

Multistate Performance Test

February 2020

MPTs and Drafters’

Point Sheets

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February 2020

MPT-1 File

Downey v. Achilles Medical Device Company

BETTS & FLORES
Attorneys at Law
300 Stanton St.
Franklin City, Franklin 33705

MEMORANDUM

To: Examinee
From: Hiram Betts
Date: February 25, 2020
Re: *Downey v. Achilles Medical Device Company*

Our client, Achilles Medical Device Company (AMDC), is the defendant in a case in which the plaintiffs allege that AMDC manufactured and sold defective walkers during the years 2010–2015. The plaintiffs are attempting to bring the case as a class action; we intend to oppose the motion for class certification.

This case presents a professional responsibility issue regarding contacts with represented persons. Despite the fact that we represent AMDC, the plaintiffs’ lawyers are seeking to speak with one former AMDC employee and four current AMDC employees regarding their knowledge of the manufacture and sale of the allegedly defective walkers. An investigator for the plaintiffs’ lawyers has contacted these individuals, without first obtaining our consent to speak with them.

Likewise, despite the fact that opposing counsel represents the named plaintiffs, we want to talk to people, including the named plaintiffs, who purchased and used the walkers in question. Doing so would help us prepare our defense.

We need to know whether the Franklin Rules of Professional Conduct (FRPC) permit these communications. (The FRPC are identical to the ABA Model Rules of Professional Conduct.) Please draft a memorandum to me analyzing two issues:

(1) Whether the plaintiffs’ lawyers or their representatives may communicate, without our consent, with the current and former AMDC employees regarding their knowledge about the manufacture and/or sale of the walkers. Discuss each individual separately and explain your conclusions.

(2) Whether we, as AMDC’s attorneys, or our representatives may communicate with any named plaintiffs or potential members of the class without the consent of opposing counsel.

Do not include a separate statement of facts, but be sure to incorporate the relevant facts into your analysis, discuss the applicable legal authorities, and explain how the facts and law support your conclusions.

BETTS & FLORES
Attorneys at Law

FILE MEMORANDUM

From: Hiram Betts
Date: January 23, 2020
Re: *Downey v. Achilles Medical Device Company*

I just received a call from Ron Gilson, president of Achilles Medical Device Company (AMDC). We represent AMDC in a class-action lawsuit and are in the early stages of litigation. The plaintiffs allege that AMDC negligently manufactured and then sold defective walkers. The plaintiffs claim that, due to manufacturing defects, the walkers collapsed when the plaintiffs tried to use them and that the plaintiffs were injured as a result. Five named plaintiffs, led by Marie Downey, are attempting to bring a class action “on behalf of themselves and all other persons who bought and used AMDC walkers (model 2852) manufactured in 2010 and marketed and sold between 2010 and 2015 and who were injured when attempting to use the walkers.” We intend to oppose the plaintiffs’ motion for class certification. We would like to contact as many potential members of the class as possible before class certification.

Gilson told me that one former employee and four current employees have been approached by an investigator employed by the plaintiffs’ law firm. The investigator has attempted to speak directly with the former employee and current employees without our consent. Gilson is very concerned about these contacts and wants to know if the plaintiffs’ lawyers are doing anything wrong.

Gilson provided a list of the former and current AMDC employees. Marilyn DePew, an associate with our firm, has spoken with each of these individuals about their interactions with the plaintiffs’ investigator.

Note that Gilson does not believe that there was a problem in the design or manufacture of the walkers. He would like us to contact as many purchasers as possible to find out about their experiences with the AMDC walkers.

BETTS & FLORES
Attorneys at Law

FILE MEMORANDUM

From: Marilyn DePew
Date: January 25, 2020
Re: *Downey v. Achilles Medical Device Company*: Interviews

Ashley Parks, an investigator employed by the law firm that represents the plaintiffs in *Downey v. Achilles Medical Device Company*, contacted one former employee and four current employees of AMDC. I have interviewed those former and current employees and, with their permission, recorded the conversations. What follows are the transcripts of the relevant portions of those interviews.

INTERVIEW WITH RON ADAMS

Q: Mr. Adams, are you a current employee or agent of Achilles Medical Device Company, commonly known as AMDC?

