THE MEE
MULTISTATE ESSAY EXAMINATION

February 2017
MEE Questions and Analyses

National Conference of Bar Examiners
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Preface

The Multistate Essay Examination (MEE) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the questions and analyses from the February 2017 MEE. (In the actual test, the questions are simply numbered rather than being identified by area of law.) The instructions for the test appear on page iii.

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

The subjects covered by each question are listed on the first page of its accompanying analysis, identified by roman numerals that refer to the MEE subject matter outline for that subject. For example, the Agency question on the February 2017 MEE tested the following areas from the Agency outline: II.A.,B. Power of agent to bind principal—Authority; Apparent authority.

For more information about the MEE, including subject matter outlines, visit the NCBE website at www.ncbex.org.

Description of the MEE

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

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

Instructions

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

> You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin.
>
> You may answer the questions in any order you wish. Do not answer more than one question in each answer booklet. If you make a mistake or wish to revise your answer, simply draw a line through the material you wish to delete.
>
> If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions.
>
> Read each fact situation very carefully and do not assume facts that are not given in the question. Do not assume that each question covers only a single area of the law; some of the questions may cover more than one of the areas you are responsible for knowing.
>
> Demonstrate your ability to reason and analyze. Each of your answers should show an understanding of the facts, a recognition of the issues included, a knowledge of the applicable principles of law, and the reasoning by which you arrive at your conclusions. The value of your answer depends not as much upon your conclusions as upon the presence and quality of the elements mentioned above.
>
> Clarity and conciseness are important, but make your answer complete. Do not volunteer irrelevant or immaterial information.
>
> Answer all questions according to generally accepted fundamental legal principles unless your testing jurisdiction has instructed you to answer according to local case or statutory law.
>
> NOTE: Examinees testing in UBE jurisdictions must answer according to generally accepted fundamental legal principles rather than local case or statutory law.

February 2017
MEE Questions

Contracts

Trusts & Future Interests

Family Law/Conflict of Laws

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CONTRACTS QUESTION

On June 15, a professional cook had a conversation with her neighbor, an amateur gardener with no business experience who grew tomatoes for home use and to give to relatives. During the conversation, the cook mentioned that she might be interested in “branching out into making salsa” and that, if she did branch out, she would need to buy large quantities of tomatoes. Although the gardener had never sold tomatoes before, he told the cook that, if she wanted to buy tomatoes for salsa, he would be willing to sell her all the tomatoes he grew in his half-acre home garden that summer for $25 per bushel.

Later on June 15, shortly after this conversation, the cook said to the gardener, “I’m very interested in the possibility of buying tomatoes from you.” She then handed a document to the gardener and asked him to sign it. The document stated, “I offer to sell to [the cook] all the tomatoes I grow in my home garden this summer for $25 per bushel. I will hold this offer open for 14 days.”

The gardener signed the document and handed it back to the cook.

On June 19, the proprietor of a farmers’ market offered to buy all the tomatoes that the gardener grew in his home garden that summer for $35 per bushel. The gardener, happy about the chance to make more money, agreed, and the parties entered into a contract for the gardener to sell his tomatoes to the proprietor.

On June 24, the cook, who had not communicated with the gardener since the June 15 conversation, called the gardener. As soon as the cook identified herself, the gardener said, “I hope you are not calling to say that you want my tomatoes. I can’t sell them to you because I have sold them to someone else.” The cook replied, “You can’t do that. I called to accept your offer to sell me all your tomatoes for $25 per bushel. You promised to hold that offer open for 14 days. I accept your offer!”

Is the gardener bound to sell the cook all the tomatoes he grows that summer for $25 per bushel? Explain.

TRUSTS & FUTURE INTERESTS QUESTION

Forty years ago, Settlor, a successful businesswoman, married a less-than-successful writer. Settlor and her husband had two children, a son and a daughter.

Two years ago, Settlor transferred most of her wealth into a revocable trust. Under the terms of the trust instrument, a local bank was designated as trustee, and the trustee was directed to distribute all trust income to Settlor during her lifetime. The trust instrument further provided that "upon Settlor's death, the trustee will distribute trust principal to one or more of Settlor's children as Settlor shall appoint by her duly probated last will or, in the absence of such appointment, to Charity." The trust instrument also stated that Settlor's power of revocation was exercisable only "during Settlor's lifetime and by a written instrument."

Following the creation of the trust, Settlor gave written direction to the trustee to accumulate trust income instead of distributing the income to Settlor as specified in the trust instrument. The trustee did so.

Six months ago, Settlor executed a valid will. The will, exercising the power of appointment created under Settlor's revocable trust, directed the trustee of Settlor's trust, upon Settlor's death,

> (1) to distribute half of the trust assets to Settlor's daughter,
>
> (2) to hold the other half of the trust assets in continuing trust and pay income to Settlor's son during the son's lifetime, and
>
> (3) upon the son's death, to distribute the trust principal in equal shares to the son's surviving children (grandchildren of Settlor).

Settlor also bequeathed $50,000 "to my descendants, other than my children, in equal shares," and she left the residue of her estate to her husband, whom she also named as the executor of her estate.

Two months ago, Settlor died. At Settlor's death, the trust assets were worth $500,000 and Settlor's probate assets were worth $100,000. Settlor was survived by her husband, her daughter, her son, and her son's child (Settlor's grandchild, age 18).

A statute in this jurisdiction provides that a decedent's surviving spouse is entitled to a "one-third elective share of the decedent's probate estate." There are no other relevant statutes.

1. Was it proper for the trustee to accumulate trust income during Settlor's lifetime? Explain.
2. Under Settlor's will and the trust instrument, what, if any, is Charity's interest in the trust assets? Explain.
3. Does Settlor's husband have a valid claim to any trust or probate assets? Explain.

FAMILY LAW/CONFLICT OF LAWS QUESTION

In 2005, Andrew and Brenda began living together in State A while both were attending college there. Andrew proposed marriage to Brenda, but she refused. However, after learning that she was pregnant, Brenda told Andrew that she wanted to marry him before the baby was born. Andrew was thrilled and told her that they were already married "in the eyes of God." Brenda agreed.

Andrew and Brenda did not obtain a marriage license or have a formal wedding. Nonetheless, Brenda started using Andrew's last name even before their daughter, Chloe, was born. After Andrew graduated from college and started a new job, he listed Brenda as his spouse so that she could qualify for benefits through Andrew's employer. They also filed joint income tax returns.

In March 2007, just after Chloe's first birthday, Andrew and Brenda decided to separate. They had little property to divide and readily agreed to its disposition. Andrew agreed that Brenda should have sole custody of Chloe, and Brenda, desiring the cleanest break possible, agreed that Andrew would not be responsible for any child support. Andrew told Brenda that no formal divorce was necessary because they had never formally married.

In June 2007, Brenda and Chloe moved to start a new life in State B. Andrew sent Chloe an occasional card or birthday gift, but otherwise maintained no contact with Chloe or Brenda. Not long after settling in State B, Brenda met and fell in love with Daniel.

In 2008, Brenda and Daniel obtained a State B marriage license and wed. Thereafter, Daniel formed a close and loving bond with Chloe. Indeed, with only very infrequent contact from Andrew, Chloe regarded Daniel as her father and called him "Dad."

In January 2017, Brenda purchased a lottery ticket. The ticket won a jackpot of $5 million, which was paid that month. Shortly thereafter, Brenda informed Daniel that she wanted a divorce and that she intended to use her lottery winnings to launch a new life with Chloe in a distant state and break off all contact with Daniel. When Chloe learned about this, she became very upset because she continues to regard Daniel as her father.

State A recognizes common law marriage. State B formerly allowed common law marriage until a statute, enacted in 2001, prospectively barred the creation of new common law marriages within the state. Neither State A nor State B is a community-property state.

1. On what basis, if any, would Andrew have a claim to a share of Brenda's lottery winnings? Explain.

2. Assuming that Andrew and Brenda have a valid marriage, on what basis, if any, would Daniel have a claim to a share of Brenda's lottery winnings? Explain.

3. If Brenda cuts off all contact between Chloe and Daniel, can Daniel obtain court-ordered visitation with Chloe? Explain.

CORPORATIONS QUESTION

A shareholder owns 100 shares of MEGA Inc., a publicly traded corporation. MEGA is incorporated in State A, which has adopted the Model Business Corporation Act (MBCA).

The shareholder read a news story in a leading financial newspaper reporting that MEGA had entered into agreements to open new factories in Country X. According to the story, MEGA had paid large bribes to Country X government officials to seal the deals. If made, these bribes would be illegal under U.S. law, exposing MEGA to significant civil and criminal penalties.

On May 1, the shareholder sent a letter to MEGA asking to inspect the minutes of meetings of MEGA's board of directors relating to the Country X factories mentioned in the news story, along with any accounting records not publicly available relevant to the alleged foreign bribes. The shareholder explained that she was seeking the information to decide whether to sue MEGA's directors for permitting such possible illegal conduct.

In her letter, the shareholder also demanded that the MEGA board investigate the possible illegal bribes described in the news story and take corrective measures if any illegality had occurred.

On June 1, MEGA responded to the shareholder in a letter, which stated in relevant part:

> The corporation will not give you access to any corporate documents or take any action regarding the matters raised in your letter. We cannot satisfy the whim of every MEGA shareholder based on unsubstantiated news stories. Furthermore, given our continuing operations in Country X, the board of directors will not investigate or take any other action regarding the matters raised in your letter because doing so would not be in the best interest of the corporation.

