

# THE MPT

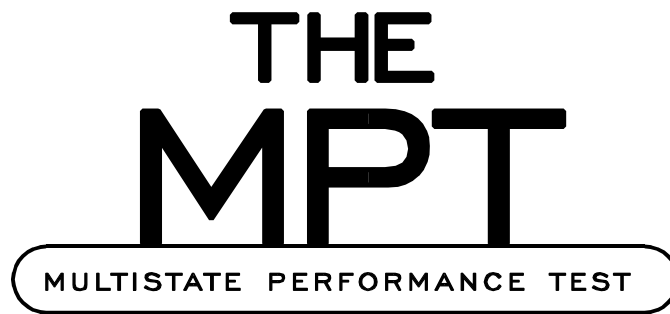
MULTISTATE PERFORMANCE TEST

## *July 1997 MPTs and Point Sheets*

*In re Kiddie-Gym System, Inc.*

*State v. Devine*





*In re Kiddie-Gym  
Systems, Inc.*

July 1997, Test 1



## Preface

The National Conference of Bar Examiners inaugurated the Multistate Performance Test (MPT) in 1997. This publication is a reprint of one of the first two MPTs, which were administered in July 1997 in eight states: Colorado, District of Columbia, Georgia, Hawaii, Iowa, Missouri, Nevada, and New Mexico.

The instructions for the test appear on the back cover. For further information regarding the test, see the **MPT Information Booklet**.

**In re Kiddie-Gym Systems, Inc.**

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**FILE**



**Elmore, Anderson & Reed**  
**Attorneys at Law**  
**3722 Page Park Road**  
**Bradley Center, Franklin 33092**  
**(489) 555-7108**

**M E M O R A N D U M**

**To:** Applicant  
**From:** Marla Reed  
**Date:** July 29, 1997  
**Subject:** Kiddie-Gym Systems, Inc.

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Our client, Kiddie-Gym Systems, Inc.(KGS), has been in business for almost a year. It furnishes and installs prefabricated indoor playground equipment for developers and operators of shopping malls, day-care centers, fast-food outlets, and other entities that want to provide such facilities for children of their customers. Earlier today, Jerry Martin, the president of KGS, came in to get our advice on a business problem involving playground equipment KGS bought from Poly-Cast, Inc. and installed at Bradley Center Mall, one of Cornet Development Corporation's shopping malls. The playground equipment was destroyed by a fire at the mall. I told him we would give him a written opinion within a few days.

I've transcribed my notes of the discussion I had with Mr. Martin, and they are included in the file along with some documents Mr. Martin left with me. I've also included parts of the Franklin Commercial Code (which is identical in substance to the Uniform Commercial Code) and some cases that may or may not be relevant. Here's what I would like you to do for me:

Draft for my signature an opinion letter to Mr. Martin addressing the following questions:

- (1) As between KGS and Cornet, which bears the risk of loss for playground equipment destroyed in the fire at Cornet's Bradley Center shopping mall?
- (2) Is KGS obligated to pay the shipping and handling charges billed by Poly-Cast?

Attached for your guidance is a memorandum regarding our firm's practice in writing opinion letters.

**Elmore, Anderson & Reed  
Attorneys at Law  
3722 Page Park Road  
Bradley Center, Franklin 33092  
(489) 555-7108**

MEMORANDUM

September 8, 1995

**To:** Associates

**Re:** Opinion Letters

The firm follows these guidelines in preparing opinion letters to clients:

- State each client question independently.
- Following each question, provide a concise one-sentence statement giving a "short answer" to the question.
- Following the short answer, write an explanation of the issues raised by the question, including how the relevant authorities combined with the facts lead to your conclusions and recommendations.
- Bear in mind that, in most cases, the client is not a lawyer, so use language appropriate to the client's level of sophistication. Remember also to write in a way that allows the client to follow your reasoning and the logic of your conclusions.

**NOTES OF DISCUSSION WITH JERRY MARTIN, PRESIDENT OF KGS**  
**July 29, 1997**

KGS installs indoor molded plastic playground equipment in places like fast-food restaurants, shopping malls, day-care centers, etc.

- A little over 2 months ago, KGS landed its largest contract so far—with Cornet Developers—3 major shopping centers in Franklin—1st one, in Bradley Center, just completed and opened to the public on July 23, 1997—2 other malls under construction. Contract drafted by Cornet's attorneys.
- Martin shopped Cornet's specifications around and found a new supplier, Poly-Cast, Inc., located in Copley, about 100 miles from here—Poly-Cast's playground equipment meets Cornet's specs—got what he thought was very favorable pricing from Melissa Parker, Poly-Cast's sales manager.
- Poly-Cast shipped 1st playground system to Bradley Center job site on time and in good condition—it arrived at the site in heavy protective wooden crates—unnecessary as far as Martin is concerned—it just costs Poly-Cast money to do the crating and costs KGS time and labor to uncrate and dispose of the wood.
- Re Bradley Center Mall, KGS crew began assembly on July 21, 1997 and finished physical installation of playground equipment and general site clean-up on July 22—removed construction barriers at end of the day and told Charlie Short, Cornet's job superintendent, Martin would be back the next day to do final site check and crew would return within 2 weeks to do final "tune-up."
- Martin went to job site the next day, July 23, about 11:00 a.m. and found 20 - 30 kids already playing on the equipment; checked with Charlie Short and learned that he had given the mall manager the green light to let the kids begin using the playground—Martin did a visual check, found things in order, and left, intending to send crew back in two weeks to do final tune-up per contract.
- Fire broke out at Bradley Center Mall on July 24—damaged part of the mall and destroyed the playground equipment—best guess is that the fire started from a cigarette someone threw into a trash bin.

- Charlie Short has told Martin that KGS won't get paid for Bradley Center job until it installs replacement equipment—Charlie also said no pay because title to the playground system hadn't yet passed to Cornet.
- Martin says Short had already given his OK for kids to begin using the equipment—can't understand why KGS should bear the loss—the fire wasn't KGS's fault—KGS hasn't been able to afford insurance for this kind of loss; is pretty sure Cornet is insured. KGS might be willing to make some accommodation on labor costs during installation of replacement system at Bradley Center Mall, at least to the extent of Cornet's insurance deductible, if any.
- Obviously, KGS can't perform final tune-up on the system that was destroyed—Martin says final tune-up is no big deal—the Poly-Cast systems shouldn't need much if any final adjustments and, at most, it would've been an hour's work by 2 workers.
- To make matters worse, Martin just received Poly-Cast's invoice for the first system, and Poly-Cast has included a \$2,500 charge for shipping and handling (amount not surprising, judging from the fancy wooden crate job)—Martin got a range of quotes that would meet specs from Melissa Parker, Poly-Cast's sales manager; the one for Model PC 443-7 was \$25,000 per playground system—no mention of additional charges—that's why KGS's purchase order states "price all-inclusive."
- Martin didn't look too closely at Poly-Cast's acknowledgement form when he received it on or about June 16, 1997, other than to notice that it agreed with the price on KGS's purchase order—just yesterday, noticed the fine print re shipping and handling.
- Even if KGS doesn't have to pay the cost to replace the Bradley Center unit, if KGS has to pay the \$2,500 in freight charges, KGS will barely break even (maybe even take a slight loss) on the Cornet contract after labor and overhead. If he'd known, he could have had his own driver pick up the shipment at Poly-Cast plant—no trouble for him to do that.
- KGS is between a rock and a hard place with respect to both Cornet and Poly-Cast—can't afford to eat the loss on the Bradley Center Mall or agree to pay the Poly-Cast freight, but needs to preserve relations with both because of the other 2 malls.

## CONSTRUCTION AND SERVICE CONTRACT

This contract for construction and services is made and entered into by and between Cornet Development Corporation ("Cornet") and Kiddie-Gym Systems, Inc. ("KGS") this 23rd day of May, 1997.

1. Work: KGS shall furnish all labor, equipment and materials necessary for the installation of molded plastic indoor playground equipment ("playground systems") at each of the three (3) Cornet shopping malls listed below. The playground systems shall be installed at locations designated by Cornet within each mall and shall conform to the specifications prepared by Cornet and delivered previously to KGS. Not later than 30 days after completion of installation of each playground system, KGS shall perform a follow-up inspection and make such final adjustments ("tune-up") of the system as shall be required, if any, as the result of initial use by patrons of the mall.

2. Mall Sites and Projected Opening Dates: KGS shall perform its work at the following mall sites and shall complete installation no later than one day before the projected opening date of each mall: Bradley Center, due to open July 23, 1997; Sedona Hills, due to open September 29, 1997; and Mayfair, due to open January 26, 1998.

3. Price and Payment Terms: The total price to be paid by Cornet to KGS is \$120,000, each playground system to be paid for at \$40,000 ("site price") upon completion of the work at each mall site.

