

July 2014 MPT Summaries

In re Kay Struckman (MPT-1)

In this performance test item, examinees are associates at a law firm representing Kay Struckman, a local attorney. She has asked for legal advice on the proposed modification of her retainer agreements with existing clients. Specifically, Struckman wants to know whether she may ethically seek to modify her retainer agreements with existing clients to include a provision requiring the use of binding arbitration to resolve future fee disputes, and whether any resulting modification using the language she proposes would be legally enforceable. The task for examinees is to draft a memorandum for the supervising attorney addressing whether Struckman's proposed arbitration clause is ethical under the Franklin Rules of Professional Conduct and legally enforceable. The File contains the instructional memo from the supervising attorney and a letter from Struckman. The Library contains Franklin Rule of Professional Conduct 1.8, an ethics opinion from the Columbia State Bar Association, two Franklin cases, and an Olympia case.

JULY 2014 BAR EXAM

SESSION NO. I

QUESTION 2

When Eric graduated from high school, his mother, Melanie, went to a local jewelry store to find a graduation present. The jewelry store is located in Tennessee and is a franchise of a national company named Box of Jewels. Melanie talked with the store manager, telling him that she would buy a graduation gift for her son that he could select for himself. She gave the store manager a budget and asked that he work with her son. Eric visited the store and chose a watch. Box of Jewels had an agreement with a world-renowned watch manufacturer, Rollax, through which it provided watches to its franchisees for sale at their stores.

The list price for the watch was \$2,500.00. Eric talked with the store manager and negotiated a price of \$2,000.00, which was within Melanie's budget.

Melanie executed a written installment sales agreement that identified the watch as a Rollax with genuine semi-precious stones. The agreement listed the purchase price, to be paid by Melanie in 36 equal monthly installments. The agreement stated that it was not assignable.

While away at college, Eric took the watch to a jeweler to be sent off to Rollax for a cleaning under its warranty. The jeweler told Eric that the watch was not a Rollax and that the "semi-precious stones" were colored glass. The jeweler also told him that the watch was worth \$100.00. Eric was upset.

Eric pursued a claim against Box of Jewels for misrepresenting the maker, quality, and value of the watch, but he did not involve Melanie. When Eric made the claim, Box of Jewels informed him that it had assigned the agreement and its right to receive payments to Fast Cash, a credit finance company. Box of Jewels had formally sent notice of the assignment to Melanie, and

she began making payments to Fast Cash. She had made payments to Fast Cash for six months.

When Eric called her, Melanie stopped paying. She had made 18 of 36 payments.

1. Can Eric prevail in a breach of contract claim against Box of Jewels? Discuss.
2. Is the assignment by Box of Jewels to Fast Cash enforceable? Discuss.
3. Can Fast Cash prevail in a breach of contract action against Melanie? Discuss.

QUESTION 3

Bert and Alice are a married couple who became addicted to painkillers after a car accident. Bert and Alice's addiction is so strong that they have discussed with each other many times that they would do anything, even kill, to prevent going through withdrawal.

Bert is the chief electrical inspector for a small Tennessee city. Inspectors have the authority to enter residences when there is a question of electrical safety. The procedure ratified by the City Council is that an electrical inspector simply presents an order signed by Bert to enter the house during reasonable business hours.

Alice tells Bert that she knows that their elderly former neighbor has prescription pain medication that they can steal if they can get into his apartment. She takes Bert's official electrical inspection order forms, and, in Bert's presence, she signs an order using Bert's name that purports to allow them to go into the former neighbor's apartment. At first Bert tells Alice he does not want her to use his name because he might lose his job, but he goes

along with the plan when Alice tells him how few pills they have left. A copy of the order is left in the inspector's logbook in Bert's City Hall office.

When they go to the former neighbor's door, the former neighbor immediately welcomes them in, saying he's missed them. Bert is wearing his inspector's uniform, but they do not present the purported order. The visit is friendly until the neighbor catches Bert going through his medicine cabinet. The neighbor says he hates drug addicts and that he will turn them in.

Alice immediately picks up a cheese knife and kills the elderly neighbor by stabbing him in the neck.

Bert and Alice are arrested after an employee of the inspector's office sees the order allowing Bert to inspect the deceased apartment on the day of his death.

Please answer the following three questions, including detailed analysis of Tennessee law.

