

**FEBRUARY 2009 MICHIGAN BAR EXAMINATION MODEL ANSWERS**

**ANSWER TO QUESTION NO. 1**

The testimony of Gladys Gage is admissible. Under MRE 406, evidence of a person's habit is admissible to prove that a person's conduct on a particular occasion was in conformity with their habit. Under this evidentiary rule, evidence of the habit need not be corroborated. *Id.* Thus, Gladys can testify that Dwayne has a habit of leaving Wally's Wintergreen chewing gum wrappers on the floor.

The testimony of Carolyn Clark is also admissible. Under MRE 901(a), evidence must be authenticated or identified as a condition precedent to its admissibility. In order to properly authenticate or identify the author of the note left at the crime scene, Carolyn's non-expert opinion regarding the handwriting must be based on familiarity that was not acquired for the purposes of the litigation. MRE 901(b)(2). Here, Carolyn's familiarity with Dennis Dwayne's handwriting was premised upon her relationship with him as his administrative assistant, and was not acquired for the purposes of the criminal trial.

The letter itself is admissible as a party admission under MRE 801(d)(2)(A). The statement is allegedly Dwayne's statement, and it is being offered against him. While the rule contains an exception for statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or motor vehicle civil infraction, those exceptions are not implicated here.

While the letter is admissible as a party admission, the

defense attorney can seek the admission of the entire letter under MRE 106. Under this rule, otherwise known as the "rule of completeness," if a portion of a writing or recording is introduced by a party, then the adverse party can seek to have introduced any other parts of the writing or recording "which ought in fairness to be considered contemporaneously." In this case, admission of the second portion of the statement is favorable to Dwayne because it makes it less likely that Dwayne was the culprit because it indicates that motive for the crime was to obtain beer, while Dennis Dwayne maintains that religious beliefs preclude him from consuming alcohol.

Lastly, the testimony of Dr. Hubert Hubris is not admissible. Under MRE 610, evidence regarding a witness' beliefs on matters of religion is not admissible to show that the witness' credibility is impaired. Thus, Hubris will not be able to opine that Dwayne's credibility is suspect because of his unorthodox religious beliefs.

ANSWER TO QUESTION NO. 2

Discovery is available in circuit courts after the commencement of an action. MCR 2.302(A)(1). A civil action commences with the filing of a complaint. MCR 2.101(B). Additionally, interrogatories and requests for the production of documents may be served on a civil defendant with service of the summons and complaint. MCR 2.309(A)(2) and MCR 2.310(C)(1).

The general rule governing discovery is that a party may obtain discovery on any matter as long as it is (a) not privileged and (b) relevant to the subject matter involved in the pending action. MCR 2.302(B)(1). Materials are discoverable even if they are not themselves admissible in court, as long as the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." MRE 2.302(B)(1).

Peter's own medical records are discoverable. Although medical records are ordinarily privileged under the statutory physician-patient privilege, MCR 600.23157, the privilege belongs to the patient, not the doctor. Accordingly, Peter may intentionally and voluntarily waive his physician-patient privilege. *Kelly v Allegan Circuit Judge*, 382 Mich 425 (1969). As Peter's physician, Duck is a "custodian" of Peter's medical records, as the term is used in MCR 2.314(D)(1). As such, he must "comply with a properly authorized request for the medical information within 28 days after the receipt of the request" for a patient's medical information. *Id.*

Although relevant to whether Duck was unprepared to practice medicine on the day in question, Duck can, however, assert the physician-patient privilege to prevent discovery of the medical records of his other (nonparty) patients. The names and records of nonparty patients are protected by the physician-patient privilege. *Dorris v Detroit Osteopathic Hosp*, 460 Mich 26, 34 (1999).

The existence and terms of Duck's personal medical malpractice insurance policy are discoverable under express provision of MCR 2.302(B)(2). Even though MCL 500.3030 specifically precludes any reference to liability insurance during trial, the amount or extent of insurance coverage is a matter that affects the way a case may be prosecuted or defended, and so is relevant to the cause of action. Accordingly, MCR 2.302(B)(2) specifically allows a party to obtain discovery "of the existence and contents of an insurance

agreement under which a person carrying on an insurance business may be liable to satisfy part or all of a judgment".

Duck's personal finances are not discoverable. *Bauroth v Hammoud*, 465 Mich 375 (2001), held that the financial status of a defendant physician (beyond insurance) is not relevant in a medical malpractice action. Moreover, the request is not reasonably calculated to lead to the discovery of admissible evidence.

The existence of previous medical malpractice lawsuits is discoverable. It is relevant because it may show that Duck has a habit of being negligent in certain material ways (such as practicing medicine without his contact lenses in place). Furthermore, it is not covered by any recognized privilege of Michigan law. The physician-patient privilege, MCL 600.2157, applies only to "information that [a] person has acquired in attending a patient in a professional character". Accordingly, it does not apply to the mere existence of other medical malpractice lawsuits.

### ANSWER TO QUESTION NO. 3

**Premises Liability:** A landowner's duty to a visitor depends on that visitor's status. Michigan recognizes three common-law categories of persons who enter upon the land or premises of another: invitee, licensee and trespasser. *Stitt v Holland Abundant Life*, 462 Mich 591, 596 (2000). An invitee is a person who enters upon the land of another upon an invitation. *Id.* A licensee is a person who is privileged to enter the land of another by virtue of the possessor's consent. *Id.* And a trespasser is a person who enters upon another's land without the landowner's consent. *Id.*

Blackacre was not open to the public. D & D posted "No Trespassing" signs and notified abutting landowners through the mail that Blackacre was private property. D & D neither expressly nor implicitly invited Chris onto its property, nor consented to his entry onto its land. Therefore, Chris was a trespasser.

A landowner owes no duty of care to an undiscovered trespasser except to refrain from injuring him by willful and wanton misconduct. *Id.* Willful and wanton misconduct requires an intent to harm or such indifference to whether harm will result as to be the equivalent of a willingness that it does. *Burnett v City of Adrian*, 414 Mich 448, 455-456 (1982); *James v Leco Corp*, 170 Mich App 184, 193 (1988). Nothing in the facts provided suggests that D & D intended that the dirt piles would cause harm or exhibited such indifference as to be equivalent to a willingness that harm would occur to anyone. The dirt piles alone were not inherently dangerous and even Amber did not believe that they or her child's activity on them was dangerous. Moreover, D & D did not have any notice that the children were digging holes in the dirt piles prior to the accident. It does not appear that Amber's premises liability claim is very strong.

**Attractive Nuisance:** The doctrine of attractive nuisance imposes liability on landowners for injuries suffered by trespassing children. Michigan has adopted the five-part test from 2 Restatement Torts, 2d, §339, p 197:

"A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

"(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

"(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve

an unreasonable risk of death or serious bodily harm to such children, and

"(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

"(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved and

"(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children." *Murday v Bales Trucking, Inc*, 165 Mich App 747, 751-752 (1988).