On October 1, the shareholder filed a lawsuit in a State A court. Her petition includes (1) a claim against MEGA seeking inspection of the documents previously requested and (2) a derivative claim against all of the MEGA directors alleging a breach of their fiduciary duties for failing to investigate and take action concerning the alleged foreign bribes.

MEGA's board has asked the corporation's general counsel the following questions:

> (1) Is the shareholder entitled to inspect the documents she requested?
>
> (2) May the board obtain dismissal of the shareholder's derivative claim if the board concludes that it is not in the corporation's best interest to continue the lawsuit, even though the board has not investigated the allegations of illegal foreign bribes?
>
> (3) Is the board's decision not to investigate or take further action with respect to alleged illegal foreign bribes consistent with the directors' duty to act in good faith, and is that decision protected by the business judgment rule?

How should the general counsel answer these questions? Explain.

AGENCY QUESTION

An inventor retained a woman to act as his agent to purchase 25 computer chips, 25 blue lenses, and 25 lawn mower shutoff switches. The inventor told her to purchase only:

- Series A computer chips,
- blue lenses that cost no more than $300 each, and
- shutoff switches that could shut down a lawn mower in less than one second after the mower hits a foreign object.

The woman contacted a chip manufacturer to purchase the Series A computer chips. She told the manufacturer that she was the inventor's agent and that she wanted to purchase 25 Series A computer chips on his behalf. The manufacturer told her that the Series A chips cost $800 each but that she could buy Series B chips, with functionality similar to that of the Series A chips, for only $90 each. Without discussing this with the inventor, the woman agreed to purchase 25 Series B chips, signing the contract with the chip manufacturer "as agent" of the inventor. The Series B chips were shipped to her, but when she then took them to the inventor and explained what a great deal she had gotten, the inventor refused to accept them. He has also refused to pay the manufacturer for them.

The woman also contacted a lens manufacturer for the purchase of the blue lenses. She signed a contract in her name alone for the purchase of 25 blue lenses at $295 per lens. She did not tell the lens manufacturer that she was acting as anyone's agent. The lenses were shipped to her, but when she took them to the inventor, he refused to accept them because he had decided that it would be better to use red lenses. The inventor has refused to pay for the blue lenses.

The woman also contacted a switch manufacturer to purchase shutoff switches. She signed a contract in her name alone for switches that would shut down a lawn mower in less than five seconds, a substantially slower reaction time than the inventor had specified to her. When she signed the contract, she told the manufacturer that she was acting as someone's agent but did not disclose the identity of her principal. The switches were shipped to her. Although the inventor recognized that the switches were not what the woman had been told to buy, he nonetheless used them to build lawn mowers, but now refuses to pay the manufacturer for them.

All elements of contract formation and enforceability are satisfied with respect to each contract.

1. Who is liable to the chip manufacturer: the inventor, the woman, or both? Explain.
2. Who is liable to the blue-lens manufacturer: the inventor, the woman, or both? Explain.
3. Who is liable to the shutoff-switch manufacturer: the inventor, the woman, or both? Explain.

REAL PROPERTY QUESTION

On January 1, 2015, a landlord who owned a multi-unit apartment building consisting only of one-bedroom apartments leased an apartment in the building to a tenant for a two-year term ending on December 31, 2016, at a monthly rent of $2,000. The tenant immediately took possession of the apartment.

The lease contained the following provision:

> Tenant shall not assign this lease without the Landlord's written consent. An assignment without such consent shall be void and, at the option of the Landlord, the Landlord may terminate the lease.

On May 1, 2015, the tenant learned that her employer was transferring her to a job overseas to begin on August 1, 2015. On May 2, the tenant emailed the landlord that she needed to vacate the apartment on August 1, but that she had found a well-to-do and well-respected lawyer in the community who was willing to take over the balance of the lease term at the same rent. The landlord immediately emailed the tenant that he would not consent to the lawyer taking over the lease. He wrote, "I don't rent to lawyers because I've learned from personal experiences with them as tenants that they argue about everything, make unreasonable demands, and make my life miserable. Find somebody else."

On July 25, 2015, the tenant vacated the apartment and removed all her personal property from it. She left the apartment keys in an envelope in the landlord's mail slot. The envelope also contained a note in which the tenant wrote, "As you know, I am moving overseas and won't be back before my lease ends. So here are the keys. I won't pay you any rent from August 1 on."

On July 26, 2015, the landlord sent the tenant an email acknowledging that he had found the keys and the note. In that email, the landlord wrote: "Although this is a problem you created, I want to be a nice guy and help you out. I feel pretty confident that I can find a suitable tenant who is not a lawyer to rent your apartment."

As of August 1, 2015, the landlord had four apartments, including the tenant's apartment, for rent in the building. The landlord put an "Apartments for Rent" sign in front of the apartment building and placed advertisements in the newspaper and on a website listing all the apartments for rent. However, because of a recent precipitous decline in the local residential rental property market, the landlord listed the apartments for a monthly rent of $1,000. The landlord showed all four vacant apartments, including the tenant's apartment, to each prospective tenant.

By September 1, 2015, the landlord was able to rent only two of the apartments at $1,000. The landlord was unable to rent the two remaining apartments, including the tenant's, at any price throughout the rest of 2015 and all of 2016, notwithstanding his continued efforts to rent them.

On January 2, 2017, the landlord sued the tenant to recover 17 months of unpaid rent, covering the period August 1, 2015, through December 31, 2016.

Identify and evaluate the arguments available to the landlord and the tenant regarding the landlord's claim to 17 months of unpaid rent.

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ANALYSIS

Legal Problems:

(1) What body of contract law governs the dealings between the gardener and the cook?

(2) Was the gardener entitled to revoke his offer before the cook accepted it?

(3) Did the gardener revoke that offer before the cook accepted it, thereby preventing the formation of a contract?

DISCUSSION

Summary

Because tomatoes are "goods," the gardener-cook transaction is within the scope of Article 2 of the Uniform Commercial Code (UCC), although common law principles remain applicable to the extent that they are not displaced by the UCC. The gardener made an offer to the cook to sell the cook his tomatoes for $25 per bushel and promised to hold that offer open for 14 days. That promise was not supported by consideration, however, and it is not binding on the gardener because no exception in the UCC overrides the requirement of consideration in order to make such a promise binding. The gardener revoked that offer before the cook accepted it when he informed the cook that he had sold his tomatoes to the proprietor of the farmers' market before the cook told the gardener that she accepted the offer. Thus, the gardener's revocation is effective and the gardener is not bound to sell the tomatoes to the cook.

Point One (10%)

<u>Tomatoes are "goods," and, therefore, the transaction between the cook and the gardener is governed by Article 2 of the UCC. Further, the document signed by the gardener was an "offer" for a contract under the UCC.</u>

UCC Article 2 governs "transactions in goods." UCC § 2-102. The term "goods" includes, among other things, growing crops (such as tomatoes). UCC § 2-105(1). Thus, the transaction in question is a transaction in goods that is governed by Article 2 of the UCC. Common law principles remain applicable, though, to the extent not displaced by the UCC. UCC § 1-103(b).

The document signed by the gardener, which was capable of being accepted, constituted an "offer" for a contract under UCC § 2-206. *See also Restatement (Second) of Contracts* § 24.

Point Two (60%)

<u>Generally, an offer to buy or sell goods may be revoked at any time before acceptance unless the offeror promised to hold the offer open and that promise is supported by consideration, or revocation of the offer is barred by UCC § 2-205.</u>

A person makes an offer when the person communicates to another a statement of "willingness to enter into a bargain, so made as to justify" the other person "in understanding that his assent to that bargain is invited and will conclude it." *Restatement (Second) of Contracts* § 24; *Nordyne, Inc. v. Int'l Controls & Measurements Corp*., 262 F.3d 843 (8th Cir. 2001). Here, the gardener's statement in the document that he signed was an offer because it expressed the gardener's willingness to enter into a bargain in a way that justified the cook in understanding that assent would create a contract.

Under the common law of contracts, an offer may be revoked by the offeror at any time before acceptance unless an option contract is created limiting the power of revocation. *Restatement (Second) of Contracts* §§ 25, 87. No option contract is created here because there was no consideration for the gardener's promise to keep the offer open, and there was no writing reciting a purported consideration. *Id*. § 25, cmt. c, and § 87(1)(a). As a result, the promise to hold the offer open is not enforceable under the general rule requiring consideration for such a promise.

As the Restatement notes, a promise to hold an offer open may also be made binding by statute. *Id.* § 87(1)(b). Because the tomatoes constitute goods, Article 2 of the Uniform Commercial Code is the relevant statute. In some circumstances, the "firm offer" rule in UCC § 2-205 makes a promise to hold open an offer to buy or sell goods binding even in the absence of consideration. UCC § 2-205 does not apply in this situation, however, because it applies only to an offer by a "merchant." The term "merchant" is defined in UCC § 2-104(1) as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction . . ." Here, the gardener is an amateur gardener with no business experience who has never sold tomatoes. Under these facts, the gardener is not a merchant. As a result, UCC § 2-205 does not make the gardener's promise to hold the offer open binding in the absence of consideration.

In some cases, "an offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract." *Restatement (Second) of Contracts* § 87(2). There is nothing in these facts, however, that would justify application of this rule.

In sum, the gardener was not bound by his promise to hold the offer open for 14 days and could revoke it at any time.

[NOTE: Even if the gardener were a merchant, UCC § 2-205 would not prevent revocation of this offer. This is because the promise to hold the offer open was on a form supplied by the cook (the offeree) and UCC § 2-205 requires that, when the term of assurance is on a form supplied by the offeree, that term of assurance must be "separately signed" by the offeror. There is no indication that the promise to hold the offer open was separately signed by the gardener (such as by placing his initials next to that sentence).]