A: No.

Q: Have you ever been an employee of AMDC?

A: Yes, I worked for AMDC from 2003 to 2017. I was director of quality control during that time. Now I am happily retired.

Q: When you were at AMDC, what were your responsibilities as director of quality control?

A: I was in charge of the quality control department. Employees in my department, whom I supervised, inspected every product that left the manufacturing plant and was made available for sale. I am very proud of the work we did.

Q: So the department for which you were responsible would have inspected the walkers that were manufactured in 2010 and sold between 2010 and 2015?

A: Yes.

Q: Do you have any specific knowledge about the walkers that are alleged to have been defective?

A: No, not specifically. I do know that every piece of equipment that left the factory was inspected. If it did not meet company standards, it was rejected. I would like to know what the purchasers are complaining about.

- Q:** What do you mean by “rejected”?
- A:** The item was not released for sale and either was put in the trash or was refurbished and then inspected again to make sure it met company standards.
- Q:** Do you have any knowledge of what is happening in the quality control department at AMDC now?
- A:** No, not really.
- Q:** It is my understanding that you were contacted about the class-action litigation regarding the walkers. By whom were you contacted?
- A:** I received a phone message from Ashley Parks, who said she was an investigator employed by the law firm that represents the plaintiffs in the case of *Downey v. AMDC*. She said she wanted to talk to me about the quality inspection of the walkers.
- Q:** How did you respond to this request?
- A:** I haven’t called her back yet. Quite honestly, I am happy to talk with her. I didn’t do anything wrong.

INTERVIEW WITH GUS BARTHOLOMEW

- Q:** Mr. Bartholomew, how long have you been employed by AMDC?
- A:** I have worked there continuously since 2003.
- Q:** Have you had the same job during all that time?
- A:** Yes, for all that time, I have been employed as the executive assistant to the president of the company. We have had several presidents during my tenure, but I’ve stayed in my position.
- Q:** What are your responsibilities as executive assistant to the president of AMDC?
- A:** I am basically the president’s administrative assistant. I do word processing, answer the phone, organize the president’s schedule, get the president organized, and anything else the president wants.
- Q:** Do you attend meetings of the board of directors of AMDC?
- A:** Yes, I sit in on the meetings and take the meeting notes. I don’t say anything—I just record exactly what is said during the meeting and then provide my notes to the board secretary and president for approval.
- Q:** Have you taken notes on discussions between the lawyers for AMDC and the board?

- A: Yes.
- Q: Have any of those discussions involved AMDC's response to the *Downey* litigation?
- A: Yes.
- Q: Do you have a vote on the matters before the board of directors?
- A: No, I do not.
- Q: Do you see or hear communications between the president of AMDC and counsel for AMDC?
- A: Sometimes. I type and proofread all written letters sent by the president to the company's lawyers. I also open and review any incoming mail from the lawyers. I have access to the president's emails and frequently review them. I do not listen in on my boss's—the president's—phone conversations.
- Q: Did anyone contact you about the litigation involving the walkers that AMDC manufactured in 2010 and sold between 2010 and 2015? These are the walkers at issue in the class-action lawsuit *Downey v. AMDC*.
- A: I received a phone message from an Ashley Parks. She said she was an investigator who is employed by the plaintiffs' lawyers in the *Downey* case. She said she wanted to talk to me about the case. I haven't returned the call yet.

INTERVIEW WITH AGNES CORLEW

- Q: Ms. Corlew, how long have you been employed by AMDC and what is your position with the company?
- A: I have been employed since January of 2017, and I am head of the public relations department.
- Q: What are your responsibilities as AMDC's head of public relations?
- A: I am responsible for the team that responds to all media requests, writes and publishes all written materials about the company, and answers public inquiries about the company. I am, in essence, the voice of the company. I don't make the company's policies, but I frequently communicate the official position of the company to the public.
- Q: Is it your job to answer questions about pending litigation?
- A: Yes, I answer questions from the press and the public about pending litigation.
- Q: Do you play any role in decisions about the litigation?