In order for a possessor of land to be held liable for injury to a trespassing child, all five conditions must be met. *Id.* at 752. "The term 'attractive nuisance' is a misnomer (or historical leftover) because it is not necessary, in order to maintain such an action, that the hazardous condition be the reason that the children came onto the property." *Pippin v Atallah*, 245 Mich App 136, 146 fn 3 (2001). Elements (a) and (c) appear to favor Amber, while elements (d) and (e) may require development before they can be resolved in favor of either party. However, it appears unlikely that plaintiff will be able to establish element (b). The dirt piles alone did not involve an unreasonable risk of death or serious bodily harm. The dirt piles were only made dangerous by Chris' digging. Moreover, it is certainly arguable that Chris' digging did not create an unreasonable risk of death or serious bodily harm; even his mother, Amber, saw Chris digging and did not believe that he was in any danger. Element (b) also poses a problem for Amber because D & D did not and had no reason to know about the danger created by Chris' digging. This is a critical point because whether the danger was created by Chris or D & D is irrelevant. *Id.* p 143. D & D is responsible for a condition only if it knows or has reason to know that it existed. *Id.* Because D & D was not at the property after Chris dug the holes, it did not know or have any reason to know about the dangerous condition that Chris created. *Id.* Accordingly, it is unlikely that Amber can establish element (b).

Amber, therefore, is unlikely to recover in tort under either of her theories of recovery.

ANSWER TO QUESTION NO. 4

The Fourth Amendment to the United States Constitution guarantees the people the right to be free from unreasonable searches and seizures. Likewise, the Michigan Constitution also guarantees against unreasonable searches and seizures. Mich Const 1963, art 1, §11. The protection afforded under the Michigan Constitution is equivalent to the protection provided under the federal constitution. *People v Faucett*, 442 Mich 153, 158 (1993). As a general matter, where evidence has been seized in violation of the right to be free from unreasonable searches and seizures, the court will suppress the illegally seized evidence and preclude it from being admitted in the related criminal prosecution. This is known as the exclusionary rule. E.g., *Mapp v Ohio*, 367 US 643 (1961) (exclusionary rule applicable to states).

Generally, in the criminal context, a search or seizure conducted without a warrant is unreasonable unless there exists both probable cause and a circumstance establishing an exception to the warrant requirement. *People v Tierney*, 266 Mich App 687, 704 (2005). Several exceptions to the warrant requirement have evolved in the law. One such exception is known as the exigent circumstance warrant exception. Under this exception, evidence that is seized from a dwelling without a warrant may be admitted in a criminal prosecution if at the time the law enforcement officers entered the dwelling they had probable cause to believe that: (1) a crime was recently committed on the premises; (2) the dwelling contained evidence of illegal activity or the perpetrators of the suspected crime. Additionally, the prosecution must present specific and objective factual evidence that establishes the existence of an actual emergency whereby immediate action is necessary to either: (1) prevent the eminent destruction of evidence; (2) protect law enforcement officers or others from harm; or, (3) prevent the escape of a suspected perpetrator. *People v Cartwright*, 454 Mich 550 (1997), citing *In re Forfeiture of \$176,598*, 443 Mich 261, 266 (1993).

The validity of an entry into a dwelling in which exigent circumstances are claimed must be based on the facts as perceived by law enforcement at the time of the entry. *People v Olajos*, 397 Mich 629, 634 (1976). The entire premises may be examined as long as it relates to the purpose of addressing the exigent circumstances that justified the entry. *Mincey v Arizona*, 437 US 385 (1978). Further, law enforcement officers are free to seize evidence in plain view. *Id.* However, searches into specific areas outside the scope of the emergency are not warranted under this exception. *Id.*

Another is the consent exception to the warrant requirement, which allows search and seizure when consent is unequivocal and specific, and freely and intelligently given. *People v Galloway*, 259 Mich App 634, 648 (2003). Although consent to a search must ordinarily be given by the person affected, a third party may consent to the search when the consenting person has equal right of possession or control of the premises. *People v Brown*, 279 Mich App 116, 131 (2008).

Further, even if evidence is unconstitutionally seized, evidence is not to be excluded if law enforcement would have inevitably discovered the evidence regardless of the unconstitutional conduct. *People v Stevens (After Remand)*, 460 Mich 626, 637 (1999). Under this exception, evidence illegally seized in violation of the Fourth Amendment may nonetheless be admitted in a criminal prosecution if the prosecution establishes by a preponderance of the evidence that the evidence inevitably would have been discovered by lawful means. *Nix v Williams*, 467 US 431 (1984). The prosecution is not required to prove the absence of bad faith under this rule. *Id.*

Under the facts presented in this case, Officer Jones clearly entered the curtilage of the Pusher home without a warrant when he proceeded to the rear door of the home. However, in *Hardesty v Hamburg Twp*, 461 F3d 646 (CA 6, 2006), the court recognized that police officers are permitted to enter private property and approach and knock on the front door of a home in order to ask questions of persons inside the home. Where there is no response at the front door of a home, an investigating officer may also proceed around the house and knock on a rear door of the home in order to initiate a conversation with persons believed to be in the house. *Id.* Therefore, the officer's entry into the curtilage in order to effectuate the knock and talk investigative technique did not violate Paul Pusher's Fourth Amendment rights.

Once at the rear door, the facts indicate that Officer Jones "looked into a basement window located to the rear door of the home." Looking through a window of a home does not violate Paul Pusher's Fourth Amendment rights, since Officer Jones was legitimately at the rear of the home. *People v Custer*, 248 Mich App 552, 561-563 (2001). After Officer Jones looked through the window, he forcibly entered the Pusher home without a warrant. Thus, absent an exception to the warrant requirement, the evidence will be suppressed under the exclusionary rule.

The prosecution will have an excellent argument that entry into the Pusher's home was authorized due to exigent circumstances. Upon peering into the basement window of the Pusher's home, Officer Jones observed what he believed to be a laboratory designed to manufacture illegal drugs. Thus, he had reason to believe that a crime was recently committed on the premises and that the premises

contained evidence of illegal activity. Additionally, Officer Jones observed "an extraordinarily high flame burning under a petri dish filled with liquid and solid substances." The facts tell us that Officer Jones believed this was a lab constructed for the manufacture of methamphetamine. Officer Jones knew that "such labs often result in explosions that expose the public to hazardous chemicals. Thus, based on the perceptions of the officer, the prosecutor will be able to present specific and objective factual evidence that established the existence of an actual emergency such that immediate action was necessary to prevent the imminent destruction of evidence and protect Officer Jones and the persons residing in nearby homes.