4. Passage of Title: Title to each playground system shall pass to Cornet upon completion by KGS of the final tune-up of the system.

5. Penalty for Delay: KGS shall forfeit \$500 for each day of delay in the completion of the installation of the playground system at each site.

6. Entire Agreement: This writing sets forth the entire agreement of the parties, and any prior or contemporaneous promises or representations made and not set forth in this writing shall be of no effect. No modification of this agreement may be made except in a writing executed by both parties.

Cornet Development Corporation

Kiddie-Gym Systems, Inc.

By \_\_\_\_\_  
Thomas G. Bodette  
Vice President for  
Development

By \_\_\_\_\_  
Jerome A. Martin  
President

# PURCHASE ORDER

Date: May 29, 1997

No. 447A

Kiddie-Gym Systems, Inc.  
4722 Industrial Way  
Bradley Center, FN 33087  
(489) 554-6249

Seller: Poly-Cast, Inc.  
790 Polypropylene Way  
Copley, FN 33124

Ship To: Per Instructions

This constitutes order by Kiddie-Gym Systems, Inc. of three (3) Poly-Cast molded playground systems, Model No. PC443-7. Systems per sample shown and to conform to Cornet Development specifications furnished to Poly-Cast.

Systems to be delivered by Poly-Cast to Cornet Development job sites per instructions to be given by Kiddie-Gym Systems. First system to be delivered to Bradley Center Mall job site not later than July 21, 1997. Delivery to other job sites (Sedona Hills and Mayfair) per later instructions.

Price: \$25,000 per unit, all-inclusive, per quote from Melissa Parker. Payable net 60 days after delivery.

## General Conditions

Seller warrants all goods are of merchantable quality and fit for the intended purpose. Seller warrants that all goods are free and clear of all liens and claims by third parties and that Seller possesses all rights to sell said goods free and clear.

Date: May 30, 1997

Authorized Signature: \_\_\_\_\_  
Jerome A. Martin

**ACKNOWLEDGEMENT OF ORDER**

**POLY-CAST, INC.**  
**Premier Molded and Extruded Plastic Products**  
**790 Polypropylene Way**  
**Copley, FN 33124**  
**(489) 550-0900**

No. 277695

Date: June 9, 1997

BuyerKiddie-Gym  
4722 Industrial Way  
Bradley Center, FN 33087  
(489) 554-6249

Ship To: Per Instructions

Contact: Jerry Martin

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Poly-Cast hereby acknowledges your Order per your PO #447A dated May 29, 1997:

- Three (3) Model PC443-7 playground systems  
Unit price \$25,000
- Systems to conform to Cornet Development specs
- Will ship first system to Cornet site at  
Bradley Center Mall by July 21, 1997 per instructions
- Will wait for shipping and delivery instructions on  
Sedona Hills and Mayfair sites
- Payable net 30 days from date of invoice

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Arthur Haskins  
Vice President/Sales

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**Conditions Applicable To All Sales:** All goods subject to limited warranties of merchantability and fitness. All shipments subject to charges for shipping and handling to be paid net 30 days from date of invoice. Goods are guaranteed against defects discovered and reported within ten (10) days of delivery. Late charges at 10% per month for past due payments; minimum late charge \$10.00. Shipments travel at the risk and cost of Buyer. Risk of loss passes to Buyer at time of identification

of goods to the contract at Seller's loading dock.

**POLY-CAST, INC.**  
**Premier Molded and Extruded Plastic Products**  
**790 Polypropylene Way**  
**Copley, FN 33124**  
**(489) 550-0900**

**I N V O I C E**

**Date:** July 25, 1997

**No. 114076-96**

**Customer:** Kiddie-Gym  
4722 Industrial Way  
Bradley Center, FN 33087

**Attention:** Jerry Martin  
Your PO# 447A

<u>Quantity</u>	<u>Description</u>	<u>Price</u>
1	Poly-Cast playground system - Model PC443-7 delivered July 21, 1997 per customer's instructions	\$25,000.00
	<u>Shipping &amp; handling</u>	<u>\$ 2,500.00</u>
	Total Due (net 30 days)	\$27,500.00

Make checks payable to Poly-Cast, Inc.

# **LIBRARY**



## Franklin Commercial Code

\* \* \* \*

**§ 2102. Scope:** Unless the context otherwise requires, this division of the Commercial Code applies only to transactions in goods; it does not apply to any transaction which is solely for the sale of services.

\* \* \* \*

### **§ 2104. Definitions: "Merchant"; "Between Merchants":**

(1) "Merchant" means a person who deals in goods of the kind . . . involved in the transaction . . . .

(2) "Between merchants" means any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

**§ 2105. Definitions: "Goods":** "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid.

\* \* \* \*

### **§ 2207. Additional Terms in Acceptance or Confirmation:**

(1) A definite and seasonable expression of acceptance or written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) The offer expressly limits acceptance to the terms of the offer;

(b) They materially alter it; or

(c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such a case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this

code.

\* \* \* \*

**§ 2319. F.O.B.:**

(1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which

(a) When the term is F.O.B. the place of shipment, the seller must at that place ship the goods and bear the expense and risk of putting them into the possession of the carrier; or

(b) When the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them.

\* \* \* \*

**§ 2401. Passing of Title:** Each provision of this division of this code with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision of this code refers to title. Insofar as situations are not covered by the other provisions of this division of this code and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract. Subject to these provisions, title to goods passes from the seller to the buyer in any manner and on conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods.

\* \* \* \*

**§ 2503. Manner of Seller's Tender of Delivery:** Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery.

\* \* \* \*

**§ 2509. Risk of Loss in the Absence of Breach:** The risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery. The provisions of this section are subject to contrary agreement of the parties.

## Coakley, Inc. v. Washington Plate Glass Co.

Franklin Court of Appeal (1991)

PER CURIAM: Washington Plate Glass Co. had a contract "to furnish and install aluminum and glass curtain wall and storefront work" on a building owned by Coakley, Inc. To accomplish its contractual undertaking, Washington purchased the glass required from Shatterproof Glass Corp. Other materials were acquired elsewhere.

The contract price under the Coakley/Washington contract was \$262,500. The glass purchased from Shatterproof cost \$87,715. The other materials necessary for the performance of the contract, aluminum, anchor clips, fittings, field fasteners, etc., cost approximately \$80,000.

Within a year, the glass began to discolor. When Coakley complained to Washington and Shatterproof, they declined to replace the glass, so Coakley filed suit against them in the Franklin District Court. Coakley alleged breach of implied warranties of merchantability and fitness for a particular purpose created by Franklin Commercial Code §§ 2314 and 2315.

Shatterproof moved for dismissal on the sole ground that the FCC was inapplicable. The District Court granted the motion and Coakley appeals.

Whether the FCC applies turns on whether the contract between Coakley and Washington involved principally a sale of goods or a

provision of services. Unless there has been a buyer of goods, the implied FCC warranties of merchantability and fitness do not apply. Thus, the question as to the availability of warranties comes down to whether the transaction between Coakley and Washington was a sale of goods or the provision of services. Any requirement for privity between Coakley and Shatterproof is abolished if the FCC applies. See FCC § 2314(1)(b): "Any previous requirement of privity is abolished as between the buyer and the seller in any action brought by the buyer."

The cases dealing with this issue turn upon whether the thrust of the contract is to supply goods or to furnish services. The mixed character of the contract does not remove it from the ambit of the sales division of the FCC. The words of § 2102 of the FCC support this conclusion: The sales division of the FCC "does not apply to any transaction which is solely for the sale of services."

Therefore, we apply the test articulated in *Wilson v. Sharpe* (Franklin Supreme Court, 1974): in situations where the contract is a mixed contract involving both the sale of goods and the rendition of services, it will be deemed that the contract comes within the sales division of the Franklin Commercial Code if the value of the goods being furnished under the contract exceeds one half of the total contract price. By that measure, at least, it can be clearly said that the predominant factor in

the contract is the sale of goods and that the sale of goods is more than merely incidental to the contract.

Applying that principle to the case at hand, we note that more than one-half of the price in the Coakley/Washington contract is attributable to the value of the goods to be furnished thereunder. The contract therefore falls within the Franklin Commercial Code. Accordingly, we reverse.

## **Hughes v. Al Green, Inc.**

Franklin Court of Appeal (1993)

Laura Hughes purchased a new 1989 Lincoln Continental from Al Green Dodge-Lincoln. She tendered a cash down payment and arranged to finance the balance through a local bank. In the meantime, she completed the necessary application for a certificate of title. The parties agreed that Hughes would take immediate possession of the automobile but that she would return it to the dealership on the following Monday for certain new car preparations and installation of the CD player. En route from the dealership to her home, Hughes was involved in a collision and the automobile was substantially damaged. The title documents, showing Hughes as the legal owner, were subsequently delivered to her.