- A: No. I present only the information that has been provided to me and has been approved by the president's office.
- Q: Have you ever met with counsel for AMDC regarding the *Downey* case?
- A: Absolutely not.
- Q: Has anyone associated with the plaintiffs' lawyers in the *Downey* case tried to contact you?
- A: My assistant told me that I had a call from Ashley Parks, an investigator who works for the plaintiffs' law firm. I haven't returned the call.

INTERVIEW WITH ELISE DUNHAM

- Q: Ms. Dunham, what is your job with AMDC and how long have you worked there?
- A: I am the plant manager at AMDC. I have been employed in that position continuously since March of 2009.
- Q: What are your responsibilities in that position?
- A: I oversee all the manufacturing at the plant. I also make sure that every product meets our quality control standards.
- Q: So the director of quality control reports to you?
- A: Yes, as does the director of manufacturing.
- Q: So you were manager of the plant at the time AMDC manufactured the walkers, model 2852, that are alleged to have been defective in the *Downey* case.
- A: Yes, although I honestly don't remember anything about those particular walkers.
- Q: Have you been contacted by any of the plaintiffs' counsel or their representatives?
- A: I received a note from Ashley Parks, an investigator with the plaintiffs' law firm, saying that she wanted to speak with me. Since then, I've hired a lawyer, and I called Ms. Parks to give her my lawyer's name and contact information.

INTERVIEW WITH PENNY ELLIS

- Q: Ms. Ellis, I understand that you are employed by AMDC and have been employed by the company since 2008. But I also understand that your responsibilities have changed over that time period. Could you explain the different responsibilities you have had since you began working at AMDC?

A: Sure. From 2008 to 2016, I was director of marketing for AMDC. Essentially, I was responsible for all sales of all products. Of course, I had a staff that worked for me. In 2016, I changed positions and am now chief financial officer of the company.

Q: So, from 2010 to 2015, did your responsibilities include sales of the walkers that are at issue in the *Downey* case?

A: Yes, definitely.

Q: Do you remember anything specifically about the walkers?

A: No, we had a lot of products that were sold while I was head of marketing.

Q: Currently, do you have any responsibility for sales, marketing, or anything else regarding walkers or any other equipment?

A: No, I manage the company's financial actions, including cash flow and budgeting, and help shape the company policy.

Q: As chief financial officer, are you a member of the board of directors of AMDC?

A: Yes, I serve as treasurer.

Q: Does the board have any involvement in the lawsuit?

A: The lawyers from your firm, Betts & Flores, consult with the board about the litigation and seek input from the board. I really don't know anything about law, so I mainly listen when they discuss the litigation. I would be involved in the financial aspect only if there were a settlement or if there were a judgment against the company.

Q: Are you a voting member of the board of directors of AMDC?

A: Yes. I have a vote on every issue that comes before the board.

Q: Does that include voting on issues related to the *Downey* litigation?

A: Yes.

Q: Have you been contacted by anyone associated with the plaintiffs' law firm in the *Downey* matter?

A: Yes, I was called by a woman named Ashley Parks. She told me that she was an investigator working for the plaintiffs' law firm and that she wanted to speak with me about the walkers. I told her I would call her back. What should I do?

February 2020

MPT-1 Library

Downey v. Achilles Medical Device Company

Excerpts from the Franklin Rules of Professional Conduct

Rule 1.0(f)

“Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

...

Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment [1]: This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

...

Comment [3]: The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

...

Comment [7]: In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization’s lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

...

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

. . .

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

FRANKLIN BOARD OF PROFESSIONAL CONDUCT
Ethics Opinion 2016-12

We have been asked to give a formal ethics opinion on the interpretation of Franklin Rule of Professional Conduct (FRPC) 4.2. Specifically, we have been asked to provide some guidance as to the interpretation of Comment [7] to the Rule.

Franklin Rule of Professional Conduct 4.2 provides: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter” without the prior consent of the represented person’s counsel. Rule 4.2 applies equally to organizations and to individuals. Comment [7] to Rule 4.2 states that such unauthorized communications with agents or employees of an organization are prohibited in three situations: (1) where the agent or employee of the organization “supervises, directs or regularly consults with the organization’s lawyer concerning the matter”; (2) where the agent or employee of the organization has “authority to obligate the organization with respect to the matter”; and (3) where the agent’s or employee’s “act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.” Importantly, Rule 4.2 prohibits such unauthorized communication only with *current* agents and employees of the organization. Counsel may communicate freely with former agents and employees of an organization without the consent of the organization’s lawyer regardless of the role the agent or employee may have played in the matter.