1. Under Tennessee law, are Bert and Alice guilty of burglary?
2. Under Tennessee law, is Alice guilty of forgery?
3. Alice is charged with premeditated murder. Her attorney has her evaluated by a psychiatrist who produces a report stating that at the time of the offense she suffered from post-traumatic stress disorder which, in combination with the compulsion of addiction, caused her to be unable to conform her conduct to the law. The psychiatrist further opines that the disorder and addiction rendered her unable to premeditate at the time of the offense. In Tennessee, should the opinion be admitted at trial?

QUESTION 4

A duplex in Williamson County, Tennessee, was owned and leased by Joe Brown (Landlord), a resident of North Carolina. Bill and Mary Green (Tenants) signed a lease for a period of one year for Side A of the duplex.

The lease agreement provided that the tenants be given quiet and peaceful possession of the premises to be used exclusively as a residence and Tenants shall maintain the interior of the rental unit subject to normal wear and tear. The lease agreement further provided that Tenants shall pay a \$1500 deposit and pay a rental amount of \$1500 per month during the lease term with a \$50 per day late fee after the 3rd of each month. Landlord shall maintain the essential services including heat, air conditioning, water and electricity. The lease provision shall be governed by the laws of the state of North Carolina.

The Greens paid the deposit and the first month's rent and moved their possessions into the residence. The Greens were given a receipt for the security deposit identifying only Side A, the amount received, and the date.

Shortly after the Greens moved in, Landlord leased Side B to Johnson under the same lease agreement terms. A few weeks later Johnson noticed that the Greens starting having a large number of guests whose cars continually blocked the common driveway and prevented Johnson from driving his car out to the street. Each guest appeared to leave with packages. Johnson complained to Brown several times requesting that he get the Greens to vacate, but he received no response from Brown.

The next month Johnson notified Brown that the electricity for the duplex was off but was working elsewhere on the street. Brown sent out the electrician who called Brown and said that the present electric system didn't have the capacity to handle all the hot plates the Greens were using to make wax candles and unless the capacity was increased there was a fire hazard.

Brown did not request that the Greens vacate but increased the Green's monthly rent to \$2000 and requested an additional \$500 deposit. The Greens refused to comply with the increases and Brown refused to fix the electricity problem and turn the electricity back on.

Brown filed a detainer action against the Greens for \$14,000 for the cost of fixing the electrical system, painting the unit, hauling off trash and his attorney fees.

Johnson vacated the property. Afterwards he wrote Brown advising he had vacated the premises and requested his deposit be returned and include a list of any damages and repairs for which Brown may think Johnson would be responsible.

Brown took the security deposit and sued Johnson for the remaining amount of \$14,500 for the rent due for the lease term, painting the unit, replacing the broken garbage disposal, repairing scrapes on the door, hauling off trash and his attorney fees.

The Greens and Johnson have requested that you represent them and that you provide them with the remedies that are available, if any, and assuming any conflict is waived.

JULY 2014 BAR EXAM

SESSION NO. II

QUESTION 5

Andy and Bain had been enemies since Cub Scouts. It was May 15, 2014, forty years later that Andy was found dead on East Main Street in Big City, Tennessee after being hit by a car driven by Bain. Bain had become wealthy over the years and Andy's heirs brought a civil suit for wrongful death against Bain. The District Attorney General has also brought a criminal charge of murder against Bain.

Andy's heirs found out that Bain, in the course of entering a Rule 11 nolo contendere plea (which was later withdrawn by Bain), had stated that he had killed Andy and was "glad" that he (Bain) had fulfilled a desire that "has haunted me for years." This statement was made when Bain was under oath, on the record before the circuit judge and had been made when Bain's defense attorney was present. Andy's heirs want to introduce this statement in their wrongful death suit. Bain's defense attorney filed a motion to keep this statement out of the wrongful death suit and the judge ruled on the motion at the pretrial conference.

Part A: What did the judge rule and explain why?

At the pretrial conference for the wrongful death suit and in response to the argument of Bain's defense attorney, the attorney for Andy's heirs produced a certified copy of the waiver of the Miranda rights signed by Bain at the time of his questioning by the police.

Part B: Does this make a difference in the judge's ruling, and if so or if not, explain why?

