a T/E.

B. Encumbrance

1. Neither spouse alone can convey any interest in entireties property. By parity of reasoning, no creditor of one spouse can reach T/E property to satisfy the separate debt of one spouse, with two limited exceptions: The IRS and the bankruptcy court in certain instances treat T/E as though it was a joint tenancy, thereby allowing, in limited circumstances, one-half to be taken for tax or creditor claims of one spouse.

2. Involuntary partition is not applicable to T/E property.

C. Severance

1. A T/E may be severed by joint action of husband and wife, e.g., a deed executed by husband and wife to themselves creating a tenancy in common.

2. A T/E is severed, or terminated:

a. Upon the death of one spouse;

b. Upon divorce, with a resulting tenancy in common; and

c. Upon execution by a creditor of both husband and wife.

II. DEED OF TRUST ("D/T")

Although a mortgage is allowable under Missouri law, in almost every instance a D/T is utilized because it is simpler and, if there is a default, a less expensive procedure than foreclosure under a mortgage.

A. Form

1. There are three parties to a deed of trust:

a. Debtor – the person or persons borrowing funds, whose real property serves as security for payment of the loan.

b. Trustee – the person holding legal title to the real property on behalf of the lender.

c. Beneficiary – the lender of funds.

2. If the Beneficiary sells or otherwise transfers the note secured by the D/T, then in addition to assignment of the note, an assignment should be recorded to show, of record, the new holder of the D/T.

3. If the note is paid in full, a deed of release must be recorded to release the property from the lien of the debt. (§443.060, RSMo) Failure to file the release within 15 days after satisfaction of the debt can result in a penalty equal to 10% of the debt. (§443.130, RSMo)

B. Foreclosure

1. In the event of default, the "Beneficiary" instructs the "Trustee" to sell the real property to provide funds for payment of the debt balance plus the costs of foreclosure. Any excess funds derived from the sale are payable to the Debtor.

2. As with a mortgage, there are notice requirements, both personal and by publication, which must be observed. (§§443.310-.370)

C. Death of Debtor

1. If the Debtor dies before payment of the debt in full, foreclosure is not allowed until 6 months after the Debtor's date of death. (§443.300, RSMo) This does *not* apply with respect to tenancy by the entirety property with respect to which both husband and wife are obligated, as the "Debtor," now the surviving spouse, is the sole owner.

2. The Beneficiary creditor may also file a claim in the Debtor's probate estate for the balance due.

III. THE RULE AGAINST PERPETUITIES AND RELATED RULES

The Rule Against Perpetuities and two related rules, the Rule Against Unreasonable Restraints on Alienation and the Rule Against Accumulations, historically have most often arisen in cases involving real property. These rules, however, apply to all types of property, both real and personal, and frequently are encountered in trust situations.

A. The Rule Against Perpetuities ("RAP")

1. A recent Missouri case has stated the RAP as follows:

> "The Rule Against Perpetuities prohibits the granting of an estate which will not necessarily vest within a time limited by a life or lives in being and 21 years thereafter, together with the period of gestation necessary to cover cases of posthumous birth." *Cole v. Peters,* 3 S.W.3d 846, 851 (Mo.App. W.D. 1999).

2. Court decisions focus on the possibility factor, and disqualify a restricted property transfer if there is the remotest possibility the interest will not vest within the time constraints of the RAP.

3. **NOTE:** The RAP is concerned with *vesting* of title, not necessarily the actual transfer of the property title.

4. Missouri law (§442.555, RSMo) has slightly modified the RAP in regard to real property. The statute allows reformation by court action of a document otherwise violative of the RAP if "reformation would more closely approximate the primary purpose or scheme." This allows changing the terms of the document to eliminate violation of the RAP.

B. The Rule Against Unreasonable Restraints of Alienation ("RARA")

1. While the RAP is concerned with *vesting* of title, the RARA is concerned with suspension of the ability to *transfer* title, e.g., sell the real property.

2. The time limit for a restraint on alienation is the same as that for the RAP, as set forth above.

C. The Rule Against Accumulations ("RAA")

1. The RAA is concerned with accumulations of income, or conversely with avoiding distribution of income to beneficiaries of the property.

2. The time limit on the ability to retain, or accumulate, income is the same as that for the RAP, set forth above.

NOTA BENE: The RAP, the RARA and the RAA apply to all non-trust situations. These Rules do not apply to employee pension plans (§§456.011-.014, RSMo) nor, more importantly, to trusts, which are governed by §456.025, RSMo. **See the Trust Law outline for a discussion of the statute applicable to trusts.**

SIGNIFICANT MISSOURI LAW DISTINCTIONS
TORTS

I. Venue

A. Venue is determined as of the date that plaintiff is first injured. [Mo. Rev. Stat. §508.010.9]

1. First Injury – First Injury is defined as the location where the trauma or exposure occurred, rather than where the symptoms are first manifested. [Mo. Rev. Stat. §508.010.14]

2. For actions accruing in Missouri – proper venue is the county in which the action accrued. [Mo. Rev. Stat. §508.010.4]

3. For actions accruing outside of Missouri:

a. Individual Defendant – venue is proper where the individual defendant resides, **or** if plaintiff was a Missouri resident at the time s/he was first injured, the county that was plaintiff's principal resident. [Mo. Rev. Stat. §508.010.5(2)]

b. Corporate Defendant – the county where the corporation's registered agent is located **or** the county of plaintiff's principal resident, if plaintiff resided in Missouri on the date of first injury. [Mo. Rev. Stat. §508.010.5(1)]

c. Multiple Defendants – in any county in which an individual defendant resides or a defendant corporation's registered agent resides.

II. Punitive Damages

A. Discovery – Discovery is only permitted after the trial court makes a finding that it is "more likely than not" that plaintiff can present a submissible punitive damages case. [Mo. Rev. Stat. §510.263.8]

B. Limits or Caps – Punitive damages are limited to $500,000 or five times the net amount of the judgment rendered against the defendant, whichever is greater. [Mo. Rev. Stat. §510.265.1(1)-(2)]

III. Vicarious Liability

A. Parental Liability for Child(ren)

1. Parents or guardians of any unemancipated minor, under the age of eighteen, are statutorily liable for up to $2,000 in damages if the child:

a. Purposefully "marks upon, defaces or in any way damages property." [Mo. Rev. Stat. §537.045.1].

b. Purposefully causes personal injury to any individual. [Mo. Rev. Stat. §537.045.2]

2. A judge may order the parent, or guardian and/or minor to work for the owner of the property damaged or the person injured in lieu of payment. [Mo. Rev. Stat. §537.045.3]

B. Bar Owner or Tavernkepper Liability

1. Missouri's dramshop statute provides that a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against a liquor licensee when it can be proven by clear and convincing evidence that the seller knew or should have know:

a. That intoxicating liquor was served to a person under the age of 21 years old; or

b. That intoxicating liquor was served to a "visibly intoxicated" person. [Mo. Rev. Stat. §537.053.2]

c. "Visible intoxication" is defined as "significantly uncoordinated physical action or significant physical disfunction." [Mo. Rev. Stat. §537.053.3]

d. An individual's blood alcohol content is not prima facie evidence of visible intoxication. [Mo. Rev. Stat. §537.053.3]

2. There is no social host liability.

C. Automobile Owner Liability for Driver – Missouri does not apply the "family car" or "permissive use" doctrines to impose liability on an automobile owner for the tortuous conduct of a driver.