However, the establishment of exigent circumstances will justify only the seizure of the drugs and paraphernalia found in the basement that was in the vicinity of the Bunsen burner. The cash and weapons found in the Pusher's attic do not in any way relate to the exigent circumstances that justified the entry. In *United States v Buchanan*, 904 F2d 349, 357 (CA 6, 1990), the court held that "police who believe they have probable cause to search cannot enter a home without a warrant merely because they plan subsequently to get one." Any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment. Thus, to justify the admission of this evidence, the prosecution will rely on the inevitable discovery rule to justify admission of the cash and guns.

Specifically, the prosecution will argue that the Pushers were at the police station reporting their concerns of suspected criminal activity that possibly involved their son at the time Officer Jones was searching the attic. In the course of reporting their concerns to law enforcement, Officer Smith requested and received permission from the Pushers to search their home. While Paul Pusher may have an expectation of privacy in the private room in which he resided in his parents' home, see *People v Flowers*, 23 Mich App 523 (1970), the attic cannot be considered Paul's private area. Paul's parents "freely and voluntarily" consented to a search of their home. Thus, the prosecution will argue, discovery of the evidence in the attic was inevitable.

Paul's defense counsel may advance an argument that because consent to search was obtained only after Officer Jones had illegally seized the cash and guns from the attic, this evidence remains subject to exclusion under the exclusionary rule. Regardless, however, given the parents' consent, the prosecution can nonetheless show that tainted evidence would ultimately have been obtained in a constitutionally accepted manner. *People v Kroll*, 179 Mich App 423, 429 (1989). In other words, the prosecution can show that Officer Smith would have searched the attic pursuant to a valid consent and discovered the cash and guns irrespective of Officer Jones' conduct. See, *United States v*

Kelly, 913 F2d 261 (CA 6, 1990) (holding consent to search may be obtained after an unlawful search).

ANSWER TO QUESTION NO. 5

**Describe and discuss defendant's right to appellate review in the state court:** At one time there existed a right to appeal to the Michigan Court of Appeals all criminal convictions, even convictions that were the product of a guilty plea or a nolo contendere plea. However, in 1994, the people of Michigan amended the Michigan Constitution to eliminate the right to appeal criminal convictions that result from nolo contendere and guilty pleas. See Mich Const 1963, Art 1, §20. Here, defendant's conviction is the result of a plea of guilty. Therefore, Peter has no right to an appeal.

Art 1, §20 of the Michigan Constitution provides, however, that "an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court." Peter's appellate remedies are therefore limited to the filing of an application for leave to appeal. Unlike an appeal by right, where the Michigan Court of Appeals must address the merits of every timely filed claim of appeal, the determination of whether to address the merits of claims asserted in an application for leave to appeal is left to the discretion of the Court of Appeals.

MCR 7.205(A) describes the time requirements for filing an application for leave to appeal in the Michigan Court of Appeals: "An application for leave to appeal must be filed within 21 days after entry of the judgment or order to be appealed from or within other time as allowed by law or rule." Thus, Peter has the opportunity to timely file an application for leave to appeal in the Michigan Court of Appeals.

Further, MCR 7.205(F) permits the filing of delayed applications for leave to appeal. An appellant bringing a delayed application for leave to appeal must not only provide the court with a statement of appellant's allegations of error and the relief sought, the appellant must also explain the delay for failing to timely file an application for leave to appeal. MCR 7.205(F)(1). The Court of Appeals may consider the reason for the delay in filing when passing on the merits of the application. Like a timely application for leave to appeal, the disposition of a delayed application for leave to appeal is left to the discretion of the Court of Appeals.

Should Peter be denied leave to appeal in the Court of Appeals, he may seek leave to appeal in the Michigan Supreme Court. MCR 7.302. Such applications are rarely granted. The decision whether to grant an application for leave to appeal is left to the discretion of the Supreme Court. *Id.*

**Discuss whether the trial court is obligated to honor Peter's request for the appointment of appellate counsel:** The Sixth Amendment to the United States Constitution provides that "[I]n all criminal prosecutions, the accused shall enjoy the right \* \* \* to have the assistance of counsel for his defense." In *Gideon v Wainwright*, 372 US 335 (1963), the United States Supreme Court held that the Sixth Amendment right to counsel required the state to provide indigent criminal defendants with appointed counsel at state expense to assist at trial. In *Douglas v California*, 372 US 353 (1963), the Supreme Court of the United States concluded that the right to appointed counsel for indigent defendants extended to first appeals as of right, following a criminal conviction. And in *Ross v Moffitt*, 417 US 600 (1974), the Supreme Court of the United States concluded that states need not appoint counsel to aid an indigent convict to assist in discretionary appeals to the state's highest court or to the United States Supreme Court.

In *Halbert v Michigan*, 545 US 605 (2005), the Supreme Court of the United States determined that in regard to the appointment of counsel, Michigan's constitutionally mandated review system for plea-based convictions is governed by *Douglas, supra*. Therefore, Michigan must appoint counsel to indigent defendants who plead guilty or nolo contendere to assist in obtaining first leave discretionary review before the Michigan Court of Appeals. The U.S. Supreme Court based its holding in *Halbert* on two aspects of Michigan's criminal appellate process. First, in disposing of applications for leave to appeal, the Michigan Court of Appeals looks to the merits of the claims asserted by the defendant. *Id.* at 617. Accordingly, the Court of Appeals' ruling is the first and likely to be the only direct review of the merits of defendant's conviction and sentence. Second, indigent defendants seeking review before the Court of Appeals are ill equipped to represent themselves. *Id.* Persons unskilled in the law will not be able to assist the appellate court in assessing the legal merits of their claims.

The Michigan Court Rules were amended to reflect the United States Supreme Court's holding in *Halbert*. MCR 6.425(G)(1)(c) gives indigent defendants 42 days to request appellate counsel. The trial court must grant a timely filed request for the appointment of appellate counsel. *Id.* Here, defendant sent to the trial court and the clerk of the court correspondence that requested the appointment of appellate counsel. This correspondence was filed and made part of the court record within 42 days of Peter's judgment of conviction and sentence. Pursuant to MCR 6.425, *Halbert v Michigan, supra*, and the Sixth Amendment to the United States Constitution, the trial court must appoint appellate counsel to assist Peter in his pursuit of appellate review before the Michigan Court of Appeals of his plea-based conviction.

ANSWER TO QUESTION NO. 6

Dan and Dave Defendant are charged with carrying a concealed weapon. When a defendant is charged with carrying a concealed weapon in a vehicle, the prosecution must prove each of the following elements beyond a reasonable doubt:

1. That the instrument or item was indeed a dangerous weapon, in this case a gun.
2. That the dangerous weapon was in a vehicle that defendant was in.
3. That the defendant knew the instrument was in the vehicle.