[NOTE: Nonetheless, an examinee should receive credit if he or she concludes that the gardener had become a merchant by virtue of the sale of all of his tomato crop and then goes on to discuss the gardener's liability to the cook under a theory of promissory estoppel.]

Point Three (30%)

<u>The gardener revoked his offer to sell all his tomatoes to the cook for $25 per bushel when he told her that he could not sell the tomatoes to her because he had sold them to someone else before the cook told him that she accepted his offer.</u>

An offer is revoked when the offeree "receives from the offeror a manifestation of an intention not to enter into the proposed contract." *Restatement (Second) of Contracts* § 42; *Normile v. Miller*, 326 S.E.2d 11 (N.C. 1985) ("notice of the offeror's revocation must be communicated to the offeree to effectively terminate the offeree's power to accept the offer"). Here, the gardener told the cook that he could not sell her tomatoes because he had sold them to the proprietor of the farmers' market. The gardener's statement is a clear manifestation of an intention not to enter into the proposed contract and is a revocation of the gardener's offer to sell his tomatoes to the cook. The revocation occurred before the cook accepted the gardener's offer. Thus, the cook's power to accept the offer and create the contract was terminated before her acceptance and there is no contract between them with respect to the tomatoes. *See Restatement (Second) of Contracts* § 36(1)(c).

ANALYSIS

Legal Problems:

(1) Can the trustee of a revocable trust, who is required by the terms of the trust instrument to pay all trust income to the settlor, accumulate income upon the settlor's written direction?

(2)(a) Can the holder of a testamentary power of appointment exercisable in favor of the holder's children exercise the power by appointing trust assets to the holder's grandchildren?

(2)(b) Who takes trust assets that have been impermissibly appointed?

(3) Can the surviving spouse of the decedent settlor of a revocable trust claim an elective share of assets in that trust even though the spouse is not a named beneficiary of the trust?

DISCUSSION

Summary

A trustee is obligated to administer a trust in accordance with the trust terms. However, when the settlor of a trust has the power to revoke, she also has the power to amend the terms of the trust. Here, the trust was revocable, Settlor had the power to amend, and the accumulation of trust income at Settlor's written direction was the equivalent of an amendment to the trust. Thus, the trustee properly accumulated trust income.

A power of appointment can only be exercised in favor of a permissible object of the power; any property impermissibly appointed passes to the taker in default of appointment. Here, the trust instrument gave Settlor a special testamentary power of appointment; the only permissible objects of the power were Settlor's son and daughter. Thus, Settlor's appointment of trust assets to her *grandchildren* was impermissible. Settlor's testamentary appointment to the son's children cannot be treated as a valid trust amendment because Settlor's retained power of revocation was exercisable only during her lifetime and, here, the appointment was by her will. Because the testamentary appointment of trust assets to the son's children was impermissible, the share that would have passed to them upon the son's death passes to Charity, the taker in default of appointment.

The power to appoint trust assets includes the power to appoint in further trust. Thus, Settlor's appointment of her son's share of trust assets in trust was proper. Accordingly, Charity cannot reach the son's interest in the trust by claiming that the appointment to the son in trust was impermissible.

Settlor's husband is entitled to a one-third elective share of the probate estate. If he could not reach the trust assets, he would not make the election but would merely claim the $50,000 left to him under the will, as that amount exceeds one-third of the probate estate. If, as is more likely, he could reach the trust assets, the probate and trust estates would have an aggregated value of $600,000 and he would be entitled to a $200,000 elective share. Presumably, in satisfying that share he would take $50,000 from the probate estate, which was left to him by Settlor's will, and the rest from the trust.

Point One (25%)

It was proper for the trustee to accumulate trust income because Settlor retained a power to revoke the trust during her lifetime in a written instrument, and the trustee accumulated income based on written directions from Settlor during her lifetime.

A retained power to revoke a trust includes the power to modify or amend the trust instrument. *See Restatement (Third) of Trusts* § 63 cmt. (g). Courts have taken this position to avoid the triumph of form over substance; the contrary position would require a settlor who wants to amend a trust and lacks clear authority to do so to first revoke, and then to completely restate, the terms of the trust with the intended amendment. Such cumbersome formalities should not be encouraged; thus, the power to revoke includes the power to amend.

The Uniform Trust Code (UTC) follows this approach; under UTC § 602, a trust is both revocable and amendable unless the trust instrument expressly provides otherwise. Under the UTC, the power to revoke or amend is exercisable by will unless, as here, the trust instrument provides otherwise. *See* Unif. Trust Code § 602(c).

Here, the trust instrument required the trustee to distribute all trust income to Settlor during her lifetime; Settlor retained the power to revoke the trust "during Settlor's lifetime"; and the trustee accumulated trust income at Settlor's written direction, drafted during her lifetime. Settlor's written direction effectively amended the terms of the trust as initially created. Thus, no improper accumulation of income occurred.

Point Two(a) (25%)

Settlor could not appoint an interest in the trust to her son's children (Settlor's grandchildren) because they were not permissible objects of her power of appointment.

The donee of a special (nongeneral) power can appoint the property over which the power is exercisable only to "permissible appointees" or "objects" of the power. *Restatement (Third) of Property: Wills and Other Donative Transfers* § 19.14 (2011). *See also Restatement (Second) of Property: Donative Transfers* § 19.3. Permissible appointees are "the persons to whom an appointment is authorized." *Id*. § 17.2(c). Appointments to impermissible appointees are invalid. *Id*. § 19.15. However, objects of a power include only those who receive a "beneficial interest." Thus, when, as here, property is appointed in further trust, the trustee is not an impermissible appointee. *See id*. § 19.15 cmt. e.

Although the trustee is not an impermissible appointee, Settlor's grandchildren (her son's children) are impermissible appointees. Under the trust instrument, Settlor's "children" were the only permissible objects of her testamentary power of appointment. It might be argued that Settlor intended to include more remote descendants, such as grandchildren, when she used the word "children" when creating the power of appointment. However, Settlor's will—executed contemporaneously with the trust instrument—includes a $50,000 bequest to her "descendants *other than my children*," clearly evidencing Settlor's ability to distinguish between children and more remote descendants. The argument that Settlor intended to include more remote descendants in the term "children" is thus highly likely to fail, and Settlor's appointment of trust assets to the children of Settlor's son thus should be ineffective.

The trust instrument allowed for amendments during Settlor's lifetime by a written instrument. However, the appointment in Settlor's will cannot be treated as an amendment made during Settlor's lifetime by a written instrument.

Point Two(b) (20%)

<u>As the named taker in default of appointment, Charity is entitled to the portion of the trust ineffectively appointed to Settlor's grandchildren. It is not entitled to any interest appointed to the son.</u>

"If part of an appointment is ineffective and another part, if standing alone, would be effective, the effective part is given effect, except to the extent that the donee's scheme of disposition is more closely approximated by concluding that some or all of the otherwise effective part should be treated as ineffective." *Restatement (Third) of Property: Wills and Other Donative Transfers* § 19.20 (2011). To the extent that a power is ineffectively appointed, the ineffectively appointed property passes to the so-called "taker in default of appointment" (here, Charity) designated by the donor of the power (here, Settlor). *See id.*

Thus, assuming that the appointment to Settlor's son's children is ineffective, the share they would have received upon the son's death passes to Charity. The appointment in trust to the son is permissible. Thus, Charity has no claim to the trust income interest appointed to the son.

Point Three (30%)

<u>Settlor's husband may be entitled to an elective (i.e., forced) share of Settlor's revocable trust assets under the illusory-transfer doctrine, the fraudulent-transfer doctrine, or a like doctrine. He is also entitled to one-third of the probate assets.</u>

Although many states have statutes under which a surviving spouse's elective (forced) share of the decedent spouse's estate extends to assets placed into a revocable trust by the decedent spouse (*see, e.g.*, Unif. Probate Code §§ 2-201 *et seq.*), here, the jurisdiction's elective-share statute provides that the spousal right of election extends only to *probate* assets. Because the disposition of assets in a revocable trust is determined by the terms of the trust instrument, trust assets are not probate assets. Thus, the statute does not give Settlor's husband any claim to assets in her revocable trust. Assuming that the husband has no claim to the trust assets, he will not claim an elective share because that share ($33,333) would be less than the amount he is entitled to under the will ($50,000).

However, in many states, case law permits a surviving spouse to claim an elective share of assets contained in a revocable trust under either the illusory-transfer doctrine, the fraudulent-transfer doctrine, or a like doctrine.

Under the illusory-transfer doctrine, a surviving spouse can reach assets transferred during the marriage by the deceased spouse into a revocable trust on the theory that the transfer is economically "illusory" because, by the simple expedient of exercising the power of revocation—typically with nothing more than a signature on a piece of paper—the deceased spouse could have recaptured the assets she had placed in the trust. *See, e.g., Newman v. Dore*, 9 N.E.2d 966 (N.Y. 1937).

Under the fraudulent-transfer doctrine, a surviving spouse can reach assets transferred into a revocable trust on the theory that, as to the surviving spouse, the transfer was "fraudulent." The assumption behind this doctrine is that a state statute providing surviving spouses with an elective-share entitlement gives spouses a legitimate expectancy in assets that would have been included in the decedent spouse's probate estate but for their transfer into a revocable trust; such a transfer is treated as defrauding the surviving spouse of his or her expectancy. *See, e.g., In re Estate of Froman*, 803 S.W.2d 176 (Mo. Ct. App. 1991).