The first prong to Comment [7] prohibits unauthorized communication (i.e., communication without prior consent of the organization’s lawyer) with a person in the organization who supervises, directs, or regularly consults with the organization’s lawyer concerning the matter. This generally includes the people who are giving and receiving information from the lawyer and directing the lawyer’s actions in the matter, as well as those who have power to compromise or settle the matter in consultation with the lawyer. In a corporation, persons under this prong would generally include the “control group”—that is, the board of directors and top management officials. However, the analysis under this prong is functional. One must determine whether particular members of the board and other top officials actually do consult with or direct the actions of counsel concerning the matter.

The second prong prohibits unauthorized communication with a person in the organization who has “authority to obligate the organization with respect to the matter.” This includes only

those agents or employees who have authority to enter into binding contractual settlements on behalf of the organization. An agent's authority may be actual or apparent. An agent can bind a principal when given actual authority to do so, either through express words or through implication. In addition, an agent may have apparent authority if it reasonably appears to an outsider that the agent has been given authority to bind the principal. Only those agents or employees who have either actual or apparent authority to settle litigation on behalf of the organization are covered under this prong. Obviously, this prong overlaps with the first prong, as it may include members of the board of directors as well as those agents and employees who have been given explicit authority by the organization's rules or bylaws to settle the matter on behalf of the organization. But this prong, unlike the first, also covers those who have the apparent authority to settle the matter as well as those with actual authority.

The third prong of Comment [7] prohibits unauthorized communication with an agent or employee of the organization whose "act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Whether an agent's or employee's conduct may be so imputed must be determined with reference to the specific facts and circumstances of the case; it is not simply a fanciful construct of potential liability. The focus is on the conduct of the agent or employee and whether, based on that conduct, a fair-minded person could foresee imputation of liability. Communication is prohibited only when the agent's or employee's act or omission is obviously relevant to a determination of corporate liability. In other words, the agent or employee has acted in the matter on behalf of the organization and, save for the separate legal character of the organizational form, would be directly named as a party in a lawsuit involving the matter. By focusing upon acts or omissions, this prong precludes unauthorized communications only with actors, not mere witnesses. If it is not reasonably likely that the agent or employee is a central actor for liability purposes, nothing in FRPC 4.2 precludes unauthorized contact with the agent or employee. Only those agents or employees whose actions or omissions are the subject of the litigation—or those individuals who supervised or approved the actions or omissions of those persons—are covered by the Rule.

Importantly, even if Rule 4.2 does not prohibit counsel from speaking with an employee or former employee of an organization, counsel must be careful not to speak with that agent or employee about any information that might be protected by attorney-client privilege. Attorney-client privilege protects any communications between counsel and client for the purpose of

obtaining legal advice. For purposes of this ethics opinion, the client would be the organization. If a lawyer seeking to speak with an employee or former employee has reason to believe that the employee or former employee is privy to communications protected by the attorney-client privilege, counsel must make every reasonable effort not to breach that privilege. Indeed, counsel is prohibited from asking directly or indirectly about any of those communications.

Mahoney et al. v. Tomco Manufacturing
Franklin Court of Appeal (2010)

Robert Mahoney and 12 other named plaintiffs filed a lawsuit on behalf of themselves and all other persons who purchased allegedly defective lawn mowers manufactured by Tomco Manufacturing. The motion for class certification has been granted, and notice has been given to all persons who purchased the allegedly defective lawn mowers during the applicable time period. The plaintiffs filed a motion seeking an order from the trial court preventing Tomco's lawyers or their representatives from speaking with any current or potential members of the class without the permission of the plaintiffs' counsel. At the time the plaintiffs filed this motion, the potential class members had been given six months to let the court know if they wished to be excluded from the class (typically referred to as "opting out").