Andy's sister who worked for Dr. Watson, a psychiatrist, knew that Bain

had been seeing Dr. Watson for years for psychiatric help in dealing with his hatred for Andy. About two weeks after Andy's death she heard Bain yelling to Dr. Watson in one of the psychiatric treatment sessions. She heard Bain clearly say, "I told Pastor Dove that I was going to offer to pay for Andy's cremation so he could roast here just like he's roasting in [expletive deleted]." Andy's sister also heard Bain say he made this statement after church the previous Sunday when he (Bain) and a couple of friends were congratulating Pastor Dove on his sermon. Andy's attorney wants to have Pastor Dove and Dr. Watson appear at trial and testify that Bain made these statements. Bain's attorney objected to having either of these testify.

Part C: What is the reason for the objection by Bain's attorney to allowing Pastor Dove to testify?

Part D: How did the judge rule about allowing Pastor Dove to testify to the statement Bain made to Pastor Dove and explain why?

Part E: What is the reason for the objection by Bain's attorney to allowing Dr. Watson to testify?

Part F: How did the judge rule about allowing Dr. Watson to testify to the statement Bain made to Dr. Watson and explain why?

In separately labeled paragraphs, give your answers.

QUESTION 6

Michael and Steve are college friends who spent a lot of time at the gym together. Michael is an author and Steve is the owner of a gym and local used equipment store. After watching countless episodes of Shark Pool, a show about entrepreneurs, the friends were determined to create the next big thing. In the fall of 2011, they tossed around the idea of selling unique

workout shirts that had special sweat capture material. Michael would use his artistic skills to design the shirts and both friends tested various fabric combinations to create the sweat capturing shirts they envisioned.

By January of 2012, Michael and Steve felt they had a product that would revolutionize the fitness apparel industry. Michael had a contact that could screen print his designs on the shirt and Steve identified a local company in Nashville that could mass produce the shirts. Consistent with their pattern of dividing up tasks, Michael secured a trademark for his designs and Steve secured the patent for the shirt material. In September of 2012, the friends decided it was time to test the market to see if their shirts would in fact be as popular as they expected. Michael entered into a contract dated September 12, 2012 with a printing company to print the initial 500 test shirts. Steve entered a contract dated September 15, 2012 with the manufacturer to produce the actual shirts. The total costs to produce the shirts is \$12 each. Michael and Steve equally split the costs for the initial batch of shirts.

On October 15, 2012, the friends received their first boxes of inventory. They met to finalize their sales strategy and confirm the final retail price for their product. For the initial sales attempt, they focused on gyms and boxing facilities. They also settled on \$25 as the retail price for the shirt and \$20 as the wholesale price. Steve also planned to display the shirts in his gym and store. To their surprise, the entire inventory was depleted in less than a week. The friends subsequently discovered that the initial purchases were made based upon the unique graphic designs, but demand for more shirts was based on the sweat capture material. With each gym requesting re-orders, Michael and Steve were faced with the challenge of not having enough cash to fund the orders. Additionally, they have been approached by a regional sales contact for Nick's Sporting Goods who heard about the shirts and would like to place an order for 50,000 shirts.

After investigating their funding options, Michael and Steve decided they should form a corporation and pursue funding options. They have also

determined that based upon the expected size of their next order, they could save \$2 per shirt if they use a national manufacturing company. Their current contract with the manufacturer has a 90 day without cause termination provision. They have come to you for advice and have requested that you provide information on the following issues:

1. Describe the minimum information necessary to form a corporation.
2. Upon formation of the corporation, describe the legal options with respect to the manufacturing contract.
3. Discuss the options for funding the corporation.
4. Michael and Steve have also been approached by a national towel company requesting the right to use the sweat capture technology. Michael is interested in this opportunity, but Steve is not. Discuss the legal issues that could arise after formation of the corporation as a result of this opportunity.

QUESTION 7

John and Mark, electricians in Memphis, Tennessee, decide to go into business together. They start a company called ABC Electric. The business is not incorporated. John and Mark each contribute \$20,000 to the business and orally agree to split evenly any profits they make. The business is very successful, and John and Mark split \$100,000 in profits the first year.

John then decides to do some electrical and other construction work on his off days. John does not tell Mark he is doing outside jobs and does not share any of the money he makes from these jobs. John makes a total of \$50,000 doing these other jobs.