Thus, if this jurisdiction recognizes one of these doctrines or another similar doctrine, Settlor's husband will be entitled to receive one-third of the combined probate ($100,000) and trust estate ($500,000) or $200,000 (1/3 of $600,000). However, this $200,000 would be reduced to $150,000 to take account of the fact that he received $50,000 under the will.

Not all jurisdictions recognize such a doctrine, however. In those jurisdictions that do not, the husband would receive nothing beyond the $50,000 he would receive under the will because that amount exceeds the elective share (1/3 of $100,000).

[NOTE: If an examinee concludes that the husband can elect against the trust assets, the examinee may also discuss who would bear the burden of paying the husband's share. No credit should be given for this discussion, as the payment issue is beyond the scope of the question.]

FAM I.E.; III.D.; IV.B.; V.A.; VI.F. / CNF III.C.5.

ANALYSIS

Legal Problems:

(1)(a) Did Andrew and Brenda's conduct in State A establish a valid common law marriage?

(1)(b) Will State B recognize Andrew and Brenda's common law marriage as valid, notwithstanding State B's policy forbidding common law marriages?

(1)(c) Does Andrew's common law marriage to Brenda give him a basis for claiming a share of her lottery winnings?

(2)(a) Can Daniel claim a share of Brenda's lottery winnings on the ground that he and Brenda are married and the winnings are marital property?

(2)(b) If Daniel and Brenda are not married, is there any other basis on which Daniel can claim a share of Brenda's lottery winnings?

(3) Can Daniel, a nonparent, obtain court-ordered visitation with Chloe despite Brenda's objection and her assertion of parental rights?

DISCUSSION

Summary

Andrew and Brenda established a valid common law marriage in State A, which they did not dissolve by divorce. Under generally accepted conflict-of-laws principles, State B will recognize the validity of Andrew and Brenda's marriage in State A, notwithstanding its own policy against common law marriage. Because Brenda remains married to Andrew in most states, her lottery winnings qualify as "marital property" subject to equitable distribution, although a court would be unlikely to award Andrew much, if any, of the prize.

Because Brenda is married to Andrew, her attempted marriage to Daniel is void, and Daniel will not be able to claim a share of the lottery winnings as "marital" property. However, although not a spouse, in many states Daniel could assert a claim to some share of the lottery winnings under the putative-spouse doctrine. In states that do not recognize the putative-spouse doctrine, Daniel might still be able to claim a share of the lottery winnings under a statute allowing a party to a void marriage to obtain a share of "marital" assets or under a cohabitation-contract theory.

Because Daniel has acted as a parent to Chloe, it is probable, but not certain, that he will obtain visitation with Chloe, notwithstanding Brenda's assertion of parental rights.

Point One(a) (15%)

<u>Andrew and Brenda formed a valid common law marriage in State A and remain married.</u>

Formation of a valid common law marriage requires that the partners (1) cohabited, (2) agreed to be married, and (3) held themselves out to others as a married couple. *See In re Estate of Duval*, 777 N.W.2d 380, 384 (S.D. 2010); *Smith v. Deneve*, 285 S.W.3d 904, 909–10 (Tex. Ct. App. 2009). Andrew and Brenda satisfied all of these requirements. While living together, they agreed to marry and appeared to regard themselves as married; they consistently held themselves out as married to friends, to Andrew's employer, and to governmental authorities. In a state recognizing common law marriage, this conduct would establish a valid marriage.

When Andrew and Brenda separated, they did not divorce and thus continued to be married to each other. A common law marriage, just like a ceremonial marriage, must be dissolved through a divorce. *See* Homer H. Clark, *The Law of Domestic Relations* § 2.1 (2d ed. 1987); Henry D. Krause and David D. Meyer, *Family Law in a Nutshell* 54–55 (5th ed. 2007).

Point One(b) (10%)

<u>State B will recognize a common law marriage entered into in another state.</u>

Under generally accepted conflict-of-laws principles, a marriage valid under the law of the state where it was contracted is valid elsewhere unless it violates the strong public policy of another state which has the most significant relationship to the spouses and the marriage. *See Restatement (Second) of Conflict of Laws* § 283(2) cmt. f; *Godfrey v. Spano*, 920 N.E.2d 328, 337–38 (N.Y. 2009) (Ciparick, J., concurring); *Duval*, 777 N.W.2d at 382. Perhaps because the vast majority of states once permitted common law marriage, courts in states that do not recognize common law marriage have consistently held that it does not violate any strong public policy to recognize an out-of-state common law marriage. *See Restatement, Conflict of Laws* § 123 (1934) ("A marriage without any formal ceremony is valid everywhere if the acts alleged to have created it took place in a state in which such a marriage is valid."); *accord Restatement (Second) of Conflict of Laws* § 283 cmts. (g) & (h). Thus, a State B court will recognize Brenda's common law marriage to Andrew.

Point One(c) (15%)

<u>In most states, Andrew could recover a share of the lottery proceeds in a divorce action against Brenda, but a court is unlikely to award him a significant share of Brenda's winnings.</u>

Property acquired by either spouse during an ongoing marriage, other than by gift or inheritance, is marital property subject to division on divorce. *See Smith v. Smith*, 687 S.E.2d 720, 729 (S.C. Ct. App. 2009). Although some states provide that marital property ceases to accrue after the parties' separation, most hold that marital property continues to accrue until the marriage is dissolved. *See, e.g., Larsen-Ball v. Ball*, 301 S.W.3d 228 (Tenn. 2010). Accordingly, because Brenda remains married to Andrew, her lottery winnings are likely to be considered marital property. Thus, Andrew could seek to obtain a share of the lottery winnings in a divorce action.

Some states divide marital property equally, but most grant judges authority to divide the property equitably. Although Andrew, in a divorce action, will likely be able to seek an equitable distribution of Brenda's lottery winnings as part of the marital property, it is unlikely that a judge would award him a significant (or perhaps *any*) share of the lottery money given the relatively short duration of their cohabitation, the absence of any contributions by Andrew to the marital estate, and the parties' long and near-total estrangement. *See In re Marriage of Palacios*, 656 N.E.2d 107 (Ill. App. Ct. 1995).

Point Two(a) (15%)

Because Brenda was already married when she purported to marry Daniel, her marriage to Daniel is void. Because he is not her legal spouse, he is not entitled to a share of her lottery winnings as marital property.

Bigamy is illegal in all states; no individual may have more than one legal spouse at a time. Because of the ban on bigamy, when a first marriage has not been legally terminated, a second marriage has no legal effect. *See* Clark, *supra,* § 2.7. Because Brenda and Andrew did not divorce, application of this rule suggests that Brenda and Daniel are not married, and Daniel would have no claim to a share of marital property because they have no "marital" property.

One potential impediment to that conclusion is the presumption that the latest in a series of marriages is valid. The presumption is "one of the strongest known to the law" and can be rebutted only by "strong . . . evidence that the prior marriage still subsists or by cogent and conclusive evidence." *Id*. The presumption is designed to protect the parties' expectations; thus, some cases hold that the presumption's strength increases with the lapse of time and the birth of children in the later marriage.

Once Daniel establishes his marriage ceremony with Brenda, to overcome the presumption of validity, Brenda must show that she previously entered into a valid common law marriage with Andrew and that this marriage was not terminated by divorce or annulment. Most courts have held that the presumption may be rebutted with a showing that court records in all jurisdictions where the first spouse has lived do not evidence a divorce. *See id*., n. 38 (listing cases). *See also Lott v. Toomey*, 477 So. 2d 316 (Ala. 1985); *Pigford Bros. Const. Co. v. Evans*, 83 So. 2d 622 (Miss. 1955). Thus, if Brenda can show that she had a common law marriage with Andrew, and if there is no evidence that a State A court terminated that marriage, the State B court should find that she is still Andrew's wife. Because the facts specify that Andrew and Brenda were not divorced, it seems likely that Brenda can meet her burden of proof, in which case Daniel will not obtain an equitable distribution of the lottery proceeds or other property through a divorce.

Point Two(b) (25%)

In some jurisdictions, Daniel may be entitled to a share of the lottery proceeds under the putative-spouse doctrine, or under a statute permitting a party to a void marriage to obtain a share of "marital" assets, or under a cohabitation-contract theory.

The putative-spouse doctrine permits a would-be spouse, who participated in a marriage ceremony with a good-faith but mistaken belief in its validity, to be treated like a spouse for purposes of equitable distribution of the property acquired by the couple during their invalid marriage. *See In re Marriage of Tejeda*, 102 Cal. Rptr. 3d 361 (Ct. App. 2009); *Williams v. Williams*, 97 P.3d 1124 (Nev. 2004). In this case, it appears that Daniel believed in good faith that he was married to Brenda and was wholly unaware of the defect in their marriage. (Indeed, even Brenda appears to have been unaware of the defect, as she appears to have accepted Andrew's mistaken assurance that they needed no formal divorce to dissolve their common law marriage.) Accordingly, Daniel would qualify as a putative spouse and could seek an equitable distribution of any property that would have been classified as marital property had the parties been validly married, including Brenda's lottery winnings. *See id.* Given the duration of their relationship, Daniel's equitable claim is likely to be substantial.