IV. Joint and Several Liability

A. 51% or Greater Liability – If a defendant is found to bear 51% or more of fault/liability, then the defendant is jointly and severally liable for the amount of the judgment rendered against all defendants. [Mo. Rev. Stat. §537.067.1(1)]

B. Less than 51% Liability – If a defendant is found to be less than 51% at fault, the defendant is responsible for the percentage of the judgment assessed against the defendant, unless:

1. The other defendant was acting as an employee of the defendant; or

2. The defendant's liability arises out of a duty created by the Federal Employer's Liability Act. [Mo. Rev. Stat. §537.067.1(2)]

3. Joint Liability does not apply to punitive damages. [Mo. Rev. Stat. §537.067.2]

C. Governmental Tort Immunity – State Government & Public Entities

1. As a general rule, the State of Missouri and other public entities are immune from tort liability.

2. However, sovereign immunity from tort claims is statutorily waived in two instances:

a. In cases where injuries arise from the negligent operation of a motor vehicle by a public employee within the course of his/her employment. [Mo. Rev. Stat. §537.600.1(1)]

b. In cases where the injuries were caused by the dangerous condition of a public entity's property. [[Mo. Rev. Stat. §537.610.0(2)]

3. Liability of the State and/or public entities is capped and/or limited as followed:

a. Liability in limited to $300,000 for any one person in a single accident or occurrence.

b. Liability is limited to two million dollars for all claims arising out of a single accident or occurrence.

c. These statutory limits on awards for liability are calculated and can be increased or decreased on an annual basis by the Director of Insurance. [Mo. Rev. Stat. §537.610.1(2)]

4. No award for tort damages against a public entity can include punitive or exemplary damages. [Mo. Rev. Stat. §537.610.1(3)]

V. Negligence – Standard of Care

A. Standard of Care for Medical Professionals – A national standard of care is applied to medical professionals. However, some allowances are made for the type of community (i.e. urban, rural, etc.) in which the medical professional maintains his/her practice. [Gridley v. Johnson, 476 S.W.2d 475 (Mo. 1972)]

B. Standard of Care Owed by Owners/Occupiers of Land – The duty of care owed by the owners/occupiers of land is determined by whether the plaintiff is a trespasser, licensse or invitee. [Penberthy v. Penberthy, 505 S.W.2d 122 (Mo.App. 1973)]

C. Violation of a Statute or Ordinace – Violation of an ordinance or statute is negligence per se. [*McKinney v. H.M.K.G. & C.*, 123 S.W.3d 274 (Mo.App 2003)]

VI. Comparative Fault

A. Missouri is a pure comparative negligence or fault state. The fault of plaintiff will reduce plaintiff's damages, but will not completely bar recovery. The last clear chance doctrine does not apply. [*Gustafson v. Benda*, 661 S.W.2d 11 (Mo.1983) and Mo. Rev. Stat. §537.765]

VII. Medical Malpractice Claims

A. Venue – In medical malpractice tort actions, the plaintiff is considered "injured' only in the county where the plaintiff first received treatment by a defendant for the medical condition at issue. [Mo. Rev. Stat. §538.232]

B. Affidavit of Merit [Mo. Rev. Stat. §538.225]

1. The submission of an Affidavit of Merit is required in all medical malpractice action. The trial court is required to dismiss any medical malpractice claim wherein a claimant fails to file an affidavit stating that s/he has obtained a written opinion of a "legally qualified health care provider" stating that the defendant failed to use "reasonable care" and thereby caused plaintiff's claimed damages.

2. A "legally qualified health provider" is defined as a health care provider licensed in Missouri or any other state in the same profession as the defendant and either actively practicing or within five years of retirement from actively practicing substantially the same specialty as the defendant. [Mo. Rev. Stat. §538.225.2]

3. A separate affidavit must be filed for each defendant named in the Petition. [Mo. Rev. Stat. §538.225.3]

4. If plaintiff failed to timely file the Affidavit of Merit, upon motion of any party, the Court must dismiss the action against plaintiff without prejudice. [Mo. Rev. Stat. §538.225.6]

C. Benevolent Gestures – Statements, writings or other benevolent gestures expressing sympathy made to either the person injured or that person's family is prohibited form being admitted into evidence. Only statements of fault can be

admitted. [Mo. Rev. Stat. §538.229.1]

D. Statute of Limitations for Minors – Missouri law had been revised to state that medical malpractice lawsuits filed on behalf of injured minors must be commenced within two (2) years of the minor's 18th birthday. [Mo. Rev. Stat. §516.105]

E. Hard Cap or Limit on Non-Economic Damages – Non-economic damages are capped at $350,000, regardless of the number of defendants. The cap applied to individuals and entities that "provide, consult upon, refer, coordinate or arrange" for health care services. The cap applies to claims for contribution as well, and spousal claims for loss of consortium are considered the same as the plaintiff for purposes of applying the cap. Similarly, all persons and entities asserting a wrongful death claim are considered one plaintiff. [Mo. Rev. Stat. §538.210]

VIII. Products Liability

A. Innocent "Seller in the Stream of Commerce" – Under Missouri's "innocent seller" statute, a seller of a defective product "whose liability is based solely on his status as a seller in the stream of commerce may be dismissed from a products liability" claim if another defendant, from whom total recovery may be had for plaintiff's claim, is properly before the court. [Mo. Rev. Stat. §537.762]

IX. Wrongful Death Actions

A. Statute of Limitations

1. A wrongful death actions accrues on the day of the death of the person for whose death suit can be instituted. [*Gramlich v. Travlers Ins. Co.*, 640 S.W.2d 180 (Mo. Ct. App. E.D. 1982]

2. There is a three (3) year statue of limitations for all wrongful death claims. [V.A.M.S. §537.100]

3. V.A.M.S. §537.100 applies to every wrongful death action. The statute of limitations statute for the underlying tort does not apply.

B. Who May Sue

1. V.A.M.S. §537.080 specifies or delineates who may sue in a wrongful death action. The classes of plaintiffs are as follows:

a. Class One: The spouse or children, or the surviving lineal descendants of any deceased children, whether the child is natural or adopted, legitimate or illegitimate, or the father or mother of the deceased, whether natural or adoptive.

b. Class Two: If there are no persons in Class One entitled to bring the wrongful death action, then the brother or sister of the deceased, or their descendants, who can establish his or her right to those damages set forth in V.A.M.S. §537.090 because of the death.

c. Class Three: If there are no persons in Class One or Two entitled to bring the wrongful death actions, then a plaintiff ad litem may file suit. The plaintiff ad litem shall be appointed by the court having jurisdiction over the action.