One of John's outside jobs is to do electrical and plumbing work for Matthew at his home. Matthew pays John in cash, and there is no written contract. When John goes to Matthew's house to do the work, John drives a van with the name ABC Electric on the side. Matthew is not satisfied with the work and contends John installed the wrong type of pipes in his bathroom. Matthew sues John, Mark, and ABC.

1. Discuss in detail what claims, if any, you would recommend Mark assert against John. Explain the reasons for your recommendation.
2. Assuming John installed the wrong pipes in Matthew's bathroom, discuss in detail whether Matthew can recover resulting damages against Mark and/or ABC. Why or why not?

QUESTION 8

Jill owns the following real property in Tipton County, Tennessee: Windermere, a 50-acre estate; Elysian Fields, a 10-acre tract adjacent to Windermere; and Whispering Oaks, a 100-acre farm. Last year, Jack moved to Windermere with Jill to take care of Jill after she took a terrible fall down a hill. To show her appreciation to Jack for his help, Jill conveyed Windermere "to Jack and Jill as joint tenants with rights of survivorship" by a quitclaim deed. Jill properly recorded the quitclaim deed the day after executing it.

Jack was delighted to receive such a great appreciation gift from Jill, and since Jill was in such a giving mood, Jack asked Jill if she would convey Elysian Fields to him as another gift. Feeling generous and grateful, Jill agreed and conveyed Elysian Fields "to Jack in fee simple" by quitclaim deed. Jack immediately recorded the quitclaim deed for Elysian Fields. Unbeknownst to Jack, Jill already had sold Elysian Fields to McDonald for \$100,000 and conveyed fee simple title to him by warranty deed six months prior. However, McDonald never recorded the warranty deed.

Jill never fully recovered from her injuries after her fall down the hill. Jill wanted to make sure that Jack would inherit all of her worldly possessions in the event she predeceased Jack. Jill found a fillable Last Will and Testament form online. Jill typed in information in the appropriate fields on the online form, leaving all of her property, real and personal, to Jack. Jill printed the completed Last Will and Testament form and signed it. Jill left the signed form on the kitchen counter with a note to Jack requesting that he sign the document as well. Jack saw the note and form on the counter later that day. Jack was again delighted to be on the receiving end of Jill's generosity and quickly signed the Last Will and Testament form on the witness signature line. A week after signing the Last Will and Testament form, Jill died. At Jill's funeral, Jack learned that Jill had two estranged sons. Jack also learned that McDonald claimed to be the owner of Elysian Fields.

Jack comes to you for legal advice and counsel as Jill's two estranged sons are threatening to take all of Jill's property, real and personal, and leave Jack destitute and homeless. Jack wants to probate the Last Will and Testament form executed by Jill as soon as possible.

1. Discuss issues, if any, with the validity of the Last Will and Testament form executed by Jill.
2. In light of your conclusions regarding the Last Will and Testament form executed by Jill, discuss the status of the right, title and interest of Jack, Jill's two estranged sons and McDonald to the following property: (a) Windermere; (b) Elysian Fields; (c) Whispering Oaks and (d) \$100,000 sale proceeds.

QUESTION 9

Best friends Tom and Jerry are hanging out in Tom's backyard listening to music and drinking beer. The music is blaring all day and unreasonably interferes with Nancy's use of her backyard. Nancy often complains about Tom's loud and rowdy backyard parties that occur at all hours of the day and night. Jerry decides to "clean up" while Tom is in the house. Unbeknownst to Tom, Jerry dumps their garbage, including chicken bones, over the fence into Nancy's yard. As Tom knows, Nancy's dog, Ruff, is allergic to chicken. Fortunately, Nancy finds Ruff in time and rushes him to the vet. Ruff survives. Nancy's vet bill is \$1,000.

Meanwhile, Jerry forces Tom into Jerry's company car telling Tom he is taking him out to Louie's Bar and Grill to celebrate Tom's birthday. Although Jerry is visibly intoxicated, the bartender obliges Jerry's request for another round for himself and Tom. After Jerry punches Tom's right arm 30 times – one for each year - he drives Tom home. When they arrive,

Jerry misses Tom's driveway, plowing over Nancy's mailbox and through her rose garden.

The next morning, Tom, who can barely lift his right arm, drives himself to the emergency clinic. One x-ray and two MRI's later, Tom's doctor says his subscapularis muscle is badly bruised. The doctor prescribes a muscle relaxer and orders Tom to stay home for two days. Tom, who has an hourly full-time job, does not have any sick leave.