In states that do not recognize the putative-spouse doctrine, Daniel might still be able to recover some share of the lottery winnings. Some states that have not recognized the putative-spouse doctrine nonetheless permit distribution of "marital" assets in a proceeding to declare a marriage void. *See, e.g.,* N.Y. Dom. Rel. Law § 236B(5)(a). "The trend of modern statutes . . . is increasingly to blur the line not only between void and voidable marriages but even between them and valid marriages in an attempt to equalize the consequences of termination of marital relationships on whatever ground." Krause, *supra*, at 60. In such a state, Daniel could obtain a share of "marital" assets even though his marriage to Brenda is void.

It is also conceivable that Daniel could claim a share of the lottery proceeds under the law governing unmarried cohabitants. In states following the California Supreme Court's ruling in *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), property or support rights between cohabitants can be founded upon an express or implied contract to share assets. *See* Annot., *Property Rights Arising from Relationship of Couple Cohabiting Without Marriage,* 69 A.L.R. 5th 219 (1999 & Supp.) (surveying state laws). Although the *Marvin* theory is almost invariably applied to cohabiting couples who have not entered into a ceremonial marriage, Brenda and Daniel's attempted marriage does imply an agreement to share their property as would a married couple. However, some states refuse, on public policy grounds, to enforce cohabitation agreements. *See, e.g., Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979); *Malone v. Odom*, 657 So. 2d 1112 (Miss. 1995).

Point Three (20%)

<u>It is probable that Daniel will succeed in obtaining court-ordered visitation with Chloe, notwithstanding Brenda's objection.</u>

Although Chloe regards Daniel as a father, he is not her legal parent. The Supreme Court of the United States has recognized that parents have a fundamental constitutional right to control the upbringing of their children, including decisions about with whom their children will visit. *See Troxel v. Granville*, 530 U.S. 57, 66 (2000). A fit parent is presumed to act in the best interests of her children, and courts are constitutionally required to give "special weight" to a parent's reasons for objecting to visitation with a third party before overriding the parent's objection and granting visitation. *See id.* at 68–69.

Accordingly, a court would be required to carefully consider Brenda's reasons for objecting to Daniel's further contact with Chloe, but would be permitted to grant visitation if the balance of considerations strongly favored ongoing contact. Here, Daniel has lived with Chloe for 9 of her 11 years, and he has played an active parental role. Chloe calls Daniel "Dad" and regards him as her father. Daniel could thus be considered a "de facto parent."

There are facts to support a finding that Chloe would be harmed by termination of contact with Daniel. Chloe became "very upset" when she learned that Brenda planned to cut off contact. Moreover, Brenda plans to cut off *all* contact with Daniel. In *Troxel*, in explaining why deference to the parent's objection was appropriate, the plurality emphasized that the mother sought only to limit the access of the paternal grandparents and did not seek to cut them off entirely. Brenda's plan to cut off all contact with the man Chloe regards as her father thus will probably weigh against her. *See Peters v. Costello*, 891 A.2d 705 (Pa. 2005) (holding that grandparents who served as caregivers of child, *in loco parentis*, had standing to seek visitation notwithstanding mother's objection under state's Grandparents Visitation Act). Chloe also does not have an active relationship with her biological father and regards Daniel as her dad. In some states, this could tip the balance in Daniel's favor. *See* Utah Code Annotated 30-5a-103(2)(g); *In re C.M.F.*, 314 P.3d 1109 (Wash. 2013).

State law on nonparent visitation rights varies substantially, however. Thus, it is probable, but not certain, that Daniel will obtain visitation with Chloe.

ANALYSIS

Legal Problems:

(1) Does the shareholder have a "proper purpose" in seeking to inspect MEGA's board minutes and accounting records to determine whether to bring (and maintain) a suit concerning the alleged foreign bribes?

(2) May the board obtain dismissal of the shareholder's derivative claim if the board concludes that it is not in the corporation's best interest to continue the lawsuit, even though the board has not investigated the allegations of illegal foreign bribes?

(3) Is the decision of the MEGA directors not to investigate or take action on the shareholder's allegations of illegal corporate behavior a breach of the directors' duty to act in good faith, and is that decision protected by the business judgment rule?

DISCUSSION

Summary

The shareholder had a "proper purpose" when she sought to inspect board minutes and accounting records relevant to alleged foreign bribes to determine whether to bring a lawsuit concerning possible illegal corporate conduct. Therefore, the shareholder is entitled to inspect the requested minutes and accounting records.

Because the MEGA board did not conduct a reasonable inquiry before concluding that it was not in the corporation's best interest to investigate and remediate alleged illegal activities, the court is not required to dismiss the shareholder's suit, and her claim can proceed.

The MEGA directors have a fiduciary duty to act in "good faith," which encompasses an obligation not to condone illegal corporate conduct and to investigate credible evidence of such illegality. The business judgment rule does not protect decisions of directors to condone or disregard illegal corporate conduct, even if such conduct may be profitable for the corporation.

Point One (30%)

The shareholder has a right to inspect board minutes and accounting records if she has a "proper purpose." Gathering information to decide whether to bring a lawsuit alleging a breach of fiduciary duties arising from illegal corporate behavior is a proper purpose.

A shareholder, whether of record or who beneficially owns her shares, has a right to inspect minutes of board meetings and "accounting records" for a proper purpose. Model Business Corp. Act (MBCA) § 16.02(b), (c), (f). *See also* Del. Gen. Corp. L. § 220(b) (inspection right encompasses "corporate books and records"). A proper purpose is a purpose reasonably related to a person's interest as a shareholder, "such as a desire . . . to determine whether improper transactions have occurred." Official Comment, MBCA § 16.02(d) (2011). *See also* Del. Gen. Corp. L. § 220(b).

Here, the shareholder has an interest in determining whether the directors permitted the corporation to engage in illegal conduct that could result in the corporation paying civil and criminal penalties. An inspection request must be granted whenever the shareholder articulates a purpose to address "economic risks" to the corporation. *See Conservative Caucus v. Chevron Corp.*, 525 A.2d 569 (Del. Ch. 1987) (permitting inspection of shareholders' list by shareholder seeking to propose that corporation stop doing business in communist Angola, based on alleged economic risks to corporation).

A shareholder seeking inspection of corporate documents must offer credible evidence that there was mismanagement or other improper conduct. *See Security First Corp. v. U.S. Die Casting and Dev. Co*., 687 A.2d 563 (Del. 1997) (shareholder has burden to show credible evidence of possible mismanagement to obtain inspection of books and records).

Here, the news story in a leading financial newspaper, coupled with the board's failure to investigate or to deny the truth of the allegations in the news story, appears to constitute a credible basis for concluding that MEGA may have engaged in illegal conduct. Moreover, although MEGA's response to the shareholder indicated that the news story about the illegal foreign bribes was "unsubstantiated," there is no indication in the facts, nor did MEGA make the assertion, that the news story was untrue.

Under the MBCA, the shareholder's right to inspect corporate documents relevant to the alleged bribery is subject to certain limitations. The MBCA allows a shareholder to inspect "only relevant excerpts of [board] minutes . . . directly connected with the shareholder's purpose." Official Comment to MBCA § 16.02(c) (2011). The MBCA also allows inspection of "accounting records," although this category is not as broad as the "books and records" category found in other corporate statutes. According to the Official Comment, accounting records are "records that permit financial statements to be prepared which fairly present the financial position and transactions of the corporation." Official Comment to MBCA § 16.01(b). Many documents related to the payment of foreign bribes could be seen to be "accounting records," to the extent that they relate to how such transactions would be presented in the corporation's financial statements. Under the MBCA, the corporation could refuse to allow inspection of non-financial documents related to the alleged foreign bribery.

In sum, the shareholder has a right to inspect MEGA's board minutes and accounting records related to the alleged bribery of Country X officials because her purpose is connected to bringing a lawsuit to protect her economic interest in MEGA.

[NOTE: Under the MBCA, a "proper purpose" need not be shown for the inspection of minutes of shareholders' meetings. *See* MBCA §§ 16.01(e), 16.02(a). But here the shareholder asked for board minutes, for which a "proper purpose" must be shown. *See* MBCA § 16.02(d)(1).

Under the MBCA, the shareholder's inspection rights were not terminated when she filed her derivative claim against the MEGA directors. The MBCA instead specifies that shareholders who have been denied inspection may apply for a court order permitting inspection, which the court is to decide "on an expedited basis." MBCA § 16.04(b). Courts have encouraged shareholders to first seek inspection of corporate documents before bringing suits alleging improper corporate transactions and breaches of fiduciary duty. *See Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). But the right to inspection has been recognized even while a lawsuit is proceeding. *See King v. VeriFone Holdings, Inc*., 12 A.3d 1140, 1145–46 (Del. 2011).]

Point Two (30%)

<u>The board may not obtain dismissal of the shareholder's derivative claim, even if the board concludes that it is not in the corporation's best interest to continue the lawsuit, because the board's conclusion was not based on a reasonable investigation into the shareholder's allegations.</u>

Under the MBCA, the board can seek dismissal of the shareholder's derivative action if a majority of the board's "qualified directors"—those directors who do not have a material interest in the derivative action, *see* MBCA § 1.43(a)(1)—determine in good faith, after conducting a reasonable inquiry upon which its conclusions are based, that continuance would be contrary to the corporation's best interests. MBCA § 7.44(a) & (b). Although the Official Comment to MBCA § 7.44 suggests that a full-blown board investigation is not necessary, the board's request for dismissal must have "some support in the findings of the inquiry." Failure to investigate credible allegations of corporate illegality constitutes lack of "good faith." *Stone v. Ritter*, 911 A.2d 362, 364–65 (Del. 2006) (stating that directors breach duty of good faith if they "knew or should have known" of violations of law and failed to act).