2. Only one wrongful death action may be brought against a defendant for the death of any one person.

3. A lower class member cannot file a wrongful death action if a higher class member survives and can file suit. [*State ex rel. Griffin v. Belt*, 941 S.W.2d 570, 572 (Mo. Ct. App. W.D. 1997]

4. Where two or more may assert a cause of action for wrongful death, it is not necessary for a plaintiff to join all other permissible plaintiffs as long as the plaintiff has made a diligent effort to notify all parties with a cause of action. V.A.M.S. §537.095.1]

X. Prejudgment Interest & Demand Letters [Mo. Rev. Stat. §408.040]

A. A plaintiff may receive prejudgment interest if s/he has made a demand for payment of the claim or an offer of settlement of a claim to the party(ies) or their representative(s) and to such party's liability insurer if known to claimant, if the amount of the judgment or order exceeds the demand for payment or offer of settlement.

B. In order to qualify as a demand or offer, the demand must:

1. Be written;

2. Sent by certified mail;

3. Be accompanied by an affidavit of the claimant describing the damages, including, the nature of the claim, the nature of any injuries claims and a general computation of any category of damages sought by the claimant with supporting documentation, if any is reasonable available;

4. For wrongful death, personal injury and bodily injury claims, "be accompanied by a list of the names and addresses of medical providers who have provided treatment to claimant or decedent for such injuries,

copies of all reasonably available damages for loss of wages or earnings, and written authorizations sufficient to allow the party, its representative and liability insurer if known to the claimant to obtain records form all employers and medical providers;"

5. Reference §408.400; and

6. Remain open for at least 90 days.

C. If the demand or offer is not accepted, the claimant must file cause of action in the circuit court within 120 days of the date the demand or offer was received, unless the parties agree in writing to a longer period of time. [Mo. Rev. Stat. §408.040.2]

D. If the claimant fails to file a lawsuit within 120 days after the demand was received by the respondent, then s/he cannot receive prejudgment interest. [Mo. Rev. Stat. §408.040.2

SIGNIFICANT MISSOURI LAW DISTINCTIONS
TRUST LAW

The primary source of Missouri law governing express trusts is the Missouri Uniform Trust Code ("MUTC"), §§456.1-101 to 456.11-1106, RSMo. Although the MUTC only became effective on January 1, 2005, it nonetheless applies, with few exceptions, to all express trusts "created before, on, or after January 1, 2005." §456.11-1106, RSMo. For the most part, the MUTC follows the Uniform Trust Code, but there are several significant variations and, in addition, several statutes in place prior to enactment of the MUTC were retained because they address specific matters not addressed by the MUTC.

I. Retained Statutes (§§456.001-456.590)

A. Life Insurance Trust (§456.005)

1. Designation of trust or trustee as beneficiary of life insurance creates valid express trust even though beneficiary designation is revocable.

2. The trust agreement must be in writing and in existence "on the date of death of the insured," i.e., written trust agreement not required at time beneficiary designation is made.

B. Employee Trusts (§§456.011-456.017)

1. Trust created as part of a stock bonus plan, nonpublic pension plan, disability or death plan, profit-sharing plan or retirement plan is not subject to rule against perpetuities.

2. The assets and income are not subject to assignment (spendthrift) and are exempt from attachment or execution prior to payment to the employee. (§456.014)

C. Addition to Trusts (§456.021)

1. Allows transfer of property to the trust, by name. Common law required transfer be made to trustee.

2. Trust need not be in existence, i.e., transfer may be to trust "to be established."

D. The Rule Against Perpetuities and Related Rules (§456.025)

1. **NOTE:** The rules discussed in this subsection apply to a "trust" as defined in §456.025.4. The statute also contains a listing of trusts specifically not included.

2. The Rule Against Perpetuities ("RAP") (§456.025.1)

   a. Defined: "The Rule Against Perpetuities prohibits the granting of an estate which will not necessarily vest within a time limited by a life or lives in being and 21 years thereafter, together with the period of gestation necessary to cover cases of posthumous birth." *Cole v. Peteres,* 3 S.W.3d 846, 851 (Mo.App. W.D. 1999).

   b. The RAP does not apply to a "trust" if the trustee, or another person delegated the power, has the power to sell the property, *and* the power to sell is effective no later than the date the RAP would have expired if it applied.

3. The Rule Against Unreasonable Restraints on Alienation ("RARA") (§456.025.1)

   a. The RARA applies the same time limitation as the RAP.

   b. As with the RAP, the RARA does not apply to a "trust" if the trustee, or another person delegated the power, has the power to sell the property *and* the power to sell is effective no later than the date the RAP would have expired if it applied.

4. The Rule Against Accumulations ("RAA") (§456.025.2)

   a. The RAA applies the same time limit as the RAP.

   b. The RAA does not apply to a "trust" unless the terms "require" income to be accumulated, i.e., no distributions to beneficiaries, beyond the RAP time limitation.

   c. Further, if the "trust" does require accumulations beyond the RAP period, the "trust" is not void, but rather the trustee "shall" nonetheless have the discretionary power to make distributions in accordance with the settlor's manifested intention for distribution.

5. The provisions of §456.025 apply to "trust" executed, amended or created after January 28, 2001.

NOTE BENE: The provisions of §456.025 apply only to trusts as defined in §456.025.4. **See the Real Property outline for a discussion of the RAP, the RARA and the RAA statute and rules applicable in non-trust situations and to trusts no governed by §456.025.**

E. Registration of Trust (§§456.027-456.033)

1. Allows trust to be registered in probate division of county where principal place of administration is located. (§456.027) Such registration, if proper, confers jurisdiction upon the court where registered, and upon beneficiaries of the trust. (§456.033.1-.3)

2. Allows court to conduct proceedings involving the administration of the trust; broad jurisdiction. (§456.033.4)

F. Variation of Trust Terms (§456.590.2)

1. If all adult beneficiaries who are not disabled consent **and** the court finds a proposed variation will benefit "the disabled, minor, unborn and unascertained beneficiaries," then the terms of the trust may be varied, including termination. (§456.590.2)

2. Application to court for variance may be made by trustee or person beneficially interested. (§456.590.4)

3. **NOTE: This statute must be utilized if trust became irrevocable prior to January 1, 2005, i.e., cannot proceed under provisions of MUTC for trust modifications.**

II. MUTC – VARIATIONS FROM UNIFORM TRUST CODE

A. General Provisions

1. Definitions (§456.1-103) – Adds several definitions not in Uniform Trust Code and alters other definitions to comport with other Missouri statutes.