And,

4. That the defendant took part in carrying or keeping the dangerous weapon in the vehicle. CJI2d, 11.2.

**1. The Charges Asserted Against Dave:** Dave may argue that the prosecutor cannot present evidence to establish the third and fourth elements of this offense. At the time Dave began to drive his car, he was wholly unaware that there were any guns in his car. Dan placed the guns in the car. The facts indicate that "Dan did not tell Dave that he had placed the guns in his car because Dan knew that Dave, who was on probation at the time, would not allow Dan to possess any weapon in his car." The prosecution may argue that because the guns were found in Dave's car he should be found to have constructive knowledge that they were there. See *People v Gould*, 225 Mich App 79, 87 (1997). Moreover, there is no question that Dave knew Dan had at least one gun in the car as the facts indicate that shortly after Dave drove away from their home, Dan pulled out a gun and told Dave "I hope we won't need to use this."

Dave may also argue that even if the prosecution successfully establishes that he knew that at least one gun was in his car, the prosecution will have a very difficult time establishing the fourth element of this offense -- that "defendant took part in carrying or keeping the dangerous weapon in the vehicle." Dan placed the guns in the car without notice to Dave and Dave did not become aware of the presence of even one gun in his car until just before the police stopped his car. The undisputed facts also show that while Dan placed the gun in the car for possible use by Dave, Dave was never aware of the gun under the driver seat of his car until the police discovered it in a search of the car. Dan's intent cannot be transferred to Dave. Dave may argue that these facts are simply not enough to establish that he took part in carrying or keeping

the dangerous weapon in his car. The prosecution will argue, however, that even momentary innocent possession of a concealed weapon is not a defense to a charge of carrying a concealed weapon. *People v Hernandez-Garcia*, 477 Mich 1039 (2007). The jury will have to determine whether Dave, who was trying to assist his brother to avoid a lethal and possibly fatal confrontation with a criminal aggressor and who was wholly unaware of Dan's activities until just moments before the police stopped his vehicle, can be found to have taken part in his brother's scheme to carry and keep dangerous weapons in Dave's car.

**2. The Charges Asserted Against Dan:** By contrast, Dan will have a much more difficult time establishing a defense. The facts clearly establish that Dan knowingly possessed a gun in the car and that Dan was the primary and sole person responsible for placing, carrying and keeping the gun in Dave's car. In short, the prosecutor has sufficient evidence to establish a prima facie case against Dan. The facts suggest that Dan was motivated by his very legitimate concern for his safety, as Andy Aggressor had threatened his life and had taken steps toward carrying out this threat. While self-defense is often a legal defense available to criminal acts, self-defense is not a defense to the charge of carrying a concealed weapon. *People v Townsel*, 13 Mich App 600 (1968).

ANSWER TO QUESTION NO. 7

Spousal support would most likely be awarded on the basis of the factors outlined below. The particular amount of spousal support, if quoted by the examinee, is not important. The examinee's familiarity with the factors pertinent to making the determination is what is being tested.

A divorce court has the discretion to award alimony as it considers just and reasonable. MCL 552.23, *Ianitelli v Ianitelli*, 199 Mich App 641, 642-643 (1993). Relevant factors for the court to consider include the length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health and fault, if any, and all other circumstances of the case. *Id.* at 643; *Demman v Demman*, 195 Mich App 109, 110-111 (1992). The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. *Hanaway v Hanaway*, 208 Mich App 278, 295 (1995).

A full analysis of the pertinent factors would include the following:

(a) Length of the marriage. This is a 19-year, long-term marriage. This weighs in favor of spousal support.

(b) Parties' ability to pay. Jane has ample ability to pay. Disparity in income and lifestyle is relevant, but there is no legal right for the parties to live in the same lifestyle. This factor weighs in favor of spousal support.

(c) Past relations and conduct. Both parties worked hard and contributed equally--although differently--to the family unit. (A good answer should not weigh a contribution within the home as less valuable than one outside the home--*Hanaway*). This is a neutral factor in this matter.

(d) Their ages. The inference is George and Jane are middle-aged. That is young enough for George to retrain and re-enter the work force. Jane has already "arrived" in her career and enjoys a higher earning potential for that reason. This factor is more neutral.

(e) Needs. George will need more support than Jane because the children remain at home and that will impact his ability to earn. Also, George will need financial assistance because he has not supported himself and the family financially. This factor favors George.

(b) Ability to work. Jane can obviously work. George can work, but he has no relevant and timely training and has been out of the workforce for 19 years. This factor weighs in favor of George. On Jane's behalf, the examinee might note that George is expected to work and courts can assign income if they wish as if he was working.

(g) Health. There is no reason to think that either party has health issues.

(h) Fault. Jane is at fault for the breakdown of the marriage due to her extramarital affair. This will weigh in George's favor. Jane would emphasize, however, that the court should not use spousal support to punish her, nor may the court weigh this factor more heavily than the others.

Finally, an examinee may discuss George's contribution to Jane's acquisition of her degree as a property issue--this is a claim under *Postema v Postema*, 189 Mich App 89 (1991). The exam question is not a *Postema* question. A *Postema* claim is separate and distinct from spousal support; it is not a factor in a spousal support determination. Nevertheless, an astute examinee may note the issue. A grader should not penalize the examinee for such recognition, but reward it, particularly since Jane's advance degree can be considered a result of a "concerted family effort" under *Postema*.

ANSWER TO QUESTION NO. 8

**Bounty Bank:** Bounty Bank's security interest in Big Bobs' inventory, including the big screen television purchased by Joe Spartan, was perfected by timely filing an appropriate finance statement. MCL 440.9310(1).

**Joe Spartan:** A buyer in the ordinary course of business takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence. MCL 440.9320(1).

A buyer in the ordinary course of business is a buyer from a person in the business of selling goods of that kind. MCL 440.1201(9). Since Big Bobs is in the retail business of selling televisions, Joe Spartan took free of Bounty Bank's perfected security interest.

**City Bank:** City Bank has a purchase money security interest in the big screen television, since it loaned the money to Joe Spartan to purchase the television. MCL 4450.9103(1).

A purchase money security interest in a consumer good is perfected when it attaches. MCL 440.9309(a). A consumer good is defined as a good that is used or bought for use primarily for personal, family, or household purposes. MCL 440.9102(1)(w). Joe Spartan purchased the big screen television for family use, so it is a consumer good.

A security interest attaches when value is provided, the debtor has rights in the collateral, and a security agreement exists that includes the collateral. MCL 440.9203(2).

Since City Bank's purchase money security interest in the big screen television attached, the security interest is perfected, even though City Bank did not file a finance statement.

City Bank has priority over Bounty Bank to the television, even though Bounty Bank's security interest was perfected first. The general priority rule of first to perfect does not apply because Joe Spartan purchased the big screen television free of Bounty Bank's perfected security interest because he purchased the television from Big Bobs in the ordinary course of business. MCL 440.9320(1). As a result, City Bank's security interest has priority over Bounty Bank's security interest, even if City Bank does not have a perfected security interest.

**National Bank:** National Bank's security interest was perfected

when it timely filed an appropriate finance statement. MCL 9310(1). National Bank does not have a purchase money security interest.