Hughes refused to pay the balance and sued Al Green, Inc. for breach of contract alleging that the vehicle had been transferred to her in a damaged condition. Her claim is based on the notion that, when the certificate of title was issued to her, thereby legally transferring title to her, she no longer possessed that for which she had bargained, i.e., an undamaged 1989 Lincoln Continental.

A jury found for Green. The case is now before us on appeal.

We must determine whether the buyer or the seller bore the risk of loss or damage to the automobile at the time of the collision. To say that the buyer had the risk of loss at the time the goods were destroyed is to say that the

buyer is liable for the price. To say that the seller had the risk of loss at the time the goods were destroyed is to say that the seller is liable in damages to the buyer for nondelivery unless he tenders a performance in replacement for the destroyed goods.

Franklin Commercial Code § 2509 provides that "the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery." This provision represents a significant shift away from the prior importance of the concept of title in determining the point at which risk of loss passes from seller to buyer. Under the common law, title to the contract goods determined the locus of risk of loss. Under the Commercial Code, however, each provision relating to the rights, obligations and remedies of sellers and buyers applies irrespective of title except where the provision of the code itself refers to such title. (FCC § 2401.)

FCC § 2509 sets forth a contractual approach, as distinguished from the property concept of title, to solving issues arising when goods are damaged or destroyed. The section focuses on specific acts, such as tender of delivery by the seller or receipt of the goods by the buyer. Title is relevant under this section only if the parties provide that risk of loss shall depend upon the locus of title. Unless the contract specifically provides that risk of loss depends

upon the locus of title, it is irrelevant where title resides.

In this case, the buyer had received possession of the automobile as partial execution of a merchant-seller's obligations under a purchase contract. There is no question but that the buyer, having physical possession and use of the vehicle, had "receipt" within the meaning of the FCC. Nothing in the contract purported to shift the risk of loss dependent upon the locus of title. Thus, Hughes, as a buyer in receipt of goods identified to the contract, must bear the risk of loss of the car's value resulting from the collision.

Affirmed.

## Album Graphics, Inc. v. Craig Adhesive Company

Franklin Court of Appeal (1995)

Plaintiff Album Graphics, Inc. brought a complaint against Craig Adhesive Company alleging a breach of express and implied warranties. The trial court dismissed.

Album manufactures containers for cosmetics. Craig manufactures and sells adhesives (glue). A salesperson employed by Craig visited Album's plant and, after discussions with Album's manufacturing superintendent, offered to manufacture a special glue that would meet Album's needs for the assembly of newly designed cosmetics packages. During a later visit, the salesperson demonstrated the glue and instructed plaintiff's personnel on its use. As a result of the two meetings, Album ordered a quantity of the glue and used it on the new packages. Album sold a number of the new cosmetics packages to a customer. The packages fell apart, and Album had to recall and replace them using a different glue.

The parties in the present case do not dispute that a contract for sale was entered into, or that express or implied warranties may have been created on the basis of the facts pleaded in Album's complaint. Craig alleges that such warranties were effectively disclaimed. Craig asserts its disclaimer theory on two grounds. First, each container of glue delivered to Album had a label on which there was conspicuously printed language to the effect that the only warranty made was that all goods were manufactured of standard materials and, if any material proved to be defective, Craig

would either replace the goods or refund the price. Second, Craig's invoices also contained explicit disclaimers of warranties.

Though it may be questionable that the labels and invoices are "confirmatory memoranda" of the agreement reached by the parties, we will, for the purpose of analysis, accept the defendant's contention and assume that they are. Hence, they would be "written confirmation" of the prior agreement entered into by the parties as that term is used in Franklin Commercial Code § 2207.

The general purpose of § 2207 is to allow the parties to enforce their agreement, whatever it may be, despite discrepancies between an oral agreement and a written confirmation, and despite discrepancies between a written offer and a written acceptance. Also, it allows for additional terms stated in an acceptance or written confirmation to become terms of the agreement in certain cases. Hence, the section allows a written confirmation to "operate" as acceptance for the above purposes.

Here, the question is only whether the additional terms in the written confirmations became part of the agreement. For this, we must look at § 2207(2), which states in part: "Between merchants such terms become part of the contract unless: \*\*\* (b) They materially alter it. . . ."

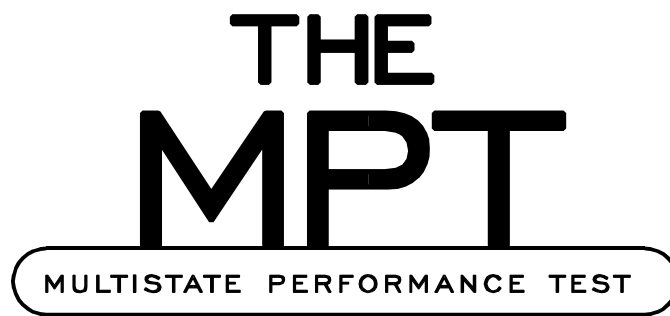
Official Comment 4 to the FCC gives as

examples of typical clauses that would materially alter the contract and so result in surprise or hardship if incorporated without the express awareness by the other party: "a clause negating such standard warranties as that of merchantability or fitness in circumstances in which either warranty normally applies. . . ." We believe that Craig's unilateral disclaimer of warranties and limitation of damages clauses are such as to result in "surprise or hardship" and therefore could not become part of the contract under § 2207(2) because they "materially alter it." On that basis alone, Craig's disclaimers were ineffective.

There is, however, an additional basis for reaching the same result. Here, the parties effectively performed their contract without taking cognizance of the conflicting terms that later resulted in this dispute. That is to say, Album ordered the goods, Craig shipped them, and Album used them. In such circumstances, § 2207(3) comes into operation. Under that section, if the conduct of the parties recognizes the existence of a contract, then a contract for sale is formed even though the writings of the parties do not establish a contract. In such a case, the contract contains "those terms on which the writings of the parties agree," and all other terms either "drop out" or are supplied by the "gap-filling" provisions of the Commercial Code.

In the present case, since Craig's labels and the invoices do not contain a term which also appears as part of the writing sent by Album, the label and invoice terms cannot become

part of the contract. The terms relating to the warranty issue are then supplied by §§ 2314 and 2315, which are sections of the Code that statutorily create the implied warranties of merchantability and fitness for a particular purpose. The warranties created by those sections are imported as "gap fillers" into the contract by operation of § 2207(3). The contract is then deemed to contain the implied warranties. Accordingly, we reverse.



*State v. Devine*

July 1997, Test 2



## Preface

The National Conference of Bar Examiners inaugurated the Multistate Performance Test (MPT) in 1997. This publication is a reprint of one of the first two MPTs, which were administered in July 1997 in eight states: Colorado, District of Columbia, Georgia, Hawaii, Iowa, Missouri, Nevada, and New Mexico.

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**State v. Devine**

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**FILE**



## Office of the District Attorney

Victoria County  
145 East Harold Street  
Beckley, Franklin 33331  
(901) 555-1111

**TO:** Applicant  
**FROM:** Peter Paulson, Assistant District Attorney  
**RE:** State v. Devine  
**DATE:** July 29, 1997

I am prosecuting David Devine in a criminal case in which he is charged with possession of cocaine with intent to distribute. He was arrested in possession of nearly half an ounce of high-grade cocaine. Defendant's motion to suppress the cocaine, based upon his claim that the search and seizure were unlawful, was denied at the pretrial hearing and again yesterday when his lawyer, Celia Delbert, renewed it at trial.

The defense is not contesting the possession charge, but rather is focused on that part of the charge dealing with intent to distribute. In her opening statement, Delbert hammered at the lack of evidence regarding Devine's intent.

Two witnesses have testified so far for us. The first witness to testify was Scott Crisman, a chemist with the State Toxicology Lab (because he was unavailable later, we called him first). He testified that he received a zip-lock bag from Detective Ripka that contained 13.1 grams of a white powdery substance that he determined was 70% pure cocaine. All of defendant's objections to his testimony were overruled.

The second witness was Detective Ripka, the arresting officer in the case. I have completed my direct examination, and the defense has completed cross-examining Ripka. I have attached the transcript of his testimony. The direct examination went well for us, but we were hurt on cross-examination when Ripka basically conceded that the facts were also consistent with the defense theory of possession for personal use. I now intend to conduct redirect examination of Detective Ripka to elicit his testimony that, two days before the arrest of Devine, he saw Devine selling what appeared to be cocaine in small packages from his car. The defense has objected to the introduction of this evidence.

I will call one more witness. Officer Fusco arrested Devine 18 months ago for possession of heroin with intent to distribute. Devine was convicted and served a year in prison. I want Officer Fusco to testify to the circumstances of that arrest. I've given defense counsel notice under Rule 404 of the Rules of Evidence, and the court has ruled that the notice is sufficient. Delbert has objected to the testimony of both witnesses on other grounds.