Although courts are not bound by the Franklin Rules of Professional Conduct in matters other than attorney disciplinary proceedings, the trial court relied on FRPC 4.2 in making its determination. Rule 4.2 prohibits a lawyer from communicating "about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." This prohibition applies equally to agents of the lawyer or persons acting at the lawyer's behest. *See* FRPC 5.3. Based on Rule 4.2, the trial court issued an order prohibiting Tomco's counsel, or their agents or representatives, from communicating with any persons who purchased a Tomco lawn mower (model 350) during the period 2005–2007; that is, all persons who could have been members of the class.

While we find no error in the trial court's reliance on Rule 4.2, we do find the order to be overly broad. Rule 4.2 prohibits communication only with persons the lawyer "knows" to be represented by counsel. "Knowledge" is a high standard. There must be more than "reason to believe" or "assumption." There must be actual knowledge. Very clearly, the named members of the class are known by Tomco's lawyers to be represented by plaintiffs' counsel. Each of those named class members has an attorney-client relationship with the lawyers representing the class. Tomco's lawyers know about that relationship. However, the trial court's order is overly broad because it also prohibits Tomco's lawyers from communicating with *potential* members of the class. Until the end of the "opt out" period, only the named plaintiffs are considered to be represented by the class counsel.

There is no way that Tomco's lawyers could know whether the potential class members were represented by counsel. Indeed, those potential class members still had six months to decide whether to opt out of the class. To Tomco's lawyers' knowledge, these potential class members were not represented by a lawyer, nor had they entered into a lawyer-client relationship with plaintiffs' counsel.

We therefore hold that the trial court's order is modified to prohibit Tomco's counsel, or their agents or representatives, from engaging in unauthorized communications only with the named plaintiffs in the lawsuit. Communication with potential members of the class, without the permission of the class counsel, is not prohibited by this order. Once the time period for opting out is completed, Rule 4.2 would prohibit Tomco's lawyers from communicating, without opposing counsel's consent, with any class member who has not chosen to opt out of the litigation.

Reversed in part and modified.

February 2020

MPT-1

Drafters' Point Sheet

Downey v. Achilles Medical Device Company

The MPT point sheet addresses the factual and legal points encompassed within this MPT. The point sheet presents the expected issues that might be addressed by an examinee in a thorough answer to the problem, but it should not be construed as a model answer.

Downey v. Achilles Medical Device Company

DRAFTERS' POINT SHEET

The examinee is an associate in the law firm of Betts & Flores. The firm represents Achilles Medical Device Company (AMDC) in a products liability action alleging that AMDC negligently manufactured and sold defective walkers. The plaintiffs allege that they were injured while using the walkers when the defective walkers collapsed. To date, there are five named plaintiffs; the trial court has yet to rule on the plaintiffs' motion for class certification.

The examinee's task is to prepare an objective memorandum that addresses two issues of professional responsibility. The first issue arises from contacts made by Ashley Parks, an investigator who is employed by the law firm representing the plaintiffs. Parks attempted to speak with one former AMDC employee and four current AMDC employees. Parks wants to question these individuals about the facts surrounding the *Downey* litigation; she has not asked for permission from AMDC's counsel to do so. The examinee is directed to address whether the plaintiffs' lawyers, or any of their agents or employees, can speak to AMDC's current and former employees without the advance permission or presence of Betts & Flores. Second, the examinee is to analyze whether attorneys at Betts & Flores can speak to current or prospective members of the plaintiffs' proposed class without the prior permission of plaintiffs' counsel.

The File contains the instructional memorandum from the supervising partner, a file memorandum describing the client's concerns, and a second file memorandum that summarizes the interviews of the one former and four current AMDC employees. The Library contains Rules 1.0(f), 4.2, and 5.3(b) and (c) of the Franklin Rules of Professional Conduct; Comments [1], [3], and [7] to Rule 4.2; an ethics opinion from the Franklin Board of Professional Conduct; and one appellate opinion, *Mahoney v. Tomco Manufacturing* (Fr. Ct. App. 2010). The Franklin Rules of Professional Conduct are identical to the ABA Model Rules of Professional Conduct.

The following discussion covers all the points the drafters intended to raise in the problem.