2. Default and Mandatory Rules (§456.1-105)

a. Authority of court to modify or terminate a trust may be overridden by terms of the trust agreement. (§456.1-105.1(4))

b. Deletes "qualified beneficiary" as one to receive notice of irrevocable trust being established, and changes age of notice from 25 to 21. (§456.1-105.1(8)) Also adds provision allowing settlor to designate a person to receive notices on behalf of others. (§456.1-105.3)

c. Changes beneficiaries entitled to receive information upon request from all beneficiaries to "qualified beneficiaries." (§456.1-105.1(9))

3. Allows principal place of administration to be changed, but requires the place selected be appropriate to trust purposes, administration and interest of beneficiaries. (§456.1-108.2)

4. Allows intervention of attorney general in administration of a charitable trust if the trust is not for the benefit of a specified charity or charities. (§456.1-110.2(1))

5. Requires court approval of agreement by beneficiaries to modify or terminate trust; cannot be done by nonjudicial agreement. (§456.1-111.6)

6. Provides trust provisions in favor of spouse are of no effect if marriage terminated or annulled. (§456.1-112)

B. Judicial Proceedings

1. Restates provisions set forth in §456.033.4 regarding matters subject to jurisdiction of court via registration (See I. F., *supra*) and adds additional matters. (§456.2-202)

2. Replaces venue rules with provisions similar to those set forth in repealed §456.450. (§456.2-204)

C. Representation (§§456.3-301-456.3-305)

1. Allows certain persons to represent, and bind, others, e.g., parent for minor or unborn child, guardian for ward.

2. Court may appoint representative if it determines interest is not represented or representation is inadequate.

D. Creation, Validity, Modification and Termination

1. Requires trust involving "lands, tenements or hereditaments" be in writing. (§456.4-407) Deletes prior law provision requiring assignment of a beneficiary's interest in trust be in writing.

2. Replaces Uniform Trust Code provision for modifying or terminating irrevocable trusts with two sections:

a. Allows nonjudicial modification or termination if settlor and all beneficiaries consent, even if contrary to a material purpose of trust. (§456.4A-411)

b. Allows judicial modification or termination if all adult, competent beneficiaries consent and court determines non-consenting beneficiary "will be adequately protected." (§456.4B-411). **NOTE:** This is successor to §456.590; see I.F. above.

E. Creditor's Claims; Spendthrift and Discretionary Trusts (§456.5-501-456.5-507)

1. Throughout, the Uniform Trust Code provisions have been modified to carry forward various provisions of prior Missouri law established by and under repealed §456.080.

2. Provides a beneficiary's interest in a trust subject to trustee discretion is not an interest in property or an enforceable right. (§456.5-504)

3. Allows publication of notice after settlor's death to bar creditor claims after 6 months. (§456.5-505.4)

F. Revocable Trusts

1. Capacity required to create or amend trust, or add property to trust, is same as that required to make will. (§456.6-601)

2. Unless trust terms expressly provide trust is irrevocable, it is revocable. This reverses presumption under prior law, and is, therefore, only effective for trust executed on or after January 1, 2005. (§456.6-602)

3. If trust provides a method for amending or revoking, method must be "substantially" followed. If no method is provided, then any method, including a will, which manifests clear and convincing evidence of intent will suffice. (§456.6-602.3)

4. Trust contest is barred upon earlier of (i) 2 years after death, (ii) 6 months after person is provided copy of trust *and* notice identifying trustee and advising of 6 month limit, or (iii) upon expiration of will contest time, if the will is pourover *and* copy of trust is filed in probate division within 90 days after death. (§456.6-604)

G. Office of Trustee

1. If trustee ceases or fails to serve and no successor named, *majority in number* of qualified beneficiaries may appoint successor. (§456.7-704.3)

2. Allows removal of trustee if level of services by trustee "substantially and materially reduced." (§456.7-706.2(4))

H. Duties and Powers of Trustee

1. Duty to protect trust property does not extend to tangible personal property not in possession and control of trustee. (§456.8-809)

2. Trustee is required:

   a. To provide copy of trust instrument to beneficiary upon request. (§456.813.2(1))

   b. To notify qualified beneficiaries of trustee's name, address and telephone number within 60 days after accepting trusteeship. (§456.813.2(2))

   c. To notify qualified beneficiaries of the trust's existence (and provide other specified information) within 60 days after trust becomes irrevocable. (§456.813.2(3))

NOTE: §456.8-813 only applies to trusts which become irrevocable on or after January 1, 2005. (§456.8-813.8)

3. Beneficiary who receives asset subject to confidentiality restriction is bound by the restriction. (§456.8-813.7) See **NOTE** above.

I. Liability of Trustee and Rights

1. Breach of trust action is barred upon later of (i) 1 year after beneficiary sent report disclosing potential problem and (ii) written notice of 1 year time limit provided with respect to report.

2. If prior provision not applicable, then 5 years after earlier of (i) trustee ceasing to serve, (ii) termination of beneficiary's interest, or (iii) termination of trust.

NOTA BENE: With the exceptions set forth in §456.1-105.2, the provisions of the MUTC are default, i.e., only apply if not overridden by the trust instrument.

SIGNIFICANT MISSOURI LAW DISTINCTIONS
CIVIL PROCEDURE

I. JURISDICTION OVER THE PERSON AND OVER THINGS

A. Personal Service on Individuals

1. Transient Jurisdiction – Personal jurisdiction may be secured by serving a defendant with a summons within the territorial limits of Missouri.

2. Domicile – A state may assert personal jurisdiction over a defendant if the defendant is domiciled in the state. Thus, Missouri can assert personal jurisdiction over a domiciliary defendant even if that defendant is outside the state at the time served.

3. Consent – Alternatively, jurisdiction could be executed pursuant to a party's consent, or by the making of a general appearance.

4. Implied or Inferred Consent – Because limitations on territorial presence, states have attempted to infer consent to jurisdiction from certain acts of the defendant within the state that have created a cause of action. For example, under the Nonresidence Motorist Statute [Mo.Ann.Stat.§506.210], use of the state's highways is deemed consent to personal jurisdiction over the defendant in actions arising out of such use and to the appointment of the secretary of state as a nonresident's agent for accepting process in lawsuits that arise out of her use of the highways.

   Note: These statutes have been upheld as consistent with due process, but it is now recognized that the true basis of jurisdiction is not consent in these cases but fundamental fairness.

B. Service on Corporations

1. Missouri Corporations and Registered Foreign Corporations – Personal jurisdiction over domestic corporations and foreign corporations registered to do business in Missouri is obtained by serving a copy of the summons and petition on the registered agent or any other agent authorized or required by law to receive service of process, or any officer or managing or general agent of the corporation found anywhere in the state: or by leaving the copies at any of the defendant's business offices with the person in charge there. [Rule 54.13].

   a. Examples of "Agents"

      The manager of a branch office and a general sales agent have been held to be managing or general agents of corporations, so that

leaving a copy of the summons with them constituted service on a corporation. The duties of these individuals indicate an appreciation of the necessity of transmitting important papers to responsible officers.

b. Those Not Considered Agents

The following have been held not to be managing or general agents: a watchman of mining property, a clerk-typist or receptionist, and an insurance salesperson who maintained an office in her residence but lacked authority to issue or sign policies for the insurer and was paid on a commission basis.

C. Service on Partnerships – Personal service on a general partnership requires individual service on each partner.

D. Service on Municipal, Governmental or Quasi-Public Bodies – Personal jurisdiction over a public or quasi-public corporation or body is obtained by serving: (i) the clerk of the county court (in the case of a county); (ii) the mayor, city clerk, or city attorney (in the case of a city); or (iii) the chief executive officer (in the case of any other public body). [Rule 54.13].

II. OUT-OF-STATE SERVICE (Long Arm Jurisdiction)

A. Procedure for Service

1. Manner of Service – Service of summons in long arm cases is to be made in the same manner as service within the state. [Rule 54.14(b)].

2. Who May Serve – Service may be made by a person or that person's deputy authorized to serve legal process in the foreign state, or by a person appointed by the court in which the action is pending. [Rule 54.14(a)].