This additional testimony from Ripka and Fusco would bolster our claim that Devine intended in the present case to distribute the cocaine. It is essential, therefore, that we persuade the court to admit the testimony of the witnesses concerning the two instances of prior criminal conduct.

The judge has declared a one-day recess. This gives us time to prepare our arguments supporting the admission of this evidence. I have attached some of the Franklin Rules of Evidence (which are identical to the Federal Rules of Evidence) and a case from our Supreme Court.

I want you to write the persuasive brief requested by the court arguing for the admission of the testimony of Ripka and Fusco concerning the two instances of prior criminal conduct. The brief should also anticipate and refute the arguments the defense is likely to make in support of the objections it made yesterday just before the judge recessed the trial. Please prepare the brief in accordance with our office procedure (which I have attached).

# Office of the District Attorney

Victoria County  
145 East Harold Street  
Beckley, Franklin 33331  
(901) 555-1111

## MEMORANDUM

September 8, 1995

**To:** Attorneys  
**From:** Andrea Preston, District Attorney  
**Re:** Trial Briefs on Evidentiary Proffers

This memo is for the purpose of clarifying the expectations of the District Attorney's Office and to provide guidance to Assistant District Attorneys. All trial briefs on evidentiary offers shall conform to the following guidelines.

We follow the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, improper: THE WITNESS IS COMPETENT TO TESTIFY. Proper: A FIVE-YEAR-OLD WHO ADMITTED HER MOTHER WOULD NOT PUNISH HER FOR LYING, BUT STILL TESTIFIED SHE KNEW THAT LYING WAS WRONG, IS COMPETENT TO TESTIFY.

The body of each argument should incorporate the relevant facts, analyze applicable legal authority, and persuasively argue how the facts and law support our position. Authority supportive of our position should be emphasized, but contrary authority should generally be cited, addressed, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs.

Unless specifically assigned, Assistant District Attorneys should not prepare separate statements of facts. Tables of contents, tables of cases, summaries of arguments, and indices for a trial brief on evidentiary proffers will be prepared, where required, after the draft is approved.

**State v. Devine, Crim. No. 23-994**  
**Transcript of the Testimony of Detective Johnny Ripka**  
**July 28, 1997**

**Direct Examination by Assistant District Attorney Peter Paulson:**

- 1    **Q:**    State your name and occupation for the record.
- 2    **A:**    I am Detective Johnny Ripka. I am employed by the Beckley Police Department at the rank  
3           of detective and am currently assigned to the narcotics squad.
- 4    **Q:**    How long have you been so employed?
- 5    **A:**    I have been with the police department for 15 years, the last five in narcotics.
- 6    **Q:**    Can you describe any special training you have had in regard to narcotics?
- 7    **A:**    Yes. In addition to the training that all police officers receive in the Police Academy and the  
8           normal detective training, both of which have components dealing with the recognition of  
9           narcotics and controlled substances, I have attended a two-month course at the State Police  
10          Academy entitled, "Detecting and Apprehending Drug Dealers." I also attended a four-week  
11          course offered by the FBI in Washington on working undercover.
- 12   **Q:**    Have you had any experience regarding the enforcement of the laws dealing with dangerous  
13          drugs?
- 14   **A:**    Yes. Four years ago, I worked undercover for a period of nine months. I lived among people  
15          active in the drug culture in order to investigate the drug trade in Beckley. As a result of that  
16          work, 34 people were indicted and convicted of the sale and possession of hard drugs in this  
17          community. I became familiar with how drugs are brought into this area, prepared for sale,  
18          sold, and used.
- 19   **Q:**    Detective Ripka, have you seen the defendant before today?
- 20   **A:**    Yes.
- 21   **Q:**    Can you describe the circumstances?
- 22   **A:**    At approximately 11:15 in the evening on March 25, 1997, I was patrolling the Frog Hollow  
23          neighborhood of Beckley with my partner, Eric Hellman. I observed a red 1990 Oldsmobile  
24          Cutlass traveling at a high rate of speed down Maple Avenue in Beckley. I followed the  
25          Cutlass for three blocks, from 4th Street to 7th Street, and clocked the vehicle at 53 miles per  
26          hour.
- 27   **Q:**    What is the speed limit in those three blocks?

1     **A:**     The area is posted as a 30 mile-per-hour zone.

2     **Q:**     What did you do next?

3     **A:**     I turned on my flashing lights and pulled the driver over. I approached the vehicle on the  
4             driver's side and Detective Hellman approached it on the passenger side. There was one  
5             individual in the car, the defendant.

6     **Q:**     And do you see that individual in the courtroom?

7     **A:**     Yes, he is that man over there (indicating).

8     **Q:**     Your honor, may the record reflect that the witness is pointing to the defendant, David  
9             Devine.

10    **The Court:**    It may so reflect.

11    **Q:**     What happened next?

12    **A:**     I shined my flashlight into the car and I asked him to produce his license and registration.

13    **Q:**     And how did he respond?

14    **A:**     He stammered, looked jumpy, looked kind of wired. He did not immediately produce the  
15             license so I requested that he exit the vehicle. I opened his door and he proceeded to exit.  
16             I asked him again for his driver's license and he replied that he had left it at home. I asked  
17             him again for the registration and he said it was in the glove compartment. I told him to  
18             retrieve it. He got back into the vehicle and reached over to open the glove compartment.  
19             When he opened it, a sandwich-size zip-lock bag fell out of it onto the floor and came into  
20             plain view. I saw that it contained a white substance. I reached in and retrieved the bag.  
21             Detective Hellman removed \$275 in cash from the glove compartment. I ordered Mr.  
22             Devine to exit the vehicle and put his hands on the roof of the vehicle. He did so and I patted  
23             him down for weapons. I visually checked the bag and believed that it contained cocaine.

24    **Q:**     What did you do at that time?

25    **A:**     I placed Mr. Devine under arrest and placed him in the back of our unit and advised him of  
26             his rights. I called the precinct and arranged to have Mr. Devine's car towed to the impound  
27             yard. Detective Hellman and I then transported Mr. Devine to central booking and processed  
28             his arrest. We relieved him of his belt, wallet, keys, and watch prior to putting him in the  
29             lockup. We discovered another \$230 in cash in his wallet at that time.

30    **Q:**     Regarding the sandwich-size zip-lock bag you referred to, what did you do with that?

31    **A:**     I placed an evidence tag on it and marked it with the date and my initials.

1     **Q:**     Showing you what has been marked as State's Exhibit Number 9 for identification, can you  
2             identify it?

3     **A:**     Yes, that is the zip-lock bag I took from Mr. Devine's car on March 25.

4     **Q:**     Detective, what if anything distinguishes cocaine held for personal use from that held for  
5             future sale and distribution?

6     **A:**     Number one is quantity. Anything more than a few grams is indicative of sale. Number two  
7             is purity. For example, 70% pure cocaine is hard to buy on the street. Street dealers buy  
8             cocaine like that from major dealers and then cut it to sell in much smaller quantities.  
9             Number three is the neighborhood. Drug activity tends to be concentrated in certain  
10            neighborhoods. Number four, sellers carry large amounts of cash in small denominations  
11            to facilitate multiple sales.

12    **Q:**     Now Mr. Crisman previously testified in this case that State's Exhibit 9 contained 13.1  
13             grams of a substance that was 70% pure cocaine. Can you tell us what it would cost to buy  
14             that much cocaine?

15    **A:**     Cocaine of that level of purity would cost anywhere from \$1,000 to \$1,700.

16    **Q:**     And, in your opinion, what does it mean when cocaine is 70% pure?

17    **A:**     It means that it will be cut and resold. The typical cocaine bought on the street has a purity  
18             of no more than 20%. It is a fairly simple procedure to mix cocaine with other inexpensive  
19             substances such as lactose. That reduces its purity but makes selling it a very profitable  
20             enterprise.

21    **Q:**     So if 13.1 grams of 70% pure cocaine were cut to 20% pure cocaine and resold, how much  
22             would the seller make?

23    **A:**     I calculate that cutting it would yield around 46 grams of cocaine. If it were sold by the  
24             gram, each gram would sell for \$90 to \$120 and so a seller would gross \$4,000 to nearly  
25             \$5,000 for his effort.

26    **Q:**     Can you describe the neighborhood where you arrested Mr. Devine?

27    **A:**     The Frog Hollow neighborhood is the center of most of the street-level drug dealing in  
28             Beckley.

29    **Q:**     In what denominations was the \$505 you seized from Mr. Devine?

30    **A:**     It was in fives, tens, and twenties.

31    **Atty. Paulson:** Thank you, no further questions.

1 **Cross-Examination by Attorney Delbert:**

2 **Q:** So you have had a lot of experience hanging out with drug dealers?

3 **A:** Yes, I have met more of them than I ever could have imagined.

4 **Q:** And drug dealing is a dangerous occupation, is it not?

5 **A:** Quite.

6 **Q:** And you said that drug purchases are made in cash?