City Bank's purchase money security interest has priority over National Bank's security interest since it was the first to perfect its security interest.

**Order of Priority:** The order of priority from highest to lowest to the big screen television is as follows: City Bank, National Bank, and Joe Spartan. Bounty Bank and Big Bobs have no legal right in the big screen television, and, therefore, no priority, because Big Bobs sold the big screen television in the ordinary course of business.

ANSWER TO QUESTION NO. 9

There are two issues that should be identified and discussed, in no particular order. First, there is the issue of whether John's back condition is work related for workers' compensation purposes. The second issue is whether John can prove that he is "disabled" and thus entitled to weekly wage loss benefits under 418.301(4), as recently informed by the Michigan Supreme Court's decision in *Stokes v Chrysler LLC*, 481 Mich 266 (2008).

With respect to the work relatedness issue, the fact that John brought to the workplace a pre-existing condition does not preclude a finding that his back condition is work related. Where work aggravates a pre-existing condition in a compensable manner, the resultant problem is deemed wholly work related for workers' compensation purposes. *E.g.*, *Smith v Lawrence Banking Company*, 370 Mich 169 (1963). Aggravation of a pre-existing condition in a compensable manner requires the claimant to demonstrate more than just aggravation of the symptoms of the preexisting condition. The claimant must demonstrate that work aggravation produced a problem "medically distinguishable" from the pre-existing problem. *Rakestraw v General Dynamics Land Systems*, 469 Mich 220 (2003). A medically distinguishable problem occurs where there has been a "change in the pathology" of the condition. *Fahr v General Motors*, 478 Mich 922 (2007). Furthermore, if the pre-existing condition is a "condition of the aging process", *i.e.*, a condition that naturally progresses with the passage of time, the claimant must demonstrate that work contributed toward the pre-existing problem "in a significant manner", rather than only insignificantly. MCL 418.301(2); MCL 418.401(2)(b).

Therefore, in addressing the work relatedness issue in John's case, the examinee must demonstrate that he or she is aware of the need to prove a "medically distinguishable" problem, a "change in pathology." And, a thorough analysis would also include consideration of the possibility that John's arthritis might be deemed a "condition of the aging process" requiring "significant" work contribution. The type of information an attorney will need to elicit in order to properly evaluate John's claim will include prior medical records to determine whether John's problem is a condition of the aging process and current medical information designed to answer the question of whether John has a problem "medically distinguishable" from his pre-existing condition. The attorney would also want to know the frequency of John's bending at work to determine the significance of work's contribution and whether John suffered any specific traumatic events at work.

With respect to the second "disability" issue, the *Stokes*

decision requires the claimant to present proofs on four different elements in order to make a *prima facie* case of disability and thereby successfully pursue weekly wage loss benefits. First, the claimant is required to fully disclose all of his qualifications and training, including education, skills, experience, and training "whether or not they are relevant to the job the claimant was performing at the time of injury." Second, the claimant needs to provide a reasonable means to assess employment opportunities at all such suitable jobs within the same salary range, including the jobs to which his or her qualifications and training might "translate." The claimant must not limit consideration to just the jobs that he has actually performed in his work life. Third, the claimant must demonstrate the work injury prevents him from performing some or all of such jobs. And, fourth, if there are any jobs suitable to his qualifications and training he is capable of performing post-injury, he must show that he has made a "good faith attempt to procure post-injury employment if there are jobs at the same salary or higher."

Therefore, with respect to the second issue, the examinee should display familiarity with this legal standard of disability articulated in *Stokes* which built on *Sington v Chrysler Corp*, 467 Mich 144 (2002). John's attorney will need to elicit from John information regarding his skills, experience, training, hobbies and the like, in addition to all the specific jobs he had previously performed. *Stokes* mentions, though it does not mandate, that claimants like John consider producing vocational testimony and a "transferable skills analysis" in order to establish how his qualifications and training might translate to other jobs beyond those he had previously performed. Finally, John's efforts to procure suitable post-injury work within his physical restrictions are important.

In sum, to prevail with a workers' compensation claim for weekly wage loss benefits, John needs to demonstrate his condition is work related and he must satisfy the *Stokes* "disability" criteria. John ostensibly has a claim, but whether it is meritorious and warrants pursuit will depend on the results of the inquiries identified above. The examinee must demonstrate he/she recognizes these two issues, knows the crucial legal criteria, and knows what information will need to be collected in order to properly evaluate the case.

ANSWER TO QUESTION NO. 10

Whether or not Patrick is entitled to each of three items depends upon whether a valid inter vivos gift was effectuated. In order for a gift to be valid, three elements must be satisfied: (1) the donor must possess the intent to transfer title gratuitously to the donee, (2) there must be actual or constructive delivery of the subject matter to the donee, unless it is already in the donee's possession, and (3) the donee must accept the gift.

It appears that Patrick will be able to compel the return of the dog. The facts indicate that Patrick was given the dog at his surprise birthday party in October, and the couple continued living together for three months before their relationship ended. The facts indicate that Dorothy intended to give Patrick the dog, that it was actually delivered to Patrick, and that he accepted the dog at his birthday party.

Patrick will not be able to recover the cufflinks. Although the facts indicate that Dorothy intended to transfer ownership of the cufflinks, there has been no delivery of the cufflinks to Patrick. In order to show delivery, there must be a showing that the donee possessed dominion and control over the gift. *Osius v Dingell*, 375 Mich 605 (1965). Here, Patrick never actually possessed the cufflinks--he has only seen a picture of them. Moreover, the picture does not constitute constructive delivery. Constructive delivery occurs only where the gift is not capable of actual delivery because of the size or nature of the item, such as delivering the keys to a safe deposit box. Because Dorothy never delivered the cufflinks to Patrick, a valid inter vivos gift was not created, and Dorothy can retain the cufflinks.

Patrick will be able to compel the return of the engagement ring. An engagement ring is a conditional gift given in contemplation of marriage, and the gift does not become absolute until the marriage occurs. There are two lines of cases dealing with which party gets the gift when the condition is not fulfilled. Under a "fault" based inquiry, the party responsible for the termination of the relationship loses the ring to the innocent party. Michigan, however, follows a "no-fault" inquiry. Because an engagement ring is a conditional gift, the donor is entitled to the return of the ring when the condition is not fulfilled *without* regard to fault. Thus, the fact that the engagement was broken due to Patrick's infidelity is irrelevant. *Meyer v Mitnick*, 244 Mich App 697 (2001).

ANSWER TO QUESTION NO. 11

Mr. and Mrs Murphy:

You have asked me to advise you regarding your rights with respect to the boundary line dispute between your neighbor, Mr. Zehnder, and you, with respect to Lots 26 and 27 of Happy Land Subdivision.

Trespass is an intentional and unauthorized invasion of another person's interest in the exclusive possession of his property. *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 344 (1997); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 195 (1995). So, at first blush, you are technically trespassing on Zehnder's property. However, that does not conclude the issue. You may have rights under the theories of adverse possession, prescriptive easement or acquiescence.