3. Returns – Whether service is made by a private person or by an officer of a foreign state who is legally authorized to serve summons, return must be by affidavit and it must state the time, manner, and place of service. [Rule 54.20(b)].

B. Out-of-State Service on Domiciliaries and Residents

1. Requirements for Domicile or Residency

Out of state service on any person, or her executor, administrator, or other legal representative, has the same effect as service within the state as long as the person was domiciled in or a resident of Missouri: (i) at the time the cause of action accrued in Missouri; (ii) at the time the action was

commenced; or (iii) at the time process was served. If any of these conditions is met, the court acquires personal jurisdiction of the defendant. [Rule 54.07].

2. Personal Representative Stands in Decedent's Shoes

A personal representative stands in the litigational shoes of a decedent who is subject to the jurisdiction of Missouri courts.

3. Domicile Distinguished from Residence

Domicile must be distinguished from residence; residence is the place where a person happens to be living, whether or not she intends to make it her permanent home.

4. Questionable Constitutionality

Missouri's long arm statute authorizing in personam jurisdiction by service out of state on persons who are or were merely residents of Missouri may not be constitutional.

C. Long Arm Statute – Missouri authorizes out of state personal service on defendants for the purpose of subjecting them to the personal jurisdiction of the court, where the defendant:

1. Is a domiciliary or a resident of Missouri;

2. Does certain acts in the state in person or through an agent;

3. Has lived in a lawful marriage within Missouri, if the other party to the lawful marriage continues to live in Missouri, or if the third party has provided support of the spouse or to the children of the marriage and is a resident of Missouri; and

4. Has engaged in sexual intercourse in the state at or about the time a child was conceived.

Note: The mere fact that Missouri rules allow service outside the state for in personam jurisdiction does not mean that Missouri's assertion of in personam jurisdiction in a particular case is constitutional. That determination requires a second analysis that embraces the requirements of *International Shoe*.

D. Acts By Which Persons Submit to Jurisdiction of Missouri Courts Through the Long Arm Statute

1. Transaction of any business within Missouri;

2. Making or acceptance of any contract in Missouri;

3. Commission of tortuous act in Missouri;

4. Ownership, use, or possession of Missouri real estate;

5. Contracting to insure any person, property or risk located in Missouri at time of contracting; and

6. Maintenance of marital domicile in Missouri.

III. SUBJECT MATTER JURISDICTION

A. Subject matter jurisdiction, in contrast to personal jurisdiction, is not a matter of the state court's power over the person, but the court's authority to render judgment in a particular case. Subject matter jurisdiction of the state's court is governed directly by the State Constitution.

B. In general, subject matter jurisdiction is not subject to waiver and be raised at any time, even on appeal.

C. If a matter is not jurisdictional but rather a procedural matter required by a statute or rule or an affirmative defense of the sort listed in the affirmative defense rule, it generally may be waived if not raised timely. For example, under McCraken v. Wal-Mart Stores, East, LP, 298 S.W.3d 473 (MO 2009) the issue of whether a statutory employee under the Workers' Compensation Act is not a matter of subject matter jurisdiction subject to a motion to dismiss, and a failure to raise the Workers' Compensation Act applicability as an affirmative defense may constitute a waiver of that defense, just as it the with other affirmative defenses.

IV. VENUE

A. Procedure for Challenging Improper Venue

1. Motions to Transfer – Challenges to venue may not be asserted by a pre-answer motion under Rule 55.27 or as an affirmative defense in defendant's answer. Instead, they must be asserted by a motion to transfer venue pursuant to Rule 51.045. Such a motion must be filed within 60 days after service on the party seeking transfer. Failure to file a timely motion waives objections to venue. If a timely motion to transfer venue is filed, the venue issue is not waived by any other action in the case.

2. Decisions on Motions to Transfer

a. Grant of Motion – IF the issue is determined in favor of transfer (or if no reply is filed), the court will transfer the entire case to a county of proper venue, unless separate trials have been ordered for separate claims. If separate trials have been ordered, the court will transfer only that part of the civil action in which the movant is involved.

b. Automatic Grant of Motion If Court Fails to Rule – A motion to transfer based on claim of improper venue will automatically be granted if the court fails to rule on the motion within 90 days after the motion's filing. However, this time period can be waived in writing by all parties.

3. Relationship Between Motion to Transfer Venue and Motion for Change of Venue Based on Population – A motion to transfer venue does not deprive a party of any right the party may have to move to change venue under Rule 51.03 if the case is transferred to a county having 75,000 or fewer inhabitants. In that situation, a motion to change may be filed within the later of the time permitted by Rule 51.03 or 10 days after being served with notice that the case has been docketed in the transferee court. The right to change venue due to population may have been eliminated with respect to tort claims.

4. Effect of Motion to Transfer on Time for Filing an Answer – Unlike a pre-answer motion under Rule 55.27, a motion to transfer venue does not extend the time for filing an answer.

B. General Rules for Proper Venue

1. Non-Tort Cases – The following rules apply only if there is no count alleging tort. They apply whether the defendants are individuals, not-for-profit corporations, or for-profit corporations. The former "corporate defendants only" venue statute and the former special venue statute for not-for-profit corporations have been repealed. These non-tort rules also apply to limited liability partnerships, and they probably also apply to limited liability companies.

a. All Defendants Residing in the Same County in Missouri

1. One Defendant – If there is only one defendant and that defendant resides in Missouri, venue is proper in the county in which (i) that defendant resides; and (ii) the plaintiff resides and the defendant may be found and served with process.

2. Multiple Defendants – If there are multiple defendants, and all reside in the same Missouri county, venue is proper in that county. In that situation, venue is probably also proper in the county in which the plaintiff resides if all the defendants are found and served with process therein.

b. Several Defendants Residing in Different Counties – If there are several defendants and they reside in different counties, venue is proper in any county in which any of the defendants reside.

c. Several Defendants – Mixed residents and nonresidents – If there are several defendants and they reside in different counties, venue is proper in any county in which any of the defendants reside.

d. All Defendants Nonresidents of Missouri – If all defendants are nonresidents of Missouri, venue is proper in any Missouri county.

2. Tort Cases – See Outline Significant Missouri Law Distinctions, Torts.

C. Special Venue Rules for Particular Types of Defendants or Plaintiffs

1. Defendant LLPs – The statute creating LLPs in Missouri provided that suits against LLPs would be governed by the general venue rules. However, in non-tort cases, venue of a suit against an LLP is broader, given that LLPs may have multiple residences (every county in which the LLP has an agent or office for doing its customary business, as well as the counties in which its registered agent and registered office are located.)

2. Plaintiff or Defendant Counties – If any of the plaintiffs is a county, the following venue rules apply:

a. If there is no count alleging a tort, the case may be commenced and prosecuted to final judgment in the county in which the defendant or defendants reside or in the county in which the plaintiff county is located, if at least one defendant can be found and served in that county. If the suit is based on contract, the suit can also be brought in the county in which the plaintiff county is located or in the county in which any party to the contract resides.

b. If there is any count alleging a tort, venue in suits by counties is probably governed by general tort venue rules.