7 **A:** Yes.

8 **Q:** And sometimes lots of cash?

9 **A:** Yes.

10 **Q:** And it is illegal?

11 **A:** Yes.

12 **Q:** And so the buyers and sellers of drugs can't expect police protection of their business?

13 **A:** Right.

14 **Q:** So a drug dealer carries lots of cash and gets no police protection?

15 **A:** Right.

16 **Q:** Isn't it true, therefore, that drug dealers need to protect themselves?

17 **A:** I guess so.

18 **Q:** And isn't it also true, Detective Ripka, that in order to protect themselves drug dealers most  
19 often carry guns?

20 **A:** Well, I wouldn't go that far but we usually see guns or knives when we arrest drug dealers.

21 **Q:** Now you searched Mr. Devine from head to toe, didn't you?

22 **A:** Yes.

23 **Q:** And you searched his car as well?

24 **A:** Yes.

25 **Q:** So if he had a weapon, you would have found it?

26 **A:** I suppose, yes.

27 **Q:** And there was no gun, no knife, no weapon of any kind, was there?

28 **A:** No.

29 **Q:** Neither in the car nor on Mr. Devine?

30 **A:** That's right.

31 **Q:** You have heard of free basing cocaine, haven't you?

1     **A:**     Of course.

2     **Q:**     Free basing is a method of smoking cocaine, right?

3     **A:**     Yes.

4     **Q:**     And before it is smoked it has to be chemically treated, right?

5     **A:**     Yes.

6     **Q:**     It would be possible to use this cocaine (indicating) for free basing?

7     **A:**     Yes, it could be converted to crack and smoked.

8     **Q:**     From the perspective of a crack user, the purer the cocaine you start with, the better the  
9             crack, the better the high. Isn't that correct?

10    **A:**     Uh huh.

11    **Q:**     Crack users try to get high levels of purity in their cocaine, don't they?

12    **A:**     Yes.

13    **Q:**     And crack is quite addictive, isn't that true?

14    **A:**     All forms of cocaine are addictive, but I understand that crack users become heavily addicted  
15             quite quickly.

16    **Q:**     And in your experience, addicts use a lot of the drug they are addicted to?

17    **A:**     Yes.

18    **Q:**     So it wouldn't surprise you to learn that someone smoked up as much as 13 grams of crack  
19             over a period of several days, would it?

20    **A:**     I guess not.

21    **Q:**     In fact, it would be typical for a crack user to consume this much crack in two to three days,  
22             isn't that true?

23    **A:**     If they can get their hands on it, they will smoke it.

24    **Q:**     So it wouldn't surprise you that an affluent crack user could consume as much as \$1,000  
25             worth of cocaine in two or three days?

26    **A:**     No.

27    **Atty. Delbert:** No further questions.

28    **The Court:** All right. We'll adjourn for the day. Ladies and gentlemen of the jury, please  
29             remember my admonition that you should not discuss the case with anyone and so forth.  
30             You're excused for the day. Will counsel please stay for a minute?  
31             [Jury leaves the courtroom. Court and counsel confer in the absence of the jury.]

1 **The Court:** Counsel, I have an engagement that's going to keep me away from court tomorrow, so  
2 we'll reconvene at the usual time the day after tomorrow. Mr. Paulson, when do you plan  
3 to rest?

4 **Atty. Paulson:** Well, your honor, I have some redirect for Mr. Ripka. I intend to elicit some further  
5 testimony based on what he saw two days before the defendant's arrest. While on stakeout  
6 in the Frog Hollow neighborhood, Mr. Ripka saw Mr. Devine pass a small plastic bag, about  
7 1" x 1" in size, containing what appeared to be cocaine through an open car window to  
8 another individual. He saw that individual give Mr. Devine some money. I also want to call  
9 Officer Fusco, the arresting officer in a prior conviction of Mr. Devine, to testify about the  
10 circumstances that led to his prior conviction for sale of narcotics. Your honor, Mr. Devine  
11 had been out of jail for only six months at the time of his arrest by Mr. Ripka. I have already  
12 given Ms. Delbert Rule 404 notice of Officer Fusco's testimony and a copy of the report he  
13 filed at the time of the prior arrest. I am now giving my notice under 404 of Ripka's  
14 testimony.

15 **Atty. Delbert:** I object to the testimony of both officers. First of all, it's too late to give notice  
16 under 404. Second, the testimony about each prior incident is out under 404. And, in any  
17 event, each incident is out under 403.

18 **The Court:** Well, look. In light of what happened on cross-examination of Ripka, I'm going to  
19 excuse the late 404 notice. Ms. Delbert, the recess will give you the time you need. It's the  
20 end of the day. Why don't you both file briefs that address the admissibility of the proffered  
21 testimony of officers Ripka and Fusco and Ms. Delbert's objections to their admissibility  
22 under 404 and 403. I'll rule when we reconvene.

# Beckley Police Department Arrest Report

INCIDENT NO.		DATE OF STATEMENT January 30, 1996			
NAME (LAST, FIRST, MIDDLE) OF PERSON GIVING STATEMENT Devine David			DOB/AGE 6-15-68	RESIDENCE PHONE (DAY/NIGHT)	BUSINESS PHONE (DAY/NIGHT)
STREET ADDRESS 555 Franklin St.		CITY Beckley	STATE Franklin	ZIP CODE 33331	
STATEMENT TAKEN BY (NAME/BADGE) Det. G. Fusco, Narcotics / #7105		IN PRESENCE OF			

## STATEMENT

Information supplied by reliable informant (#107) that a WM named "Dave" was selling heroin from his vehicle, blue 1992 Buick LeSabre (license plate #PEX 711), at the corner of Westin Hills Blvd. and Meadowood Dr. On January 30, 1996, at 2230 hours proceeded to Westin-Meadowood intersection in the Frog Hollow area of city with Officer T. Seyfat in an unmarked vehicle. Positioned vehicle about 50 ft. south of intersection on west side of Meadowood with a clear unobstructed view of intersection. At 2247 hours the suspect vehicle, blue '92 Buick with license plate #PEX 711, arrived and parked on south side of Westin Hills Blvd., about 15 ft. from corner. Only one person observed in vehicle, WM with dark hair and white shirt, who moved from driver's position to passenger seat. Observed two vehicles pull in front of suspect vehicle (at 2252 and 2258 hours). An individual exited each vehicle and proceeded to passenger side window. Observed WM in suspect vehicle turn on interior light, take something from glove compartment, and exchange unknown item for some amount of currency. At 2259 Officer Seyfat and undersigned officer exited police vehicle and proceeded to suspect vehicle. Seyfat approached driver side as I approached passenger side, identifying selves, ordering occupant out of vehicle. Patdown search of person revealed no weapons but a large bulk in rear pants pocket that proved to be \$792 in cash, no bill larger than \$20. Search of glove compartment produced 43 small glassine baggies (about 1" x 1" in size) of a white substance. Visual and texture check suggested heroin. Suspect advised of rights and taken into custody. Identification revealed name David Devine, above address.

\_\_\_\_\_  
Signature

# **LIBRARY**



**Franklin General Statutes**  
**Article XVI. Crimes and Punishments**

Section 286. Unlawful manufacture, distribution, and possession, etc., of controlled substances.

(a) Except as authorized by this subheading, it is unlawful for any person to manufacture, distribute, or dispense or to possess a controlled dangerous substance in sufficient quantity to reasonably indicate under all the circumstances an intent to manufacture, distribute, or dispense a controlled dangerous substance;

(b) Any person who violates any of the provisions of subsection (a) of this section with respect to a substance classified in Schedules I or II which is a narcotic drug is guilty of a felony and is subject to imprisonment for not more than 20 years, or a fine of not more than \$25,000, or both.

**Franklin Rules of Evidence**

**Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

**Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes**

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

\* \* \* \*

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan,

knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

\* \* \* \*

**Rule 608. Evidence of Character and Conduct of Witness**

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness's privilege against self-incrimination when examined with respect to matters which relate only to credibility.

**Rule 609. Impeachment by Evidence of Conviction of Crime**

(a) General rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

\* \* \* \*

## Milford v. State

Franklin Supreme Court (1994)

The appellant, Edward Milford, was convicted of the unlawful possession of cocaine in sufficient quantity to reasonably indicate an intent to distribute. In this appeal he claims that the trial court erred in permitting the introduction of evidence revealing other criminal activity on his part.

On December 12, 1992, three officers of the Franklin State Police executed a search and seizure warrant at the residence of Edward and Lena Milford. At the time of the search, Edward Milford was not at home, although Lena was. The police recovered from a bedroom a large plastic baggie containing five smaller baggies, each of which contained cocaine.

The fact that the appellant was not caught with the contraband in his hands is not legally fatal to proof of possession. Possession and control need not be immediate and direct but may be constructive.