**Adverse Possession:** A person who is a trespasser may be able to avoid being ousted from possession of another's land if the statute of limitations on trespass has run and certain other requirements are met. The theory is that if the record owner is barred from ousting you from land because of the 15-year statute of limitations, then nobody can oust you and, accordingly, you become the effective owner of the property. In order to secure title by adverse possession, the claimant must establish by clear and cogent proof that his or her possession is actual, visible, open, notorious, exclusive, continuous and uninterrupted for the statute period of 15 years, hostile and under cover of claim of right. *Burns v Foster*, 348 Mich 8, 14 (1957). You have been living on Lot 27 for only seven years.

Even though you have been living there for only seven years, you may be able to "tack" Mr. Brown's 27 or 28 years of possession onto your seven years in order to meet the 15-year requirement. Tacking is the ability to assume the adverse possession of one's predecessor. *Connelly v Buckingham*, 136 Mich App 462, 467-468 (1984). So, if Mr. Brown's possession was adverse, you can add his 27 or 28 years to your seven years of possession to meet the 15-year possession requirement.

The existence of the fence for 34 years, the fact that the fence was built by Mr. Brown, the planting of the hedge in the disputed area, the construction of the shed in the disputed area, installation of the sprinkler in the disputed area, and the maintenance of that area by the owner of Lot 27 since 1973-1974, are evidence that your possession and your predecessor's was

actual, visible, open, notorious, exclusive, continuous and uninterrupted. Because Brown erected the fence without regard for the boundary line, the possession was hostile. *Werner v Noble*, 286 Mich 654 (1938), and *DeGroot v Barber*, 198 Mich App 48 (1993).

**Acquiescence:** There is an alternative theory, known as acquiescence, under which you might be able to acquire title to the property. The law of acquiescence applies the statute of limitations to cases of adjoining property owners who are mistaken about where the line between their property is. Adjoining property owners may treat a boundary line, typically a fence, as the property line. If the boundary line is not the recorded property line, this results in one property owner possessing what is actually the other property owner's land. Regardless of the innocent nature of this mistake, the property owner whose land is being possessed by another would have a cause of action against the other property owner to recover possession of the land. After fifteen years, the period for bringing an action would expire. The result is that the property owner of record would no longer be able to enforce his title, and the other property owner would have title by virtue of his possession of the land. See *Jackson v Deemer*, 373 Mich 22, 26 (1964). This theory is based on an implied agreement between the adjoining property owners.

As discussed above, the fact that the fence between Lots 26 and 27 has been in existence since 1974 and that both owners treated it as their boundary shows an implied agreement that the fence was the practical boundary between the two lots. So, acquiescence is a viable theory in your case.

**Prescriptive Easement:** A prescriptive easement is similar to adverse possession. The difference is that if you are successful, you will not own the disputed area, but will have the right to use it. In order to obtain a prescriptive easement, you must show all of the same elements that are required for adverse possession except that the possession by the party claiming the easement does not have to be exclusive. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511 (1995). So, you could obtain a prescriptive easement even if the disputed area was used by the owners of both Lots 26 and 27, as long as you satisfy the other elements.

**General:** Adverse possession is not a favored theory. Therefore, you must have clear and convincing evidence to show adverse possession.

## ANSWER TO QUESTION NO. 12

This question tests three of the most common types of will contest: lack of testamentary capacity, undue influence resulting in lack of free will, and the testator's failure to properly execute the will.

**Testamentary Capacity:** MCL 700.2501 states "An individual 18 years of age or older who is of sound mind may make a will." The case law has interpreted sound mind to consist of the individual must be able to (1) comprehend the nature and extent of his property; (2) recall the natural objects of his bounty; and (3) determine and understand the disposition of property which he wishes to make. *In re Sprenger's Estate*, 337 Mich 514 (1953); *In re Carmas' Estate*, 327 Mich 235 (1950); *In re Walker's Estate*, 270 Mich 33 (1935).

In this case, Jason Walker was 84 years old so he meets the threshold age requirement. The family will say that he suffered from a number of health problems including the effects of a stroke and deep depression all of which could affect his mental capacity. Carlee will counter that when Jason dictated the letter requesting the codicil he stated specifically that he (1) knew he was wealthy; (2) knew who his family was; and (3) felt that his wealth would be wasted with his family and directed a change in who was to be beneficiary of his will. The codicil was drafted to the specifics of the letter and attorney reviewed the letter with Jason when the codicil was executed. At the time of execution, having reviewed the letter that set forth the elements of testamentary capacity Jason executed the codicil without any indication that he was not of "sound mind" as defined by law. As such, the facts do not support a claim of lack of testamentary capacity.

**Undue Influence:** According to *Kar v Hogan*, 399 Mich 529, 537 (1976), a presumption of undue influence arises upon introduction of evidence which would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest that he represents benefits from a transaction, and (3) the fiduciary had an obligation to influence the grantor's decision in that transaction. In this case, the family will argue that Carlee was a fiduciary of Jason in that she was his employee and personal caregiver. She benefitted from the transaction because she will not inherit his wealth. Finally, she not only had opportunity to influence the grantor's decision, but she actively participated in it. She drafted the letter causing the codicil to be created, she placed the pen in his hand and helped him sign the codicil, and she witnessed the codicil. Thus, the presumption of undue influence

has been met. *Kar v Hogan*, 399 Mich 529, 538 (1976). Furthermore, Jason was in a weak, paralyzed state and suffering from deep depression and the case law indicates that the lower the degree of the testatory's intellect or strength, the easier it is to infer that influence is undue. *In re Shepard's Estate*, 161 Mich 441 (1910); *Schneider v Vosburgh*, 143 Mich 476 (1906).

Carlee will counter that not all influence is undue influence and the burden of proof does not shift to her as a proponent of the codicil even though the presumption of undue influence has been met. Rather, only the burden of going forward with evidence the transaction was free of undue influence shifts to her. The burden of proof remains on the family throughout the case to show that the will was the product of undue influence and not the product of Jason's own free will. *Kar v Hogan*, 399 Mich 529 (1976). She will argue that Jason's letter to his attorney was a surprise to her and she drafted it exactly as he wanted by taking dictation as she usually did. She will also argue that even though she assisted Jason in signing the codicil, she acted only as was their usual practice in helping him sign something when he could not because of his paralysis. She will also argue that despite Jason's illness, he was of sound mind and capable of making his own decisions. Finally, she will argue that Jason obtained and consulted independent legal counsel regarding the codicil and he did so outside of her presence. Despite the presumption of undue influence having been met, the family has not met its burden in demonstrating that the codicil was the product of undue influence and not the product of Jason's own free will. Therefore, any presumption of undue influence has been rebutted.