D. Change of Venue

1. By Agreement – In any civil action, if all parties agree in writing to a change of venue, the court must transfer venue to the county within the

state unanimously chosen by the parties. If any parties who are added to the cause of action after the date of the transfer do not consent to transfer, the case must be transferred to such county in which venue is appropriate under the general rules based on the amended pleadings.

2. For Cause – A change of venue for cause may be ordered in any civil action triable by a jury if: (i) the opposite party has an undue influence over the inhabitants of the county; or (ii) the inhabitants of the county are prejudiced against the applicants.

   The application must be filed at least 30 days before the trial date or within 10 days after a trial date is fixed, whichever date is later. IF granted, venue will be changed to some other county convenient to the parties where the cause does not exist. [Rule 51.04].

3. As a Matter of Right in Counties of 75,000 or Fewer Inhabitants

   a. General "Small County Change of Venue" Rule - Pursuant to Rule 51.03, a change of venue as a matter of right to some other county convenient to the parties will be ordered in a civil action triable by jury pending in a county having 75,000 or fewer inhabitants. The application must be filed not later than 10 days after his answer is due to be filed, or 10 days after the return date of the summons if an answer is not required, and he need not allege any cause for the change.

V. CHANGE OF JUDGE

If the trial judge is interested or prejudiced, is related to either party, or has been counsel in the cause, an application is not required. The judge is considered disqualified to preside over the action and is under a duty to disqualify herself. [Rule 51.07]. However, a motion to disqualify will usually be made. The motion will state the reason the judge ought to disqualify herself, e.g. bias, prejudice, etc. If the judge refuses to disqualify herself, relief may be sought by way of extraordinary writ praying for the appellate court to direct the judge to disqualify herself.

VI. STATUTES OF LIMITATIONS

A. One-Year Savings Statute

If a plaintiff files suit within the statute of limitations, and the suit is dismissed without prejudice, the Missouri "savings statute" permits the plaintiff to re-file within one year after the dismissal. The savings statute extends, but does not shorten, the applicable statute of limitations – if a dismissal occurs before the expiration of the statute of limitations, the plaintiff has either one year under the

savings statute or the remainder of the statute of limitations period, whichever period is longer, in which to refile. The savings statute applies to voluntary and involuntary dismissals without prejudice. The savings statute can only be used once.

B. Tolling the Statute

1. Absence of a Resident Defendant – If a defendant is a resident of the state, his absence from the state will toll the statute of limitations in two situations:

   a. He is absent at the time the cause of action accrues in which case the statute of limitations does not begin to run until he returns to the state; or

   b. He is a resident of the state at the time the cause of action accrues, and he subsequently leaves the state and establishes a residence in another state.

   c. Wrongful Death Actions – A different tolling provision applies in wrongful death actions: If the defendant is absent from the state, the statute of limitations is suspended during the period the defendant is absent. This special wrongful death tolling rule applies even if the defendant was never a resident of Missouri. However, this tolling provision does not apply if the defendant can be served – even outside of the state – by use of the long arm statute, or if the defendant can be served within the state.

2. Injunction – The statutory period does not run while the action is stayed by injunction or statutory prohibition.

3. Concealment – The statutory period does not run while the defendant absconds or conceals himself, or while he, by any other improper act, prevents the commencement of the action.

VII. PLEADINGS

Fact pleading v. Federal Notice Pleading – Fact pleading requires that the pleader state his cause of action with greater specificity than that required under the federal "notice" pleading. IF the allegations are too general, a pleading is "conclusionary"; if too specific, it is "evidentiary." The pleader should state ultimate facts that logically support, on application of a rule of law, the liability of the defendant. Each averment of a pleading must be simple, concise, and direct. No technical forms of pleadings are required.

VIII. DEPOSITIONS

Depositions May Be Used at Trial for Any Purpose.

Any part of a deposition that is admissible under the rules of evidence applied as though the deponent were testifying in court may be used against any party who was present or represented at the taking of the deposition or who had proper notice thereof. Depositions may be used in court for any purpose.

IX. JURY PRACTICE

A. Instructions

1. Given to Jury Before Closing Argument

In Missouri, unlike most states and the federal system, instructions are given to the jury before the closing argument.

2. Approved Instructions Are Mandatory

If there is an approved MAI instruction applicable to the case that the appropriate party requests or the court decides to submit, the approved instruction must b given to the exclusion of any other on the same subject.

a. Deviation from MAI – If there is a deviation from an applicable MAI instruction that does not need modification under the facts of a particular case, the deviation is error and is presumptively prejudicial error.

X. APPEALS

A. Points Relied Upon

1. The brief must contain the points relied on, each of which must:

a. Identify the trial court ruling or action that the appellant challenges;

b. State concisely the legal reasons for the appellant's claim of reversible error; and

c. Explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.

2. Supporting Authorities

The petitioner must, immediately, following each point relied on, include a list of cases, not to exceed four, and the constitutional, statutory, and regulatory provisions or other authority on which the petitioner principally relies. It is no longer necessary to list all authorities or permissible to list more than four cases. Failure to cite authorities in support of a point will be deemed to be an abandonment of the issue. Similarly, failure to develop the point in the appellant's brief will be deemed an abandonment of the issue. If an issue one of first impression and no authorities exist, the appellant should state that fact.

Missouri Educational Component Test

Please answer the following 30 questions pertaining to the Missouri Materials you have reviewed. When you have answered all the questions, press the 'What is my score?' button at the bottom of the page. If you have answered 25 out of the 30 questions correctly, you have passed the test and a Certificate of Completion link will appear below. You must complete and sign the Certificate of Completion and mail it to the Board of Law Examiners.

1. Bob, a resident of St. Charles County, was involved in an automobile accident in Warren County, Missouri, with Rick, a resident of Cole County. Bob sustains personal injuries and loses time from work as a result of the accident. Bob hires an attorney to file suit against Rick for vehicular negligence. In which county is venue proper?

   - St. Charles County
   - Warren County
   - Cole County

2. Which of the following corporate documents is NOT to be filed with the Missouri Secretary of State's Office:

   - Bylaws
   - Articles of Incorporation
   - Annual registration

3. In anticipation of their impending marriage, after having lived together for several years, John Doe and Jane Smith purchased the residence they had been renting and took title as "John Doe and Jane Doe, Husband and Wife." John and Jane married the following day, and continued to reside in the residence together until John's death, 20 years later. After John's death, a judgment creditor of him sought to levy on the residence, contending John and Jane were actually tenants in common, not tenants by the entireties. The levy by the creditor:

   - Should not succeed because John and Jane did marry within 48 hours of acquiring the residence.
   - Should succeed because John and Jane were not married when title was acquired.
   - Should not succeed because John and Jane had a "marital relationship" for several years prior to acquiring the residence.

4. Which of the following is NOT subject to the exclusive jurisdiction of the Supreme Court of Missouri:

   - Jurisdiction over cases involving the validity of a Missouri statute or provision of the Missouri constitution.
   - Jurisdiction over all appeals from all inferior courts within the counties of the state.

- Jurisdiction over cases involving punishments imposing death.