In terms of legal sufficiency, Edward Milford argued that he was not only not in the bedroom from which the cocaine was seized at the time of the search, he was not even in the house. Nothing suggested that the bedroom was his. Nothing made him a more likely possessor of the narcotics than any of the other five residents of the home.

Milford's connection with the house would probably have been enough to permit the State

to clear the low hurdle of legal sufficiency, but the margin of clearance would have been narrow. In this case, however, we are not called upon to make these closer decisions, for, despite Mr. Milford's insistence, we are not going to look at the events of December 12 in a vacuum.

If the evidence of December 12, standing alone, might have given rise to arguable ambiguities, the observations of December 10 dissolved those ambiguities. On December 10, Herman J. Grunion, a neighbor of the Milfords for two years and a frequent visitor in their home, went to their home in the company of Mike Wiehl, an undercover State Trooper. In the presence of Wiehl, Grunion purchased directly from Lena Milford a one-eighth-ounce package of cocaine for \$280. Edward Milford was present when the sale was consummated.

This narcotics sale on December 10 was a crime other than the charged possession on December 12. The question for decision is whether it was relevant and important in establishing guilt with respect to the December 12 charge of possession.

The relevance and vital importance of the "other crimes" evidence here in issue looms large. Close proximity between appellant and the cocaine was shown on December 10 even if the connection was less proximate on December 12. The presence of the cocaine

was, moreover, shown to be within his knowledge on December 10.

It has long been recognized that evidence of other bad acts, although relevant and having some probative force, presents the problem that it is difficult to prevent a jury from improperly using evidence of other bad acts or giving it more weight than it deserves. The policy that other bad acts should be excluded is driven by two fears. One fear is that jurors will conclude from evidence of other bad acts that the defendant is a "bad person" and should therefore be convicted of the current charge, and the other fear is that jurors will conclude that the defendant deserves punishment for the other bad conduct.

Evidence of other bad acts may, however, be admissible if it is relevant to the offense charged on some basis other than mere propensity to commit crime, and if it passes muster under the ever-present test of balancing relevance against unfair prejudice. The threshold inquiry a court must make before admitting similar acts evidence under Franklin Rule of Evidence §404(b) is whether that evidence is probative of a material issue other than character. Evidence of other crimes may be admitted if it is substantially relevant to some contested issue in the case and if it is not offered to prove the defendant's guilt based on propensity to commit crime or his character as a criminal.

When evidence of other bad acts is relevant for reasons other than general criminal propensity, the trial judge must determine whether the accused's involvement in the other

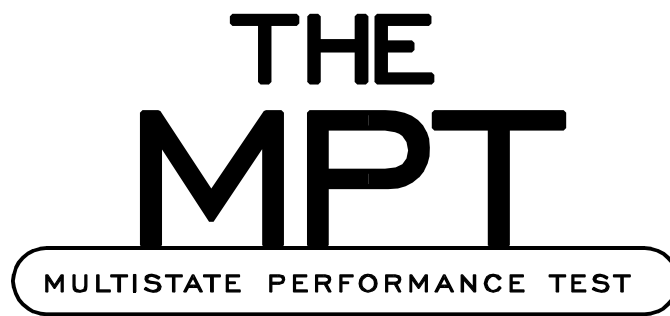
crimes is established by a preponderance of the evidence. If this requirement is met, the trial judge must then carefully weigh the necessity for and probative value of the evidence of other bad acts against any unfair prejudice likely to result from its admission. This approach recognizes that evidence of other bad acts usually has some relevance and that relevant evidence is usually admitted unless some good reason is shown to exclude it.

When a disputed issue involves the accused's state of mind, and especially when the only means of ascertaining that mental state is by drawing inferences from conduct, then prior instances of the conduct of the accused are relevant. Hence, evidence of other offenses is admissible on the trial of the current charge to prove state of mind. To be admissible as relevant, such offenses need not be exactly concurrent. If they are committed within such time, or show such relation to the current charge, as to make connection obvious, such offenses are admissible. Where the other crime is so linked in point of time or circumstances as to show state of mind, the evidence is admissible.

This case is distinguishable from *Mellish v. State* (Franklin Supreme Court, 1992), involving the charge of possession of heroin with the intent to distribute. At issue was the admissibility of evidence that at some unspecified time in the past, the defendant and the witness had "worked together selling narcotics." This Court held the evidence inadmissible, finding no special relevance, and, indeed, questionable probative value

even for criminal disposition. Proof that the accused had previously sold narcotics perhaps as long as five years before the crime charged in the indictment hardly tends to establish a disposition or propensity to commit the offense alleged, let alone an intent to do so. The remoteness in time of prior conduct has always been a consideration in determining relevancy, particularly when prior misconduct is alleged. Passage of time may actually indicate rehabilitation of the person.

In this case, the evidence, although involving other uncharged crimes, was admissible because of the strong inference that could be drawn from such evidence that Milford knowingly possessed the cocaine found on the day of the search and that he possessed it with the intent to distribute it. Evidence of the other offense possessed special relevance transcending mere criminal character. The necessity for the evidence was obvious. Proof of the other acts was clear, convincing, and uncomplicated, and the probative value of the evidence clearly outweighed its potential for unfair prejudice. Accordingly, we affirm.



*1997 Point Sheets*

*In re Kiddie-Gym Systems, Inc.  
State v. Devine*



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

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## **In re Kiddie-Gym Systems, Inc.**

### **DRAFTERS' POINT SHEET**

This sales/commercial code case requires applicants to draft an opinion letter resolving favorably for a client ("KGS") issues dealing principally with risk of loss and conflicting contract terms (i.e., "battle of the forms"). In the problem, the client has entered into two related contracts: one for the purchase of a three playground systems from a supplier ("Poly-Cast"); the other with a developer of shopping malls ("Cornet") for the installation of the playground systems at malls being built by the developer. Just after completion of the first installation by the client, the mall catches fire and the playground equipment is destroyed. The question is, under the circumstances, who bears the risk of loss for the playground equipment.

Concurrently, the client receives from the supplier of the playground equipment an invoice that includes a substantial charge for shipping and handling. The client asserts that he did not agree to pay such charges and that, if he is obligated to pay them, the contract with the developer will end up being a losing proposition. The purchase order sent by the client to the supplier states that the price was all-inclusive and calls for delivery at the construction site. The typed-in text in the supplier's acknowledgment form also provides for delivery at the construction site, but the fine print provides that, "All shipments subject to charges for shipping and handling.... Shipments travel at the risk and cost of buyer." Thus, the "battle of the forms."

**1. As between KGS and Cornet, which bears the risk of loss for the playground equipment destroyed in the fire?** There are basically two points that are essential to resolution of this issue: (1) whether the KGS/Cornet contract is subject to the Franklin Commercial Code ("FCC") in the first place; and (2) whether the ordinary risk of loss rule applies.

- The applicants should recognize after reading the entire problem that the best result for KGS can be achieved if the contract falls within the FCC, and that is the first issue they should grapple with.
  - On its face, the KGS/Cornet contract purports to be one for "construction and services." Section 2102 of the Code says that contract solely for services are outside the Code.
  - Under the contract, however, KGS must furnish all "labor, equipment, and materials," thus raising the issue of a mixed purpose contract.
  - The *Coakley & Williams* case in the library deals dispositively with the

mixed purpose issue and holds that, if the predominant factor in the contract is goods rather than services (i.e., if more than one-half of the contract price is attributable to goods), the contract will be deemed to be one for the sale of goods and therefore within the Code. Section 2105 of the Code in the library defines "goods."

- Then, applicants should look at the numbers and determine that the bulk of the KGS/Cornet contract price is for the playground equipment, i.e., "goods" within the meaning of § 2105. Of the \$120,000 contract price, \$75,000 (and perhaps even more after a mark-up by KGS), well more than half, is to cover the cost of the equipment that KGS is obligated to install. Under *Coakley & Williams*, a decision of the Franklin Court of Appeal, the contract is clearly one for the sale of goods. Also, it is clear from the interview notes that only one day was devoted to installing the playground equipment. This would indicate that the service component is fairly minimal.
- Next, the applicants should turn to the risk of loss issue:
  - It is clear from the notes of the interview with Jerry Martin that KGS had substantially performed the first installment of the contract. The installation of the playground system at the Bradley Center Mall had been completed except for the final "tune-up" which, because of the fire, became impossible to perform. At this juncture, there is a minor issue as to whether the contract is divisible so that the issues at the Bradley Center Mall can be treated separately from the yet to be completed performance at the other malls. The contract calls for separate "site price" payment, separate delivery dates, and different sites, so it seems clear enough, to the extent that it is relevant, that performance at each site can be treated distinctly. Thus, any speculation that Cornet can base a refusal to pay on an argument that there has not been substantial performance of the entire contract is misplaced.
  - The key to resolution of the risk of loss issue lies in FCC § 2509: that, absent breach, "the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant" and that it is "subject to contrary agreement of the parties."