**Failure to execute a proper will:** A codicil to a will must be executed with the same requirements that a valid will must be executed. The family will argue that under the common law Carlee could not be a witness to a will that she was a beneficiary or interested person in. Carlee will counter that when EPIC took effect in 2000, the legislature modified the common law. EPIC 700.2505(1) states: "An individual generally competent to be a witness may act as a witness to a will." EPIC 700.2505(2) states further: "The signing of a will by an interested person, does not invalidate the will or any provision of it." Thus, EPIC has changed the common law and Carlee could properly witness the codicil despite being a beneficiary of the will. Therefore, the codicil was executed with the same requirements of a valid will.

ANSWER TO QUESTION NO. 13

This question raises the issue of piercing the corporate veil and holding the shareholders liable for any judgment. With respect to this issue, the examinee should discuss whether the corporate veil of Fish-On Charters, Inc. could be pierced so as to establish personal liability against the shareholders for any personal injury judgment.

Because the shareholders of Fish-On Charters, Inc. participate in the management of the corporation, and family members control the majority of stock, it is considered a closely held corporation under Michigan law. *Estes v Idea Engineering and Fabricating, Inc*, 250 Mich App 270, 281 (2002).

As a general matter, the law treats a corporation as an entity separate from its shareholders, even where one individual owns all the corporate stock. *Kline v Kline*, 104 Mich App 700, 702 (1981). In some limited circumstances, courts will disregard the corporate form and hold a director personally liable for corporate debt. To do so is called "piercing the corporate veil," and though not a cause of action, it is a doctrine that fastens liability on an individual who uses the corporation as an instrumentality to conduct his own personal business with individual liability arising when a fraud or injustice is committed on third parties dealing with the corporation. *In re RCS Engineered Products Co., Inc*, 102 F3d 223, 226 (CA 6, 1996). Although there is no one rule or test for deciding when it is appropriate to pierce the corporate veil, Michigan courts have generally said that to pierce the corporate veil, the corporate entity must be found to be a mere instrumentality of another individual or entity. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 456 (1996). The court must also find that the corporate entity was used to commit an injustice, wrong or fraud, and there must have been an unjust injury or loss to the plaintiff. *Rymal v Baergen*, 262 Mich App 274, 293-294 (2004). All facts and circumstances surround the corporation, its economic justification and its operation, must be considered to determine if the corporate structure has been abused. *Klager v Robert Meyer Co*, 415 Mich 402, 411-412 (1982).

Because we are dealing with a motion for summary disposition, the question is whether there are sufficient facts to allow the case to go to the jury. MCR 2.116(C)(1). Here, in order for Doe to recover from these individual defendants personally, she must pierce the corporate veil. She clearly will not succeed as to Betty, Barbara and Bobby, but might have enough evidence as to Sandy. Although Betty, Barbara and Bobby participated in a couple of poor decisions (not reinvesting and allowing Sandy complete

control over the bank account), and allowed the corporation to be run very informally and without much supervision, none of them utilized the corporate entity or property for their own personal use. Thus, there is no genuine issue of material fact that none of the three used Fish-On Charters as an instrumentality to commit a wrong or fraud. They should not be held personally liable. The better argument is against Sandy.

The facts show that Sandy exercised complete dominion and control over Fish-On Charters, and disregarded corporate formalities to benefit himself. For example, Sandy unilaterally decided to discontinue all liability insurance held by the company, and to pocket corporate revenues for his own use, in order to maintain his salary level despite reduced revenues. Sandy sought out directors who he believed would give him full authority over the company, and convinced them to cede control over the bank account. Sandy also used the boat for his personal use, helping to eliminate the line between personal and corporate property. Fish-On Charters was essentially the "alter ego" of Sandy. Thus, sufficient facts support the argument that Sandy used Fish-On Charters as an instrumentality of his own.

The next question is whether Sandy used the corporate entity to commit a wrong or fraud. The evidence on this point is that Sandy must have used the corporate entity to discontinue the liability insurance. Arguably Sandy misused or disregarded the corporate form by not repairing the boat (which led to Doe's injury) for the sake of his own pecuniary gain, ignoring any real corporate formalities, and purposefully nominating shareholders whom he could control. Also, Doe can argue that she suffered an unjust loss in that she will likely recover a judgment against the company, but cannot recoup the monies because Sandy had operated the company recklessly with the sole purpose of lining his own pocket, rather than reinvesting into the company. The motion as it pertains to Sandy should be denied.

The motion should be granted as to personal liability against Betty, Barbara and Bobby, and denied as to Sandy.

ANSWER TO QUESTION NO. 14

For the following reasons, I would advise Plush Resorts ("PR") that it would be likely to succeed in a breach of contract suit against Mighty Machines ("MM"), which could be brought immediately.

1. PR does not have to wait until after MM's performance under the contract is due (February 2009) to sue. MM repudiated the contract (also called an anticipatory breach) on September 1, 2008. If a party to a contract unequivocally declares its intention not to perform its obligations before they are due, the nonbreaching party may immediately bring an action for damages. *Stanton v Dachille*, 186 Mich App 247, 252 (1990).

2. The fact that PR no longer holds a four-star rating is not an adequate excuse for MM to breach the contract even though the rating was discussed during the parties' negotiations. The contract does not make it a condition of MM's performance that PR have the four-star rating; in fact, the contract includes an express merger or integration clause providing that the parties' complete agreement with respect to the reservation is stated in the contract. While MM may argue that parol (also called extrinsic) evidence of these discussions can be admitted to show that PR's maintaining a four-star rating was part of the parties' agreement, that argument should not succeed.

In general, parol evidence of prior or contemporaneous agreements or negotiations is not admissible to vary or contradict the terms of an unambiguous written contract. The chief exceptions to the parol evidence rule allow parol evidence to be admitted to show that (1) the parties did not intend the document to be a complete and final expression of their agreement (a "fully integrated" agreement), or (2) the agreement was only partially integrated because essential elements were not reduced to writing, or (3) the contract has no legal effect because of fraud, illegality, or mistake. *NAG Enterprises, Inc v Allstate Industries, Inc*, 407 Mich 407, 410-411 (1979). But exceptions (1) and (2) cannot apply because Michigan law does not allow extrinsic evidence on the threshold question of whether the contract is integrated when the parties include an express merger clause declaring that the written contract is the entire agreement. *UAW-GM Recreation Center v KSL Recreation Corp*, 228 Mich App 486, 493-497 (1998). This is consistent with the general principle, strongly emphasized by Michigan courts, of respecting unambiguous agreements that the parties have written for themselves and not making new contracts for them. Nor does exception (3) apply. What PR told MM was not a misstatement of an existing fact, so MM has no basis to argue that it was fraudulently induced to make the

contract or made it under a mistake of fact (which, in any case, would have to be mutual). At most, the statement about the four-star rating was a promise about a future state of affairs, but that promise is not part of the parties' agreement because of the merger clause.