Here, given the apparent lack of any inquiry or corrective action by the board, as evidenced by the letter of June 1 to the shareholder, the court should not grant the motion to dismiss the derivative action or accept the board's conclusion that proceeding with the lawsuit would be contrary to the corporation's best interests.

[NOTE: Directors breach their fiduciary duties by failing to act upon "red flags" of corporate illegality. *See Graham v. Allis-Chalmers Mfg. Co*., 188 A.2d 125, 130 (Del. 1963) (directors breach their duties by ignoring "obvious danger signs" of illegal corporate conduct). Here, the MEGA board's failure to investigate the shareholder's allegations based on a report in a leading financial newspaper, which the board did not deny, suggests bad faith on the part of the directors, thus excusing demand. *See In re Abbott Laboratories Derivative Shareholders Litig*., 325 F.3d 795, 806 (7th Cir. 2003) (excusing demand when shareholders alleged that directors had known of illegal activity and allowed it to continue).]

[NOTE: The question does not call for a discussion of the MBCA's demand requirement. MBCA § 7.42 (90-day waiting period before bringing derivative claim). Thus, discussion of the demand requirement is irrelevant. *Cf. Aronson v. Lewis*, 473 A.2d 805 (Del. 1984) (requiring demand, unless excused as futile); *see also Marx v. Akers*, 666 N.E.2d 1034 (N.Y. 1996) (adopting

Aronson approach and excusing demand when current board is "interested" in challenged transaction, board decision was not appropriately informed, or challenged transaction was so egregious that it could not be product of sound business judgment).]

Point Three (40%)

<u>The MEGA directors' disregard of the legality of the corporation's conduct is a failure to act in good faith and is not protected by the business judgment rule, even if the directors believed the conduct to be in the corporation's best interests.</u>

A director is liable to the corporation for the director's decisions or failures to take action that were "not in good faith." MBCA § 8.31(a)(2)(i). The Official Comment to this section states:

> Conduct involving knowingly illegal conduct that exposes the corporation to harm will constitute action not in good faith, and belief that decisions made (in connection with such conduct) were in the best interests of the corporation will be subject to challenge as well.

Courts applying the duty of good faith have made clear that corporate directors cannot consciously violate—or permit the corporation to violate—legal norms, even when such violations may be profitable to the corporation. The Official Comment to MBCA § 8.31 states that "a lack of good faith is presented . . . where a transaction . . . is known to constitute a violation of applicable positive law." *See Gagliardi v. TriFoods Int'l Inc.*, 683 A.2d 1049, 1051 (Del. Ch. 1996); Hillary A. Sale, "Monitoring Caremark's Good Faith," 32 *Del. J. Corp. L.* 719 (2007) (collecting and summarizing cases where directors were alleged to have failed to monitor illegal corporate conduct).

In addition, the duty to act in good faith requires corporate directors to establish procedures to ensure the corporation's compliance with legal norms. *See Stone v. Ritter*, *supra,* at 369–70. Thus, courts have required corporate directors to establish "[corporate] information and reporting systems" that provide "timely, accurate information . . . concerning both the corporation's compliance with law and its business performance." *In re Caremark Int'l, Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996); *see also* Official Comment to MBCA § 8.30 (citing *Caremark* for proposition that board of directors must ensure that the corporation "has information and reporting systems in place to provide directors with appropriate information . . . to permit them to discharge their responsibilities").

The "good faith" standard requires that directors, among other things, not approve (or condone) wrongful or illegal activity. *See In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 289 (Del. Ch. 2003) (holding that attitude of "we don't care about risks" breaches duty of good faith). In particular, directors violate their fiduciary duties by approving bribery of foreign government officials, even when the practice is widespread. *See Gall v. Exxon Corp.*, 418 F. Supp. 508 (S.D.N.Y. 1976).

Even when disregard of legal norms might result in a net financial benefit to the corporation, directors are required to comply with the law. *See In re Caremark Int'l, Inc., supra* (requiring internal controls even with no net financial benefit to corporation); *see also Guttman v. Huang*, 823 A.2d 492, 506 (Del. Ch. 2003) (fiduciary cannot manage entity in illegal fashion, even if fiduciary believes illegal activity will result in profits for the entity). Here, the failure of MEGA's directors to investigate or take corrective action regarding alleged illegal foreign bribes exposes the corporation to significant penalties and constitutes action not in good faith.

The business judgment rule does not protect decisions by directors not acting in good faith. As the Official Comment to MBCA § 8.31 summarizing the business judgment rule states:

> In basic principle, a board of directors enjoys a presumption of sound business judgment . . . that, in making a business decision, directors act in good faith, on an informed basis, and in the honest belief that the action taken is in the best interests of the corporation. *See Aronson v. Lewis,* 473 A.2d 805, 812 (Del. 1983).

Specifically, the business judgment rule, while normally protecting the honest business judgment of directors, does not apply upon a showing of "illegality." *See Shlensky v. Wrigley*, 237 N.E.2d 776, 778 (Ill. App. Ct. 1968) (business judgment rule applies "unless there is a showing of fraud, illegality, or conflict of interest").

Directors breach their fiduciary duties—and the business judgment rule provides no protection—when they approve illegal business operations (or refuse to investigate alleged illegal business activities), even though the illegal business may be profitable to the corporation. *See Roth v. Robertson*, 118 N.Y.S. 351 (Sup. Ct. 1909) (bribery of state officials to protect an amusement park's illegal Sunday operations); *Miller v. AT&T*, 507 F.2d 759, 761 (3d Cir. 1974) (corporation's failure to collect loan to political party, in violation of campaign finance laws).

Thus, the MEGA directors would not be protected by the business judgment rule.

ANALYSIS

Legal Problems:

(1) When an agent enters into a contract with a third party on behalf of a disclosed principal on terms that were not authorized by the principal, who is liable to the third party: the agent, the principal, or both?

(2) When an agent enters into a contract with a third party on behalf of an undisclosed principal on terms authorized by the principal, who is liable to the third party if the principal later repudiates the contract: the agent, the principal, or both?

(3) When an agent enters into a contract with a third party on behalf of a partially disclosed principal for goods different from those authorized by the principal, who is liable to the third party if the principal accepts the different goods: the agent, the principal, or both?

DISCUSSION

Summary

As a general matter, an agent binds a principal to a contract, whether or not the principal is disclosed to the third party, if the agent had either actual or apparent authority to enter into the contract. Without that authority, the agent alone is liable on the contract unless the principal becomes liable by subsequently ratifying the contract. An agent acting with authority is not liable on the contract if the principal's identity is disclosed to the third party, but is liable if the principal's identity is not disclosed or only partially disclosed, unless the contract provides otherwise.

Applying these principles here, because the woman disclosed that she was acting for the inventor on the chip contract, but purchased different chips from those specified by the inventor, the inventor is not liable because the woman did not have authority to enter into the contract; the woman is also liable on the chip contract because she impliedly warranted that she had authority.

Both the woman and the inventor are liable on the blue-lens contract. Although the woman did not disclose that she was acting for the inventor on the blue-lens contract, the inventor is liable on this contract because he had given the woman actual authority to buy the blue lenses on his behalf; the woman is also liable because she signed the contract in her own name.

Finally, both the inventor and the woman are liable on the shutoff-switch contract that the woman entered into on behalf of the partially disclosed inventor, even though the switches were different from those authorized. The inventor became liable by ratifying the contract when he accepted the different switches, and the woman became liable by signing a contract on behalf of a partially disclosed principal.

[NOTE: While the contracts in this question are for the sale of goods and, thus, governed by Article 2 of the Uniform Commercial Code, the UCC does not contain agency rules resolving the issues in this question. Thus, common law principles govern. UCC § 1-103(b).]

Point One (30%)

<u>With respect to the chips, the woman (agent) is liable on the contract, but the inventor (principal) is not because the woman, notwithstanding her disclosure that she was acting as his agent, lacked actual or apparent authority to enter into the contract on behalf of the inventor with the chip manufacturer.</u>

A principal is not liable on a contract entered into by an agent unless the agent had actual or apparent authority. *See generally Restatement (Second) of Agency* § 140; *accord*, *Restatement (Third) of Agency* § 6.01. In the absence of actual or apparent authority, it is irrelevant whether the agent disclosed to the third party that the agent was acting on behalf of a disclosed principal. *See generally Restatement (Second) of Agency* § 144; *accord*, *Restatement (Third) of Agency* § 6.01.

Actual authority exists when the principal by written or spoken words or other conduct "causes the agent to believe that the principal desires . . . [the agent] to act on the principal's account." *Restatement (Second) of Agency* § 26. While rephrased, the Third Restatement is similar and provides that "[an] agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." *Restatement (Third) of Agency* § 2.01.

Apparent authority is created with respect to a third person when "by written or spoken words or any other conduct" the principal causes the third person "to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." *Restatement (Second) of Agency* § 27. The Third Restatement is similar: "[a]pparent authority . . . is created by a person's manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third person reasonably believes the actor to be authorized and the belief is traceable to the manifestation." *Restatement (Third) of Agency* § 3.03.

Here, the inventor is not liable on the Series B chips contract because the woman had neither actual nor apparent authority to purchase these chips on the inventor's behalf. First, there is no basis to conclude that the woman had actual authority to buy Series B chips. The inventor instructed the woman to buy only Series A chips; thus, the woman only had actual authority to purchase the Series A chips and no others. She exceeded her actual authority when she purchased the Series B chips.