- There has been no breach by KGS, so § 2509 applies. Whether KGS, in this case the seller, is a merchant is easily resolved by reference to § 2104 which defines merchant and by reference to the memo from the partner that makes it clear that KGS has been in the same business for "almost a year."
- Whether Cornet has received the goods requires some analysis. The interview notes state that KGS had finished physical installation and removed construction barriers, told Cornet's job superintendent so, that the superintendent had told Cornet's mall manager it was all right to let kids use the playground equipment, and that kids were using it the next day. The holding in *Hughes v. Al Green, Inc.* should be brought to bear to support the conclusion that Cornet, in this case the buyer, had received the goods.
- Whether the parties had made a "contrary agreement" regarding the risk of loss also requires some analysis. The KGS/Cornet contract contains some language providing that title to the playground equipment would pass to Cornet only after the final tune-up of each system, and, in the interview notes, it appears that Cornet's superintendent is basing the refusal to pay partly on the ground that title to the equipment had not yet passed to Cornet. The applicants should recognize that, absent a contrary agreement, risk of loss has nothing to do with passage of title. They should conclude that the contract language regarding passage of title is not a "contrary agreement" affecting risk of loss because it says nothing about risk of loss. They should bring to bear § 2401, which says essentially that the passage of title to goods is irrelevant under the Code, and the holding in *Hughes v. Al Green, Inc.*, which explains the Code rationale for placing the risk of loss on the buyer after the buyer has received the goods. There is something of a red herring in the acknowledgment form that Poly-Cast sent KGS. It purports to pass the risk of loss to KGS "at the time of identification of goods to the contract at Seller's loading dock." Irrespective of what this may mean insofar as the KGS/Poly-Cast contract is concerned, it has no relevance to the KGS/Cornet contract and, thus, is not a "contrary agreement" that affects the risk of loss as between KGS and Cornet.

- The result is that the risk of loss had passed to Cornet at the time of the fire.
- One of the "distractors" in the file is the \$500 per day "Penalty for delay" clause in the contract. The only possible relevance is that, because Cornet did not assert the right to assess the penalty, it is an indication that even Cornet believed that installation had been completed.

**2. Is KGS obligated to pay the shipping and handling charges billed by Poly-Cast?**

By way of overview, there are two levels at which the issue can be resolved in favor of KGS: (1) that under § 2207(2) the "additional terms" regarding shipping and handling charges contained in Poly-Cast's acknowledgment form "materially alter" the contract and are, therefore, not part of the contract; and (2) that under § 2207(3) the parties, by their conduct, "recognized the existence of a contract."

- The analysis under FCC § 2207(2):
  - The mere fact that the terms contained in KGS's purchase order forms and those in Poly-Cast's acknowledgment form are different in some respects does not under § 2207(1) prevent the formation of a contract, unless Poly-Cast's acceptance was made expressly conditional upon assent by KGS to the additional terms. There is nothing in the facts to suggest that Poly-Cast expressed a requirement for assent by KGS or that KGS gave any such assent. Thus, at the threshold, Poly-Cast's acknowledgment form was an acceptance and a contract was formed. The only question is what were the terms of the contract?
  - Under § 2207(2), it is possible that the shipping and handling term contained in Poly-Cast's acknowledgment could be deemed to be part of the contract: "Between merchants such terms become part of the contract unless \* \* \* (b) They materially alter it . . . ."
  - Applicants should resort to § 2104 which defines "merchant" and "between merchants" and to the facts inferable from the interview notes and the file documents to conclude that both KGS and Poly-Cast are merchants for purposes of applying § 2207(2).
  - The issue of whether the shipping and handling charges "materially alter" the contract requires some analysis. The reference to Official Comment 4 in the

*Album Graphics v. Craig Adhesives* case furnishes the statutory construct and turns mainly upon whether the additional term would result in "surprise or hardship" if it were made part of the contract. In the interview notes, Martin makes it clear that, if KGS had to pay the charges, it would convert a profitable contract into a loser or, at best, a break-even proposition. Moreover, the charges amount to 10% of the price of the KGS/Poly-Cast contract. Under the circumstances, it seems very arguable, if not clear, that the shipping and handling charges would work a "surprise or hardship" and would therefore be a material alteration of the contract. This is a conclusion that the applicants must reach because KGS did not comply with the only other basis for excluding the term, i.e., giving timely notification of objection under § 2207(2)(c).

- The *Album Graphics v. Craig Adhesive* case is analogous and the applicants should draw heavily upon it.
- Under this analysis, the "shipping and handling" term in Poly-Cast's form of acknowledgment is an "additional" or "different" term and therefore drops out of the contract. The acceptance is then on KGS's terms and KGS is not liable for the charges.
- The analysis under § 2207(3):
  - This subsection assumes that the parties have effectively performed their contract without even thinking about the conflicting terms. In that case, they have "recognized the existence of a contract," and the effect is that the contract is deemed to consist of the terms on which their writings do agree. The differences are ignored, and the "gaps" are filled by importing the relevant terms of the Code, if any. *Album Graphics v. Craig Adhesive* lays this out quite plainly, and the applicants should have no trouble understanding it.
  - In this case, both the order form and the acknowledgment form agree on delivery (shipment) to Cornet's job site. Thus, that term prevails.
  - The facts the applicants need in order to support this argument are found in the interview notes and the file documents: KGS ordered a particularly

described playground system, the basic price was agreed on by both parties, it was delivered, KGS accepted it, and the time for payment has not yet arrived.<sup>1</sup> The underlying agreement was fully performed. It is something of a conceptual problem that the performance related only to the first of three playground systems to be delivered under the contract, but the same argument that was made above regarding divisibility of the contract can be made here.

- The additional term that "falls out" of the contract is the provision in Poly-Cast's acknowledgment form that, "All shipments subject to charges for shipping and handling . . . . Shipments travel at the . . . cost of Buyer."
- There is no "gap filler" that supports Poly-Cast's claim for shipping and handling charges. Applicants who seize on the FOB section (2319) as a "gap filler" are simply wrong.
- Accordingly, Poly-Cast would have to bear the cost of shipping, and KGS would not be obligated.<sup>2</sup>

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<sup>1</sup> The conflicting terms in the purchase order and the acknowledgment form (30 days net vs. 60 days net and the late charges) are red herrings and are not important to the resolution of the problem.

<sup>2</sup> There is another possible argument that can be made in support of KGS's position. In Poly-Cast's acknowledgement form, the shipping and handling charge term appears as part of the printed form. Under the construction of contracts rubric that, where the written words added to a form conflict with the words printed on the form, the written words control, it could be argued that the "written-in" term controls and the printed term for shipping and handling charges is of no effect. Applicants who make this argument should receive credit.

## State v. Devine

### DRAFTERS' POINT SHEET

In this performance test, the applicant, an assistant district attorney, is asked to write a persuasive legal brief to a trial judge. A criminal defendant (David Devine) is being tried for possession of cocaine with intent to distribute. The defense concedes that Devine was in possession, but challenges the charge of intent to distribute, for which the penalty is quite heavy.

Two disputed evidentiary issues arise during the presentation of the prosecution's case. After a brief exchange on the record, the trial judge declares a recess and instructs the parties to brief the issues and says he will rule when the trial resumes two days hence.

A prosecution witness, Detective Ripka, who was the arresting officer, testified on direct regarding the circumstances of the current arrest and discovery of the cocaine. During cross-examination, Ripka conceded that the circumstances under which Devine was found to be in possession of the cocaine are as susceptible of an inference that he possessed it for personal consumption as they are of an inference that he possessed it with intent to distribute.

The prosecutor wants to elicit from Ripka on redirect examination testimony that two days before he arrested Devine he saw Devine selling cocaine from his car. The prosecutor also wants to call Officer Fusco to testify as to the circumstances of a prior conviction of Devine for possession of heroin with intent to distribute. Fusco was the arresting officer in that case. The defense attorney objects to both items of evidence, and the judge orders the briefing.

The instructional memorandum from the Assistant DA, an arrest report, and the partial trial transcript furnish the necessary factual materials. The Office Memorandum Re: Trial Briefs on Evidentiary Proffers informs the applicants on the structure and format of the brief. The criminal statute, Rules of Evidence and the Franklin Supreme Court decision in *Milford v. State* provide the legal authorities the applicants need to complete the task.

The following points were intended by the drafters to be covered in varying degrees of depth by the applicants and to affect the grading of the test item:

**1. Overview:** The applicants are expected to follow the instructions in the memo from the Assistant DA and the Office Memo:

- The trial brief they are asked to write is intended to be a persuasive piece. It is not considered responsive to the instruction if an applicant writes an objective memo in which he/she takes an on-the-one-hand/on-the-other-hand approach.