5. John Doe, a resident of Cole County, Missouri, dies on January 1, 2009, and a probate administration for his estate is commenced on February 28, 2009. John's brother, James, who is the personal representative of John's estate, files a claim against John's estate on July 15, 2009, for $200,000 he loaned John, which was not repaid. The total value of John's probate estate is only $100,000, as the bulk of his assets were held in his Revocable Trust. One year after filing his claim, James files an action seeking recovery of assets held in John's Trust in order to secure funds to pay James' claim. James' action:

   - Should proceed because timely filed.
   - Should be dismissed because not timely filed.
   - Should be dismissed because assets cannot be recovered from a trust to pay probate claims.

6. Which of the following statements is NOT true:

   - A registered agent can be a corporation.
   - A corporation can be administratively dissolved if it does not have a registered agent.
   - A registered agent does not have to reside or be authorized to do business in Missouri.

7. Ed is a lawyer that is representing a personal injury plaintiff. Ed wants to introduce his client's medical bills from the local hospital into evidence at trial, but the Custodian of Records is unavailable. Instead, Ed obtains an affidavit from the custodian stating that the medical bills were created at or around the same time as the treatment rendered and that the bills were maintained in the ordinary course of business.There is no dispute that the amount of the bills is reasonable. At trial, Ed will be able to introduce the medical bills because:

   - If a witness is unavailable at trial, the evidence is allowed to be introduced as an exception to the hearsay rule.
   - The amount of the medical bills is not in dispute.
   - Business records may be admitted based on an affidavit from the Custodian of Records.

8. Ann, a computer consultant, enters into a contract with Technology Unlimited, a computer store. Under the contract, Ann is required to provide fifty hours of consulting services to the store's customers every month for two years. Three months into the contract, Technology Unlimited has not paid Ann for any of the services rendered. Ann decides to file suit. Technology Unlimited is a general partnership owned by Jack and Jill. Ann leaves the service and summons papers with the person she believes is serving as the company's registered agent. Ann does not serve either Jack or Jill. Ann does not have valid service because:

   - Service on a general partnership requires individual service on each partner.

◎ No corporate defendant can be served by serving the registered agent with summons papers.

◎ Service on a corporate defendant is only effective if the President of the corporation is personally served.

9. John Doe, a resident of Cole County, Missouri, purchased a policy of insurance on his life and designated the "John Doe Insurance Trust" as the beneficiary. Two years later, John's attorney prepared the "John Doe Insurance Trust Agreement," which John signed as Settlor and as the Trustee. The Agreement does not name a successor Trustee to John nor does it mention the previously purchased insurance policy. After John's death, James Doe is appointed as the successor Trustee by a majority of the qualified beneficiaries of the Trust. James then demands payment of the insurance proceeds to him as the successor Trustee. The insurance company should:

◎ Pay the insurance proceeds to the Trust or to James, as Trustee.

◎ Pay the insurance proceeds to John's estate because the John Doe Insurance Trust did not exist at the time it was designated as beneficiary.

◎ Decline payment of the insurance proceeds because the John Doe Insurance Trust did not exist at the time it was designated as beneficiary.

10. The Non-Partisan Court Plan is employed to select the following judges in the state of Missouri:

◎ All circuit court judges.

◎ Only judges serving on the Court of Appeals or the Supreme Court.

◎ All Court of Appeals and Supreme Court judges and those circuit court judges in circuits to which the Plan as adopted originally applied and/or in which voters have approved the adoption of the Plan.

11. John Doe, a resident of Cole County, Missouri, dies on June 30, 2009. John has a will which is in proper form, and was signed by John and attested by two witnesses. On January 6, 2010, John's attorney delivers John's purported Last Will and Testament, to the Cole County Probate Division. On July 15, 2010, John's wife discovers an asset subject to probate, and that same day files a Petition seeking admission of the will to probate. The Petition to admit the will should be:

◎ Denied because the Petition was not filed within one year after the date of John's death.

◎ Sustained because the will was delivered within one year after the date of John's death.

◎ Sustained because an asset subject to probate is discovered.

12. In a dissolution of marriage action, the parties' assets include a $25,000 CD in the wife's name alone, which she inherited during the marriage. In dividing the property, what will the Court do with this CD?

- Give each party 50%.
- Consider it with all other property and then divide all the property on an "equitable" basis in light of the statutory factors.
- Award it to wife as separate non-marital property.

13. Professor Brown is a CPA and has taught accounting courses at the local college for twenty years. Prior to teaching, Professor Brown had his own accounting firm. Jenny is a lawyer preparing to try a complicated accounting case. She wants to call him to testify as an expert witness. Jenny will be able to call Professor Brown to testify because:

- He is a CPA and teaches at the local college.
- Specialized knowledge will assist the trier of fact in understanding the evidence and Professor Brown is qualified to testify.
- All complicated cases require the testimony of an expert witness.

14. Bill files a civil lawsuit against XYZ Corporation for fraud and seeks punitive damages. The jury returns a verdict in favor of Bill and against XYZ Corporation. The jury awards Bill $500,000 in compensatory damages. If the jury awarded Bill punitive damages, which of the following punitive damage awards would be unconstitutional, based solely upon the amount of the award?

- $500,000
- $2,500,000
- $3,000,000

15. Jane files suit against Joe for negligence. One month after suit was filed, the applicable statute of limitations for Jane's suit expired. Several months after the lawsuit is filed, Jane has second thoughts about proceeding and decides to dismiss the case. An Order is entered dismissing the case without prejudice. Fourteen months later, Jane re-files the suit against Joe for the same cause of action. The re-filed suit will be dismissed because:

- Cases dismissed without prejudice cannot be refiled.
- Res Judicata attached when the case was dismissed without prejudice.
- The re-filed case was filed more than twelve months after the dismissal of the initial suit.

16. How many judges serve on the Missouri Supreme Court:

- Ten
- Seven
- Nine

17. John Doe, a resident of Cole County, Missouri, executed an irrevocable trust and funded the trust with real property of substantial value. The trust agreement provided "none of the real property shall be sold until the death of all of my children living at the date of my death." At the date of John's death, he had three living children, two of whom were living at the time the irrevocable trust was created and one of whom was born two years after the irrevocable trust was created. The trust agreement is:

- Void because it violates the Rule Against Accumulations.
- Void because it violates the Rule Against Unreasonable Restraints on Alienation.
- Valid because the restriction on sale lapses on the death of the last living child.

18. John Doe, a resident of Cole County, Missouri, requests his attorney prepare a will for him. The attorney does so and forwards a copy for John to review. John reviews the will, finds it to be in order and dates and signs the will. John then goes to a neighbor's house, advises the neighbor the document is his will and that he has signed it, and requests the neighbor to sign as a witness, which the neighbor does in John's presence. John then repeats the process with another neighbor. After John's death, the will should be:

- Denied admission to probate because the witnesses did not see John sign the will.
- Denied admission to probate because the witnesses did not see each other sign the will.
- Admitted to probate because it was signed by John and two witnesses after proper disclosure by John.

19. In any dissolution action involving minor children, what must each party provide to the court in addition to the initial pleadings?

- A Parenting Plan detailing custody and visitation arrangements.
- Psychological evaluation.
- Both.