Next, there was no apparent authority here. There are no facts to suggest that the inventor (as opposed to the woman) manifested to the chip manufacturer that the woman had authority to acquire Series B chips. Without such evidence, there is no apparent authority.

While the inventor (principal) is not liable to the chip manufacturer on the chip contract, the woman (agent) would be liable to the chip manufacturer for damages because she breached the implied warranty to the manufacturer that she had authority to act on behalf of the inventor. A person who "purports to make a contract . . . with a third party on behalf of another person, lacking power to bind that person, gives an implied warranty of authority to the third party and is subject to liability to the third party for damages for loss caused by the breach of that warranty, including loss of the benefit expected from performance by the principal." *Restatement (Third) of Agency* § 6.10; *accord*, *Restatement (Second) of Agency* §§ 329–330. Because she breached this warranty, she is liable to the manufacturer.

Point Two (30%)

<u>Both the inventor and the woman are liable to the blue-lens manufacturer on the contract for blue lenses. The inventor is liable because the woman acted with actual authority; the woman is liable as a party to the contract because the principal was undisclosed.</u>

"An undisclosed principal is bound by contracts . . . made on his account by an agent acting within his authority." *Restatement (Second) of Agency* § 186; *accord*, *Restatement (Third) of Agency* § 6.03.

An agent who purports to act on his own account, but in fact is making a contract on behalf of an undisclosed principal, is also a party to the contract. *Restatement (Second) of Agency* § 322; *accord*, *Restatement (Third) of Agency* § 6.03. The rationale for this rule is that the third party has every reason in the case of an undisclosed principal and agency to assume that the person with whom it contracts expects to be liable on the contract. Additionally, to the extent the third party was relying on the financial solvency of the person on the other side of the contract, the third party would have no basis to rely on anyone but the agent who signed the contract.

Here, the woman had actual authority from the inventor to purchase blue lenses at a price not to exceed $300 per unit. By contracting to purchase blue lenses for $295 per unit, the woman acted with actual authority in entering into the blue-lens contract. Thus, the inventor became bound to the contract, even though the third party had no reason to know that the woman was acting on behalf of the inventor. The inventor had no right to refuse to accept the shipment and refuse to pay for the blue lenses.

The woman is also liable on the contract because she purported to act on her own behalf. The blue-lens manufacturer relied on the woman being bound by the contract.

[NOTE: Because the inventor (not the woman) was the person who expected to reap the benefit of the contract with the blue-lens manufacturer, as between them the inventor has the primary responsibility to carry out the terms of the contract, and the agent acts as a surety for that obligation. Thus, if the manufacturer were to sue the woman and recover, the woman could seek to be recompensed by the inventor. If the manufacturer were to sue the inventor and then sue the woman, the woman would be entitled to raise all defenses available to a surety. *Restatement (Second) of Agency* § 335.

In addition, in some jurisdictions the third party may be required, prior to judgment, to elect whether to take judgment against the undisclosed principal or the agent. *See Restatement (Second) of Agency* § 210A. In such an election jurisdiction, either the inventor (undisclosed principal) or the woman (agent) could escape liability by making a demand on the third-party manufacturer to elect to take judgment against the other. This "election rule" has been heavily criticized and has been abandoned in some jurisdictions in favor of a "satisfaction rule" that allows the third party to take judgment against both the undisclosed principal and the agent, but entitles the third party to only one satisfaction of the judgment. *See Restatement (Third) of Agency* § 6.09. Thus, in a satisfaction jurisdiction, if both the inventor and the woman are sued, neither of them can escape judgment by demanding that the third-party manufacturer make an election.]

Point Three (40%)

<u>Both the inventor and the woman are liable on the contract for the shutoff switches. The inventor is liable by ratifying the contract; the woman is liable because she acted on behalf of a partially disclosed principal, and there is no indication that the third party agreed to look solely to the partially disclosed principal for payment.</u>

When a third party contracts with a person that the third party knows is acting in an agency capacity for another but the third party is unaware of the identity of the principal, the principal for whom the agent acts is called a "partially disclosed principal." *Restatement (Second) of Agency* § 4(2). Here, the shutoff-switch manufacturer knew that the woman was acting as someone's agent but there is nothing to indicate that the manufacturer was aware of the principal's identity. Thus, the inventor is a "partially disclosed principal." A partially disclosed principal can be liable on a contract entered into by an agent who had actual or apparent authority. *Restatement (Second) of Agency* § 144; *accord*, *Restatement (Third) of Agency* § 6.02(1). Here, the woman acted without actual or apparent authority, so this cannot be the basis to hold the inventor liable on the contract. *See* Point One.

On the other hand, even though the woman acted without actual or apparent authority, the inventor accepted the shutoff switches and used them in the production of the mowers. This amounts to a ratification of the contract between the woman and the switch manufacturer. Where the principal ratifies the act of an agent, the principal is liable on the contract just as if the agent had acted with actual authority. *Restatement (Third) of Agency* § 4.01(1). Ratification occurs if the principal's conduct "justifies a reasonable assumption that" the principal consents to the act performed on the principal's behalf. *Id.* § 4.01(2)(b); *accord*, *Restatement (Second) of Agency* §§ 82–83. Here, the inventor's use of the switches justifies a reasonable assumption of consent.

As for the woman, she is also liable on the contract. Unless the agent and the third party agree otherwise, an agent acting on behalf of a partially disclosed principal is a party to the contract if the agent acted with actual or apparent authority. *Restatement (Second) of Agency* § 321; *Restatement (Third) of Agency* § 6.02(2). Here, because of the inventor's ratification of the contract, the woman is deemed to have acted with actual authority, and there is no indication that the manufacturer agreed to look solely to the partially disclosed principal for payment.

[NOTE: In addition, there is no requirement that the manufacturer "elect" either a remedy against the agent or a remedy against the principal where, as here, there is a partially disclosed principal. *See Restatement (Second) of Agency* § 336; *Restatement (Third) of Agency* § 6.09. Thus, neither the inventor nor the woman can escape liability by making a demand on the manufacturer to make an election to take judgment against the other.]

ANALYSIS

Legal Problems:

(1) Can the landlord argue that he (a) lawfully withheld his consent to the assignment of the lease, (b) did not accept the tenant's surrender of the apartment, and (c) had no duty to mitigate, but even if he did have a duty to mitigate, he had fulfilled that duty?

(2) Can the tenant argue (a) that the landlord unreasonably refused to consent to the assignment of the lease, (b) that the landlord accepted her surrender of the apartment and therefore is not entitled to unpaid rent, and (c) that even if the surrender was not accepted, the landlord had a duty to mitigate and failed to do so?

DISCUSSION

Summary

The landlord will argue that the lease provision restricting assignment without his consent was valid and that he could lawfully refuse to accept the tenant's proposed assignee for any reason or no reason at all. The landlord will also argue that, even if this jurisdiction requires that his refusal to consent had to be reasonable, it was reasonable in light of his prior experiences with lawyers as tenants. He will also argue that he did not accept the tenant's surrender of the apartment and that he had no duty to mitigate. The landlord will argue that even if he *did* have a duty to mitigate, he fulfilled that duty by trying (albeit unsuccessfully) to re-let the apartment. The landlord will claim that there was no market for the tenant's apartment and that he is thus entitled to 17 months of unpaid rent.

The tenant should concede that, because the restraint on assignment was valid, her purported assignment of the lease required the landlord's written consent. However, the tenant will argue that the landlord had to be reasonable if he was going to withhold his consent to an assignment, and that he was unreasonable in refusing to rent to lawyers. The tenant will argue that the landlord accepted her surrender and therefore is not entitled to sue for any unpaid rent. Alternatively, she will argue that even if the landlord did *not* accept the surrender, he had a duty to mitigate and he failed to do so, and thus is not entitled to any unpaid rent.

On the whole, the landlord here has the better arguments and should be entitled to recover 17 months of unpaid rent from the tenant.

[NOTE: The call of this question requires examinees to construct arguments relating to the following issues: (1) Did the landlord properly withhold consent to an assignment? (2) Did the landlord accept the tenant's surrender of the apartment? (3) Did the landlord have a duty to mitigate? and (4) If the landlord had a duty to mitigate, did he fulfill that duty? The question tests examinees' ability to identify the issues regarding consent to the assignment, surrender, and mitigation, and to marshal facts in support of each party's arguments.]

Point One(a) (20%)

The landlord will argue that the lease provision prohibiting assignment without his written consent was valid and that he could withhold consent for any reason or for no reason at all. The landlord will also argue that, even if this jurisdiction's law requires that his refusal to accept the assignment be reasonable, his decision to withhold consent here was reasonable, given his past experiences with lawyers as tenants.

Here, the tenant attempted to assign her lease—that is, to transfer the balance of the lease term—to a lawyer. A restriction on assignment is a valid restraint on alienation. William B. Stoebuck & Dale A. Whitman, *The Law of Property* 379 (3d ed. 2000). Because a restraint on transfer by assignment is valid, the lease provision here prohibiting an assignment without the landlord's consent was valid.

The landlord will argue that he was free to withhold his consent for any reason or for no reason at all. The clause in the tenant's lease is commonly described as a "silent" consent clause because it does not include an express standard or condition for the giving or withholding of consent. John G. Sprankling, *Understanding Property Law* 286 (3d ed. 2012). Under the traditional rule—still the majority rule today—a silent consent clause gives the landlord the right to withhold consent for any reason or for no reason—even if the withholding of consent is arbitrary and unreasonable. *Id*. at 287. (That rule, however, is subject to statutory housing discrimination laws that are not at issue here.)