- They are told to anticipate the defense objections and to argue against them. The objections the judge wants briefed are defense objections under Rules 403 and 404, i.e., undue prejudice (Rule 403) and inadmissible character evidence (Rule 404(b)) as to both Ripka's testimony about having seen Devine selling cocaine two days before the current arrest and Fusco's testimony about the circumstances of the prior conviction. Although the judge has already overruled the defendant's objection as to timeliness of notice under Rule 404(b), it would not be out of line for applicants to expect it to be renewed by the defense, but they should dispose of it by merely pointing out that the judge has already overruled it.
- The Office Memo gives them the basic format for the brief and emphasizes the importance of the use of argumentative headings. Graders should be looking for well-crafted headings and for ensuing textual arguments that support and follow logically from the headings. Applicants are expected to incorporate helpful facts into their arguments.
- In better answers, the product will have the physical appearance of a brief one would expect to see filed by an attorney.
- There are parts of the file (i.e., some of the trial transcript and some of the Rules of Evidence) that are irrelevant or superfluous to the resolution of the problem. Part of what the graders should be looking for is the ability of the applicants to focus on the relevant and not clutter up their product with the irrelevant.

**2. The Brief:** Applicants might open with a short introductory statement, but it is not necessary. The drafters felt that there is enough to do in the allotted time without requiring a separate statement of facts, so the Office Memo tells the applicants specifically not to prepare one. Nevertheless, applicants are expected to use the facts in the bodies of their arguments.

The brief should contain at least two major headings, one dealing with each of the two disputed evidentiary points. Although the arguments on the two points will necessarily involve some repetition, there are factual differences that should require different analyses. For example, Ripka's observations of two days before the current arrest were reliable and very proximate in time to the crime with which Devine was charged. A problem is that the packaging of the cocaine on the first occasion ("a small plastic bag, about 1" x 1" in size") was different from that which was found at the time of his arrest (a "sandwich-size zip-lock bag" containing 13.1 grams).

The incident as to which Fusco's testimony is sought, on the other hand, was 18 months earlier and the issue whether it occurred proximately enough is more problematic. Also, the substance with which Devine was caught at that time was different (heroin) and was packaged in 1" x 1" glassine baggies. Applicants are expected to deal with the differences.

The headings might be as follows:

- Detective Ripka's Firsthand Testimony About Having Seen The Defendant Selling A Controlled Substance Two Days Before The Current Arrest Is Highly Relevant To The Issue of Defendant's Possession With Intent To Distribute And Is Not Rendered Inadmissible By Rules Of Evidence, Rules 403 or 404(b).
- Officer Fusco's Firsthand Testimony Regarding The Defendant's Recent Prior Arrest And Conviction For Possession Of A Controlled Substance With Intent To Distribute Is Evidence That Is Highly Relevant To The Issue Of Defendant's Intent In The Present Case And Is Not Rendered Inadmissible By Rules Of Evidence, Rules 403 or 404(b).

The task for the applicants is really to respond to the objections they expect the defense to make. There is very little to be said about the admissibility of the Ripka and Fusco testimony absent an objection. The issue is whether the two items of evidence are relevant to issues other than character and propensity. They clearly are because they tend to establish a fact in issue, i.e., whether Devine intended to distribute the cocaine he had in his possession. The difficult part for the applicants will be to write their arguments in a way that avoids the implication that they are offering the evidence to prove Devine's bad character or "propensity" to be a drug dealer. They must focus on the intent issue and argue that they are only trying to use the evidence to show conduct that tends to establish Devine's intent in the present case.

The defense's objections under Rules 403 and 404(b) that the proffered testimony is inadmissible character evidence and that its admission would unduly prejudice the defendant are themselves intertwined and can be handled by the applicants under a single heading.

- The "Character" and "Propensity" Aspect of the Objection: Under Rule 404(b), the objection would be that the prosecution only wants to introduce this additional evidence to try to mislead the jury into thinking that, because Devine was dealing drugs on two prior occasions, he must necessarily have been doing so on this occasion. That is exactly what Rule 404(b) is designed to prevent and that is also

why it is prejudicial under Rule 403.

The prosecution's response must rely principally on the holding and dicta of the Franklin Supreme Court in *Milford v. State*:

- Rule 404(b) provides that evidence of other crimes, while not admissible to prove character, is "admissible for other purposes, such as proof of ... intent ...."
- Devine's intent is directly in issue in this case.
- The Court in *Milford* makes it clear that evidence of other bad acts is admissible if, balancing its relevance against unfair prejudice, it is probative of a material contested issue. The prosecution has the burden of proof on these issues.
- The Court says that the prosecution must prove the defendant's involvement in the other crime by clear and convincing evidence. Here, Ripka's testimony about what he saw two days before the current arrest and Fusco's testimony as to the circumstances of the arrest and conviction are probably clear and convincing enough. The applicants can extrapolate from the instructional memo, the transcript, and the arrest report what it is that Ripka and Fusco will be able to say and construct a good argument. Better applicants might even observe that, in *Milford*, the prior bad act that was admitted in evidence had to do with Milford's acquiescence in a drug sale while he was merely present. In this case, the evidence is of more direct prior bad acts: the selling of drugs by Devine himself.
- The Court points out that intent is a matter of the defendant's state of mind, that proof of state of mind must necessarily depend on inferences to be drawn from such things as conduct, and that the conduct needn't be concurrent as long as it is reasonably "linked in time and circumstances." Applicants should argue from these dicta that the prosecutor's only purpose for offering Ripka's and Fusco's testimony is to show that Devine's conduct on those prior occasions bears remarkable factual similarities to the present case — i.e., both prior occurrences took place in Frog Hollow, in Devine's car, with the drugs in his glove compartment, the presence of large amounts of cash, etc.

- Applicants will also have to deal with and harmonize the factual differences, e.g.:
  - The Ripka incident is very proximate and therefore easily "linked in time."
  - The Fusco incident is less so, but rendered more proximate by the fact that, although the Fusco arrest was 18 months ago, Devine had only been out of jail for 6 months at the time of the current arrest.
  - On the two prior occasions, the drugs dealt by Devine were packaged for distribution, i.e., in small, individual packages. In the current incident, the drug was in a single, larger zip-lock bag, not readily saleable to individual users. To reconcile these differences, applicants should draw upon Ripka's testimony regarding the probability that Devine just hadn't yet gotten around to cutting it for distribution.
  - In the Fusco incident, the drug was heroin, whereas, in the Ripka incident, it was cocaine. To deal with this difference, the applicants should point out that both were "controlled substances," which is what the charged statutory violation deals with.
- The "Danger Of Undue Prejudice" And "Needless Presentation Of Cumulative Evidence" Aspect Of The Objection: Under Rule 403, the defense objection would be that, although the evidence might be marginally relevant, its admission creates "undue prejudice" and, assuming that the proffered Ripka evidence is admitted, the admission of the additional Fusco testimony would be needlessly cumulative and wasteful of time.
  - As to the "prejudicial" side of the objection, applicants should argue the compelling relevance coupled with the necessity for the evidence. It is not "prejudicial" in the sense that it is remote or tangential, i.e., under the circumstances, it is evidence of conduct and the strongest evidence available to show intent.
  - With limiting instructions, the jury can be made to understand the narrow purpose for which the evidence is to be considered.
  - As to the "cumulative" side, it is not duplicative, in the sense that it is two

accounts of the same incident, and it is very clear that the testimony will take only a minimal amount of time to present.

- In light of the ambiguity injected on the issue of Devine's intent during cross examination of Ripka, this evidence of Devine's conduct becomes all the more necessary as evidence of his intent, and, as here, where it is unquestionably related recent conduct, its probative value is plainly outweighed by whatever prejudice it may have on defendant's case.
- Other Points: Rules of Evidence 608 and 609 are inapplicable to accomplishment of the task in this test item. The only possible application of Rule 609 is that an applicant may argue that the 10-year limitation period for use of a prior conviction to impeach a witness could, by way of analogy, set the outer limit for the admissibility of evidence of prior bad acts under Rule 404(b), i.e., the passage of 18 months in Devine's case comes nowhere near to the 10-year period used as the measuring stick in another section of the Rules. Other than that, applicants who try to use Rules 608 and 609 are probably confused because they erroneously believe that the character and credibility of witnesses is in issue in this case.
- Some applicants may try to raise hearsay and best evidence objections as to Fusco's testimony -- i.e., that the arrest report in the file is hearsay (albeit possibly subject to some exceptions) and that the best evidence of the prior conviction is the judgment of conviction itself. Such applicants demonstrate a lack of understanding of the facts, because it is not the written report of the conviction that the prosecutor wants to introduce, but rather it is Fusco's firsthand testimony of the circumstances surrounding the prior arrest and conviction that are probative of Devine's intent in the present case.
- Some applicants may want to re-argue the defense objection regarding timeliness of the notice required under Rule 404(b). It's not unreasonable to assume that the defense might renew the objection in its brief, but applicants should merely note the fact that the court has already ruled and move on.