20. Mary is tragically killed at the age of twenty-nine (29). Mary is survived by the following family members: (1) her husband, Jeff; (2) her twin brother, Mark; and (3) her daughter, Alexis. The family firmly believes that Mary's death is the result of a defective product that was manufactured and sold by ABC Corporation. Of the three family members, who is prohibited from bringing or lacks standing to bring a wrongful death suit against ABC Corporation for Mary's death?

- Jeff
- Mark
- Alexis

21. Jean is representing a defendant in trial. Prior to trial, Jean deposed Plaintiff. Jean would like to use the deposition of Plaintiff to impeach her if she tries to change her testimony, and to read the admissions against interest Plaintiff made during the deposition. At trial Jean will be able to use the deposition:

- Only for impeachment purposes.
- Only for admissions against interest.
- For both impeachment purposes and admissions against interest.

22. Review of a non-contested case:

- Is not available because the agency's decision was not contested.
- Is available by means of a suit for injunction or other appropriate action in circuit court.
- Is available only via a writ in the Court of Appeals.

23. John Doe, a resident of Cole County, Missouri, owns a controlling interest in a family business. John calls all of the employees of the business to a meeting, at which he announces, "Effective today, I hold all of my shares of business stock in trust for my son, James Doe, to be delivered to him after my death." Two weeks later, John dies. John's declaration:

- Did not create a valid trust and John still owns the stock.
- Created a valid trust and the stock now belongs to his son.
- Requires the stock be distributed to John's son through a probate administration of John's estate.

24. A contested case is:

- A proceeding before an agency where the party has exhausted his administrative remedies.
- Any proceeding before an agency where a hearing was, in fact, conducted.
- A proceeding before an agency where the law requires a trial type hearing.

25. Using funds inherited by John Doe from his mother, John and his wife, Jane Doe, purchased a residence and took title as "John Doe and Jane Doe, Husband and Wife." Subsequently, John wanted to borrow funds and use the residence as security for the loan, but Jane would not agree. The lender then determined that since the funds utilized to purchase the residence were John's separate property, the residence was also separate property. Based thereon, the lender loaned funds to John and took back a deed of trust on the property signed only by John. Jane was present at closing of the loan, but signed no documents. Payments on the loan were made for several months by John, and then John died. Jane refused to pay the loan, and the lender sought to foreclose under the deed of trust. The foreclosure:

- Should be allowed because the residence was John's separate property.
- Should be allowed because Jane was present at the closing and did not object.
- Should not be allowed because the residence was tenancy by the entireties property and Jane signed no documents subjecting the property to the debt.

26. A parent in Missouri with custody rights pursuant to a Missouri court's order may relocate the child to another state under what circumstances?

- After 60 days' notice to the other parent.
- After obtaining the other parent's permission or, if not given, the court's permission at a hearing.
- Only when both parties are moving to the same state.

27. The owners of a Limited Liability Corporation are known as:

- Members
- Shareholders
- Investors

28. Which is true concerning a contested case:

- The agency's findings of fact will be upheld so long as there is substantial evidence in the record to support the finding.
- The agency's fact findings are subject to de novo review.
- Only the legal conclusions of the agency are subject to review under an abuse of discretion standard.

29. Bob is a resident of a state other than Missouri. He drives through Missouri for approximately twenty miles on his way to a family wedding. Bob is five miles from the Missouri border when the car he is driving collides with several other vehicles. One of the drivers involved in the collision thinks all of the other drivers were negligent and files a lawsuit in a Missouri state court. The Missouri court has personal jurisdiction over Bob because:

- Missouri courts have personal jurisdiction over all defendants named in lawsuits.
- Bob allegedly committed a tort while driving on a Missouri highway.
- Missouri courts have the authority to hear all cases where negligence is asserted against a Missouri resident.

30. John Doe wanted to purchase land owned by Larry Smith. Larry did not want to sell, at least presently, but did agree, for consideration, to grant John a first right to purchase at a set price in the

future before sale to a third party. The contract between Larry and John contained no expiration date, and was made binding on the parties and "their heirs, executors, administrators, successors and assigns." Sometime later, Larry received an offer to purchase the property at a price much greater than the price at which John could buy under the agreement. Larry accepted the offer, and John then brought an action to enforce sale to him at the agreement price. The agreement between Larry and John:

- Should be enforced because the agreement was entered into in good faith, for consideration.
- Should not be enforced because of the large disparity between the price offered Larry and the price at which John could purchase.
- Should not be enforced because it violates the Rule Against Unreasonable Restraints on Alienation of title.

What is my score?!

EXHIBIT H

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Announcements

Missouri Educational Component Test (MECT)

The State of Missouri has adopted the Uniform Bar Examination ("UBE") for all applicants seeking licensure in the State. Because the UBE tests on uniform principals of law, the Supreme Court of Missouri and the Missouri Board of Law Examiners have prepared a mandatory open book test ("Missouri Educational Component Test" or "MECT") for all applicants to complete as a condition of licensure in accordance with Rule 8.08(c). All applicants must take the MECT and must sign the Certificate of Completion. Once issued and signed by you, the Certificate of Completion must be mailed to the Board of Law Examiners during the time frame outlined in Rule 8.08(c). Prior to mailing, please make certain that your name, email address and telephone number are correct on the form. All Certificates of Completion must be mailed to Board of Law Examiners, P.O. Box 104236, Jefferson City, MO 65110-4236. Your test score is valid in accordance with Rule 8.08(c) from the issue date on the Certificate of Completion.

The review materials ("Missouri Materials") include ten outlines on the subjects of Torts, Civil Procedure, Real Property, Trusts, Estates, Family Law, Business Associations, Administrative Law, Missouri Courts and Evidence. The Missouri Materials and the MECT are located at http://www.courts.mo.gov/page.jsp?id=325.

The Missouri Materials are intended to assist Missouri bar applicants. The Missouri Materials are distributed and presented with the understanding that the Missouri Board of Law Examiners, its committees, authors, reviewers and speakers do not render legal, accounting, tax or other professional advice. The Missouri Materials are provided as research information to be used by bar applicants for the MECT. The Missouri Materials may be used beyond the MECT by the applicants, in conjunction with other research deemed necessary in the exercise of their independent professional judgment. Original and fully current sources of authority should be researched. Although every effort has been made to assure the accuracy of the Missouri Materials, the law continues to change and there is no guarantee that every statement is correct. The MECT will be graded upon the information provided in the Missouri Materials as posted at the time of the test given even if such information is later deemed to be incorrect. The Missouri Materials and the MECT are provided in English only.

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READ MISSOURI MATERIALS ONLINE!

Click here to view the Missouri Materials. Upon review of the Missouri Materials, continue to the Missouri Educational Component Test to answer 30 questions pertaining to the outlines. The MECT is scored upon your submission of the questions by pressing the 'What is my score?' button at the end of the MECT. You must receive a passing score of 25. Upon receiving a passing score, you will be able to print your Certificate of Completion. Failure to do so will result in notification on the test page and the inability to print a Certificate of Completion. You must then retake the test until you achieve a passing score and can print the Certificate of Completion.

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Click here to begin the **Missouri Educational Component Test.**