I. OVERVIEW

A. FACTS

Marie Downey and four other named plaintiffs are suing AMDC, alleging that it manufactured and sold defective walkers. The plaintiffs allege that they purchased AMDC's walkers, and that the

walkers collapsed when the plaintiffs attempted to use them and each of the plaintiffs suffered injuries as a result.

The case is in the early stages of litigation. The named plaintiffs have filed a motion for class certification and are seeking to represent a class including “themselves and all other persons who bought and used AMDC walkers (model 2852) manufactured in 2010 and marketed and sold between 2010 and 2015 and who were injured when attempting to use the walkers.” Ron Gilson, the president of AMDC, has indicated that the company will oppose class certification.

Gilson is concerned because one former employee and four current employees have been contacted by Ashley Parks, an investigator employed by the plaintiffs’ law firm. Parks is attempting to speak with these individuals but has not secured the permission of the supervising partner (Betts) or any other lawyer representing AMDC.

Gilson does not believe that there was a problem in the design or manufacture of the walkers. He would like the law firm to contact as many purchasers as possible to find out about their experiences with AMDC walkers.

Marilyn DePew, an associate with Betts & Flores, interviewed the individuals who have been contacted by Parks. These interviews are summarized below:

(a) Ron Adams, AMDC’s director of quality control from 2003 to 2017, is now retired. Adams supervised the employees in the quality control department, who inspected every product that left the manufacturing plant and was made available for sale; employees in that department would have inspected the walkers at issue. While Adams has no recollection about the model 2852 walkers, he says that every piece of equipment that left the factory was inspected. Any product that did not meet company standards was rejected. Rejected items were either put in the trash or refurbished and then inspected again to ensure that they met company standards. Adams retired in 2017 and has no knowledge of AMDC since his retirement. He received a phone message from Parks, plaintiffs’ investigator. Adams would be happy to speak to Parks but has not returned her call. He states that he “didn’t do anything wrong” and “would like to know what the purchasers are complaining about.”

(b) Gus Bartholomew has been the executive assistant to the president of AMDC since 2003. During his tenure, Bartholomew has worked for several presidents. He does word processing,

answers the phone, maintains the president's schedule, gets the president organized, and does anything else the president requests. Bartholomew attends AMDC board meetings and takes detailed notes, but he does not participate or vote in those meetings. His notes are later provided to the board secretary and president for approval. Bartholomew has taken notes on discussions between the lawyers for AMDC and the board, including discussions about AMDC's response to the *Downey* litigation. He is also privy to written communications between the president and counsel for AMDC. He types and proofreads all letters sent by the president to the company's lawyers, and he has access to the president's email, which he frequently reviews. He does not listen to the president's phone calls. Bartholomew received a phone message from Parks but has not yet returned the call.

(c) Agnes Corlew has been the head of AMDC's public relations department since January 2017. She is responsible for the team that responds to all media requests, writes and publishes all written materials about the company, and answers questions about the company from the public. She describes herself as "the voice of the company." She does not make company policy but frequently communicates the company's official positions to the public. She is also responsible for answering all questions from the press and the public about pending litigation. She plays no role in making any decisions about the *Downey* litigation and has never met with AMDC's counsel about it. Corlew received a phone message from Parks. She has not returned the call.

(d) Elise Dunham has been the plant manager for AMDC since March 2009. She oversees all manufacturing and quality control; the directors of quality control and manufacturing report to her. Dunham was manager of the plant when the walkers at issue were manufactured, although she doesn't remember anything about that particular model. She received a note that Parks wished to speak with her. Since then, Dunham has hired a lawyer and has given the lawyer's contact information to Parks.

(e) Penny Ellis has been AMDC's chief financial officer since 2016. From 2008 to 2016, however, she was director of marketing, and in that role she was responsible for all sales of all products. She had a staff that worked for her. Although she was responsible for the sale of the model 2852 walkers, she doesn't remember anything specifically about them. Currently, as AMDC's chief financial officer, she has no responsibility for sales, marketing, or anything else regarding walkers or other products. She works on the company books and helps develop company policy. She is

also a voting member of the board of directors of AMDC, serving as treasurer. The board as a whole consults with Betts & Flores about pending litigation. Ellis doesn't know anything about law, so she mainly just listens when the board discusses legal matters. She does, however, vote on issues related to the *Downey* litigation and would be involved in the financial aspects of litigation if there were a settlement or a judgment against AMDC. Ellis received a call from Parks asking to speak about the walkers. Ellis told Parks that she would call her back.