Alternatively, the landlord will argue that, even if this jurisdiction is one of the minority group in which refusal to consent to an assignment must be reasonable, his refusal was reasonable in light of his personal experiences renting to lawyers; his refusal represented a legitimate business judgment.

[NOTE: Some examinees may conclude that the lease did not prohibit a sublet. But the tenant informed the landlord that the lawyer "was willing to take over the *balance of the [tenant's] lease term"* (emphasis added). This statement evidences that the tenant was purporting to assign the lease and not sublet. This transfer should be construed as an assignment, the making of which was restricted under the lease. Therefore, the tenant would not have the right to transfer the lease to the lawyer without the landlord's consent.]

Point One(b) (15%)

The landlord will argue that the tenant's actions (removing her possessions and leaving the keys in the landlord's mail slot with a note) constituted an abandonment of the apartment without cause. Further, the landlord will argue that he did not accept a surrender of the apartment.

Abandonment occurs when a tenant vacates the leased premises before the end of the term, has no intent to return, and defaults in the payment of rent. Sprankling, *supra*, at 293. Under traditional common law principles, a landlord has three options when a tenant abandons the premises: (1) accept a surrender of the premises, thereby extinguishing the tenant's duty to pay rent due after the acceptance of surrender; (2) re-let or attempt to re-let the premises on the tenant's behalf, and recover from the tenant damages based on the difference between what the tenant owed for rent and what the landlord collected from re-letting; or (3) leave the premises vacant and sue the tenant for unpaid rent as it accrues. *Id*. at 294; Stoebuck & Whitman, *supra*, at 403.

Here, on July 25, 2015, the tenant vacated the apartment and left the keys in an envelope in the landlord's mail slot with a note stating that she was moving abroad, would not return before the end of the lease, and would not pay any rent from August 1 onward. The landlord emailed the tenant the next day and acknowledged that he had found the keys and the note. "Although this is a problem you created," he wrote, "I want to be a nice guy and help you out. I feel pretty confident that I can find a suitable tenant who is not a lawyer to rent your apartment."

The landlord will argue that he did not voluntarily accept the keys; they were merely placed in his mail slot and the statement in his email was merely an offer to attempt to re-let the premises on the tenant's behalf. His email emphasized, "this is a problem you created," which implied that it was the tenant's problem to resolve. This interpretation is bolstered by the landlord's statement of his willingness to "help [the tenant] out." Nowhere in the email did the landlord state that he was releasing the tenant from her obligations under the lease.

Furthermore, the facts state that local residential rents had declined precipitously since early July, and it is unlikely that the landlord would voluntarily suffer any financial loss resulting from a re-let at a reduced rent.

Point One(c) (15%)

<u>The landlord will argue alternatively that he had no duty to mitigate or, if he did, that he discharged it. Either way, he will claim that he can recover the 17 months of unpaid rent.</u>

In a jurisdiction following the common-law no-mitigation rule, the landlord will argue that he had no duty to mitigate and that, because he did not accept the tenant's surrender (*see* Point One(b)), he is entitled to the 17 months of unpaid rent. In a jurisdiction that has enacted a statute requiring the landlord to mitigate, he will argue that that duty was satisfied. *See* Unif. Residential Landlord Tenant Act § 1.105(a) (1972). He advertised available apartments with a sign in front of the building, in a newspaper, and on a website, and that should be sufficient mitigation. The landlord also showed the tenant's apartment along with the other vacant apartments to prospective tenants, thereby providing a fair chance that the tenant's apartment would be rented before other apartments in the landlord's rental pool. On these facts, a court most likely would find that the landlord made reasonable efforts to mitigate.

Of those states requiring mitigation, none requires that mitigation be successful; in fact, if a court determined that the landlord made reasonable efforts to mitigate but was unsuccessful, the court would find that the landlord would be entitled to damages equal to the difference between the tenant's promised rent ($2,000/month) and the apartment's fair rental value. Given that the landlord took reasonable steps to mitigate and was unable to rent the tenant's unit "at any price," it appears that the fair rental value of the tenant's unit is $0. Thus, the landlord's position would be that he is entitled to $34,000 in damages ($2,000/month for 17 months). In other words, if the landlord did not accept the surrender, then regardless of whether the landlord had a duty to mitigate, the landlord is entitled to the 17 months of unpaid rent.

Point Two(a) (20%)

<u>The tenant will argue that although the landlord's consent to an assignment was required, withholding consent must be reasonable, and here the landlord did not act reasonably.</u>

The tenant should concede that the lease required the landlord's consent to an assignment. However, she will argue that the law requires the landlord to act reasonably in rejecting the proposed assignment and here the landlord was unreasonable. There is an emerging modern trend that a landlord's consent not be unreasonably withheld, which is based upon the principle that leases are subject to the good faith requirements of contracts in general. Thus, a minority of courts require that a landlord have a reasonable basis for withholding consent to a proposed transfer. *See Kendall v. Ernest Pestana, Inc.,* 709 P.2d 837 (Cal. 1985) (commercial leases); *see Siewert v. Casey*, 80 So. 3d 1114, 1116 (Fla. Dist. Ct. App. 2012) (residential lease); *Pac. First Bank v. New Morgan Park Corp*., 876 P.2d 761, 768 (Or. 1994); *Basnett v. Vista Village Mobile Home Park*, 699 P.2d 1343, 1346–47 (Colo. Ct. App. 1984), *rev'd on other grounds*, 731 P.2d 700, 704 (Colo. 1987) (residential leases).

Factors that may be considered under a reasonableness test include the proposed assignee's financial ability to pay, the suitability of the premises for the proposed assignee's use, and the need for alterations to accommodate the proposed assignee's use. *Kendall*, *supra,* at 842. It is not commercially reasonable to deny consent solely on the basis of personal taste, convenience, or sensibility. *Id*. Here, the facts suggest that the lawyer had the financial ability to pay the rent, and there is no indication that the lawyer intended to use the apartment for anything other than a residence. The tenant will also argue that the landlord's stated objection—"I've learned from personal experiences with [lawyers] as tenants that they argue about everything, make unreasonable demands, and make my life miserable"—is merely a matter of personal taste or convenience, and thus the landlord's refusal to consent was unreasonable.

Point Two(b) (15%)

<u>The tenant will argue that the landlord accepted the surrender of the apartment, thus ending her obligation to pay rent.</u>

The tenant will argue that the landlord accepted her surrender of the premises when he accepted the keys and emailed her, stating, "Although this is a problem you created, I want to be a nice guy and help you out. I feel pretty confident that I can find a suitable tenant who is not a lawyer to rent your apartment." Those words could be construed as a willingness to help the tenant by releasing her from her obligations under the lease. If the lease was terminated by the landlord's acceptance of the surrender, the landlord had no right to any rent after he accepted the keys and sent that email on July 26, 2015.

Point Two(c) (15%)

<u>The tenant will argue that even if the landlord did not accept the surrender, he still had a duty to mitigate and failed to do so.</u>

Alternatively, the tenant will argue that even if the landlord did not accept the surrender, he still had a duty to mitigate damages and that he failed to fulfill that duty. While most jurisdictions today reject the common-law rule that a landlord has no duty to mitigate, there is little guidance as to what efforts are sufficient to satisfy the mitigation requirement. Sprankling, *supra*, at 299. Some statutes have defined reasonable efforts as "steps which the landlord would have taken to rent the premises if they had been vacated in due course, provided that those steps are in accordance with local rental practice for similar properties." Me. Rev. Stat. Tit. 14 § 6010-A (2); Wis. Stat. § 704.29(2). The tenant might argue that the landlord should have shown the tenant's apartment to the exclusion of other vacant apartments in the landlord's rental pool. She might also argue that there was some other deficiency in the landlord's efforts. Her arguments on this point are weak, as noted above in Point One(c).

Lastly, the tenant will claim that because the landlord's efforts to mitigate were insufficient, his claim that he could not rent the tenant's apartment at any price is irrelevant. The tenant will further argue that the landlord is not entitled to 17 months of unpaid rent ($34,000) under the lease but would only be entitled to the difference between the rent owed under the lease and the fair rental value (i.e., the amount of rent the landlord could have recovered if he had made reasonable attempts to secure a substitute tenant). The fair rental value is presumably $1,000 a month in light of the fact that he was able to rent two of the other apartments for that amount. That would reduce the landlord's damages to $17,000 (unpaid rent of $34,000 for the 17 months less $17,000, the fair rental value of the apartment over the 17-month period). Sprankling, *supra*, at 299.

In some jurisdictions, a landlord's failure to mitigate would relieve the tenant of any liability for rent or damages after the date of abandonment because by failing to mitigate, the landlord is deemed to have accepted the surrender. *See* Unif. Residential Landlord and Tenant Act § 4.203(c). In those jurisdictions, the landlord would be entitled to no damages.

[NOTE: As explained in Point One(b), at common law if a tenant abandoned his or her apartment and the landlord did not accept the surrender, the landlord had no duty to mitigate damages. However, the landlord could sue the tenant only for past-due rents and, because rent was not due until the payment date, the landlord could not sue for future rents. There is an emerging doctrine applying contract principles to a lease that states that even if the landlord accepts surrender, the landlord is entitled to damages as a result of a tenant's anticipatory repudiation of the lease. Sprankling, *supra*, at 294. Under this theory, a tenant would be liable for the difference, if any, between the rent due under the lease and the fair rental value of the premises plus the landlord's consequential damages of advertising the unit for rent and the costs associated with showing it to prospective tenants. However, that possibility is written out of this question. Of course, if the duty to mitigate applies, contract damages rules apply.]

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