Nancy goes to see her lawyer friend Larry about suing Tom. Larry is a sole practitioner whose area of expertise is family law. He is extremely busy with his current clients. Larry's schedule is even busier because, as Nancy knows, he also goes to the prison each weekend as part of a Church ministry. Larry agrees to represent Nancy as a favor to her. Larry tells Nancy she will have to pay a retainer and then he will bill her by the hour. Larry deposits the retainer into his operating account.

Larry is so busy he does not timely respond to Requests for Admissions issued by Tom's lawyer. In fact, Nancy does not know the status of her case, and Larry never returns her calls. Nancy is so angry about her case she updates her status as "frustrated" on Facebook® and posts "Larry doesn't know what's going on with my case because he has to go to prison every weekend."

Basing your answers on Tennessee law, respond to the following items. Fully explain your answers:

1. List the causes of action Nancy has against Tom; Nancy has against Louie's Bar and Grill; and Tom has against Jerry. For each action, list (a) the plaintiff(s) and defendant(s); (b) the actions giving rise to the claims; (c) the claims; and (d) the applicable statutes of limitations for the claim.
2. Assume the following facts for this question only. A potential client of

Larry's is a friend of Nancy's on Facebook®. The potential client calls Larry after reading Nancy's post and tells Larry she has decided to hire another lawyer. If you represented Larry in a case against Nancy, what cause(s) of action would you recommend? Analyze the elements of the claim(s) against the facts. What defenses would you assert if you represented Nancy?

3. Has Larry violated the Tennessee Rules of Professional Responsibility? Briefly explain your answer.

QUESTION 10

Peter, a Tennessee resident, drove to RockFest, an annual rock-climbing competition located in the state of Euphoria. Peter was accompanied by Paul, a resident of the state of Calisota. RockFest was hosted and sponsored by NRG, Inc. ("NRG"), a relatively new company that sells energy drinks, including its flagship beverage product StartMeUp. Peter was made aware of RockFest through an ad by NRG he had seen on the internet.

NRG is organized under the laws of the state of Euphoria and has its headquarters there. However, its manufacturing facility and the majority of its production employees are located in the state of Calisota. NRG has a website that advertises its products, and, although it has shipped several cases of its products to Tennessee residents who have made online purchases from its website, NRG has no physical presence in Tennessee. Recently, however, NRG contracted with a distributor that plans to begin selling StartMeUp to retailers in Tennessee over the next year.

While climbing on a boulder route at RockFest, Paul suffered a severe allergic reaction to StartMeUp, which caused him to fall and break his arm. Outraged by the lack of available medical personnel at RockFest, Peter complained to representatives of NRG and a brawl ensued. Peter suffered

serious injuries, and he and Paul were taken to the hospital. While they were recovering, several employees of NRG vandalized Peter's car, resulting in a total loss.

Peter and Paul sued NRG in state court in Tennessee. Paul sought \$70,000 in compensatory damages based on various tort claims and breach of warranty. Paul also requested attorney fees under a Euphoria statute that allows the prevailing party to recover attorney fees and costs in claims for breach of warranty. Peter sought \$65,000 in compensatory damages for his personal injuries, \$15,000 for damages to his car, and punitive damages.

NRG timely removed the case based on diversity of citizenship to a United States District Court in Tennessee and simultaneously filed a motion to dismiss the case based on lack of personal jurisdiction. The District Court denied NRG's motion. Neither Peter nor Paul contested NRG's removal of the case to federal court. Several weeks before the case was to go to trial, Peter moved to the state of Euphoria and established his residence there.

The case was tried, and a judgment was entered in favor of Paul for \$7,500, and in favor of Peter for \$100,000. Dissatisfied with his judgment, Paul timely appealed on the ground that the federal court does not have subject matter jurisdiction over his claim. NRG timely appealed the judgment in favor of Peter on the grounds the court did not have personal jurisdiction.

1. How should the Court of Appeals rule on Paul's appeal? Explain your answer.
2. Did the federal court have subject matter jurisdiction over Peter's claim? Explain your answer.
3. Assuming the court has subject matter jurisdiction over Peter's claim, how should the Court of Appeals rule on NRG's appeal? Explain your answer.