**Comment:** The drafter believes that full credit should be given for all answers that spot a potential parol evidence issue and recognize that the merger clause is fatal to parol evidence arguments. "Extra" credit can be given to those who identify circumstances where parol evidence may be admitted while recognizing that under Michigan law the merger clause controls. Some credit can be given if the applicant fails to recognize the merger clause as conclusive, but rationally argues that testimony about the rating discussion may be admissible under one or more of the above-stated exceptions to the parol evidence rule.

3. The next question is whether MM can successfully defend on the ground that other changes in conditions occurring after the contract was signed, and not caused by either party, have made it "impracticable" for MM to perform the contract or "frustrated the purpose" of the contract. The essence of the modern defense of impracticability (formerly called "impossibility") of performance because of changed circumstances is that since the contract was executed the promised performance has become impracticable because it now involves some extreme or unforeseeable difficulty, expense, injury or loss. Mere increased difficulty or financial strain are not enough to invoke this defense. While MM is more financially pinched in September 2008 than it was one year earlier, the cost of renting the facility is the same cost it agreed to and it is capable of making the required payments.

The defense of frustration of purpose is a closer question, but also unlikely to prevail. The conditions to applying frustration of purpose are: (1) the contract must be at least partially executory (here this is true); (2) the frustrated party's purpose in making the contract must have been known to both parties at the time the contract was made (this is also true); (3) this purpose must have been thoroughly frustrated by an event not reasonably foreseeable at the time the contract was made, which event is not due to the fault of the frustrated party and the risk of which he did not assume (MM can make a non-frivolous argument that this is also true). *Liggett v City of Pontiac*, 260 Mich App 127, 134-35 (2003). MM could argue that the extent of the economic slowdown and the resulting need for it to rush its strategic planning has made the meeting unnecessary, that this urgency was not its doing and was unforeseeable when the contract was made, and that it did not assume this risk. However, the comments to the Restatement (Second) of Contracts, §265, suggest a high standard for finding frustration: "The object must be so completely the basis of the contract that, as both parties understand, without it

the transaction would make little sense," and "the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made." It is doubtful that MM can meet that standard. When the contract was made, the parties assumed that there would be recreation as well as strategic planning going on (MM reserved other amenities besides meeting rooms). Furthermore, accelerating strategic planning was MM's decision, and some useful business meetings at the resort could still take place.

**Comment:** This is a more extended discussion of the frustration doctrine than an applicant can be expected to provide. Full credit on this point should be given if an applicant recognizes and correctly labels the possibility of a "frustration" defense being raised, and further recognizes that frustration is not to be found too easily in order to preserve the stability of commercial relationships.

4. The logical approach to damages would be to seek the most common measure of contract damages, PR's "expectation interest." Sometimes called "benefit of the bargain damages," this measure is intended to place a party in the same position it would be in if the breaching party had fully performed its contract obligations. Here, the starting point for measuring PR's expectation interest is the unpaid balance of the contract price: \$900,000. PR could add to that any other reasonably foreseeable loss caused by the breach Restatement (Second) of Contracts, §347(b), such as advertising to find a replacement. The unpaid price must be reduced for any expenses that PR avoids by not having to perform. *Id.*, §347(c). Thus, if during litigation MM develops evidence that PR saved on wages or other expenses (buying food, providing limos, etc.) that it would have paid as part of providing the promised accommodations to MM, that evidence will reduce PR's \$900,000 expectation interest. And PR must also keep up reasonable efforts to mitigate its damages by finding a replacement for MM.

**Comment:** The concepts of (1) adding in incidental and consequential losses and (2) keeping an eye on mitigation are nonessential to full credit.

**ANSWER TO QUESTION NO. 15**

There is nothing ethically improper about Caroline directly investigating the facts of the case, or her cruising Max's neighborhood to see what can be seen from the public road. There is no indication that Caroline had any contact or communication with Max during those trips, and thus MRPC 4.2, Communication with a Person Represented by Counsel, is not triggered. Caroline should have known, however, that her direct investigation could make her a witness in the case in which she is counsel of record. MRPC 3.7, Lawyer as Witness, forbids a lawyer from being an advocate at trial in a matter in which the lawyer is also a necessary witness on contested facts. The extent of Max's injuries will clearly be contested, and if Caroline was the only one who observed Max, her testimony would be "necessary." Therefore Caroline has created a situation where she cannot be advocate at trial. Since Caroline's testimony would be consistent with the interests of her client, however, Caroline's firm is not disqualified under MRPC 3.7(b). Jackson should rectify this matter by reassigning the case to someone else in the firm.

The improper actions of Caroline and Parker are (a) falsely representing in the investigative report that the source was "anonymous," (b) claiming attorney-client privilege at deposition when the source of the information was requested, and (c) having Matt execute a false statement that he was the source of the information. The applicable ethics violations are MRPC 3.4, Fairness to Opposing Party and Counsel (obstructing another party's access to evidence, concealing evidence, failing to comply with a reasonable discovery request, and requesting a person other than a client to refrain from voluntarily giving relevant information to another party), MRPC 4.1, Truthfulness in Statements to Others, (making a false statement of material fact or law to a third person), and MRPC 8.4, Misconduct, (violating the Rules, inducing another to violate the Rules, engaging in dishonesty and deceit, and engaging in conduct prejudicial to the administration of justice). Caroline did not just withhold her identity as the source of the information about Max; she compounded the problem by arranging for Matt to lie. She allowed her personal interest in avoiding disclosure to interfere with her judgment on behalf of her client, in violation of MRPC 1.7(b), Conflict of Interest: General Rule. These are substantial violations that go to the core of the justice system. Jackson's duty to report Caroline to the Attorney Grievance Commission, pursuant to MRPC 8.3, Reporting Professional Misconduct, has been triggered.

In addition, Jackson and the counsel replacing Caroline should determine whether they have disclosure duties under MRPC 3.3,

Candor Toward the Tribunal. Michigan Ethics Opinions establish that discovery proceedings and depositions are "before the court" and trigger duties under MRPC 3.3. MRPC 3.3(a)(1) has not been violated, because no false statement of material fact has yet been made -- Matt's sworn statement has not been presented. MRPC 3.3(a)(2) has not been violated, because there has been no criminal or fraudulent act by Caroline's client. MRPC 3.3(a)(3) does not apply, because it addresses controlling legal authority. MRPC 3.3(a)(4) is not violated, because Matt's false affidavit has not yet been presented. MRPC 3.3(a) duties continue to "the conclusion of the proceeding." It is unclear whether the "proceeding" in this instance is Parker's deposition, or the entire discovery period, but in any event if the claim of privilege is challenged Parker's deposition is still open. It does not appear that Jackson has any affirmative duty to make any disclosure to the court. Caroline's conduct is not protected by MRPC 1.6, Confidentiality of Information, since it does not involve any communication between Caroline and her client. Further, it is in the interests of the client for Caroline's information to be disclosed in the matter. Jackson should reveal Caroline as the source of the information about Max's condition.