B. The Law

The Franklin Rules of Professional Conduct at issue are identical to the ABA Model Rules of Professional Conduct.

Rule 1.0(f) of the Franklin Rules of Professional Conduct defines “knowingly,” “known,” or “knows” as denoting “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.”

Rule 4.2 of the Franklin Rules of Professional Conduct states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment [1] to Rule 4.2 provides that the Rule protects a person who is represented by a lawyer in a matter “against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.”

Comment [3] to Rule 4.2 provides that the Rule applies even though the represented person “initiates or consents to the communication.” If, after commencing communication, a lawyer learns that the person is “one with whom communication is not permitted by this Rule,” the lawyer must “immediately terminate communication” with that person.

Comment [7] to Rule 4.2 provides guidance when the represented party is an organization. In such situations, the Rule prohibits communications with a constituent of the organization when (1) the constituent “supervises, directs or regularly consults with the organization’s lawyer concerning the

matter,” (2) the constituent “has authority to obligate the organization with respect to the matter,” or (3) the constituent’s “act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.”

- However, under Comment [7], consent of the organization’s lawyer is *not* required prior to communication with a *former* constituent of the organization. Note that if a constituent is represented in the matter by his or her own counsel, consent of that personal counsel is sufficient prior to communication with the constituent.

Rule 5.3(b) provides that a lawyer having supervisory authority over a nonlawyer “shall make reasonable efforts to ensure that” the nonlawyer’s “conduct is compatible with the professional obligations of the lawyer.” Rule 5.3(c) states that a lawyer who has supervisory authority over a nonlawyer is responsible for the conduct of the nonlawyer that violates the Rules of Professional Conduct when “the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved” or “the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

Ethics Opinion 2016-12 (Fr. Bd. Prof. Conduct) provides some guidance as to the application of the three categories of constituents identified in Comment [7] to Rule 4.2.

The first prong of Comment [7] prohibits unauthorized communication with an agent or employee of an organization who regularly consults with the organization’s lawyer and directs the lawyer’s actions in a matter or who has the power to compromise or settle the matter in consultation with the lawyer. The board of directors of the organization generally falls under this prong, but the analysis under this prong is functional: one must determine whether a particular member of the board actually does consult with or direct the actions of counsel concerning the matter.

The second prong prohibits unauthorized communication with an agent or employee who has the authority, whether actual or apparent, to enter into binding contractual settlements with regard to the matter. Actual authority may be given either through express words or through implication. An agent may have apparent authority if it reasonably appears to an outsider that the agent has been given authority to bind the principal. This prong overlaps with the first prong, as it includes the

board of directors as well as those employees and agents who have been given explicit authority by the organization's rules or bylaws to settle the matter on behalf of the organization.

The third prong prohibits unauthorized communications with an agent or employee of an organization whose "act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Whether an agent's or employee's conduct may be so imputed must be determined with reference to the specific facts and circumstances of the case. The agent or employee must have acted or failed to act in a way that is obviously relevant to a determination of corporate liability in the matter that is the subject of the litigation. For the third prong of Comment [7] to apply, the agent or employee must be an actor, not merely a witness.

Comment [7] does not prohibit communication with a former agent or employee of an organization, regardless of that individual's role in the organization.

Finally, even if a lawyer is not prohibited from communicating with an agent or employee of an organization under Comment [7], the lawyer may not speak with that agent or employee about information protected by the attorney-client privilege. The privilege protects any communications made between a lawyer and a client for the purpose of obtaining legal advice. For purposes of the ethics opinion, the client is the organization. If the attorney seeking to speak with an employee or former employee has reason to believe that the individual is privy to privileged communications, the attorney must make every reasonable effort not to breach that privilege.

Mahoney v. Tomco Manufacturing (Fr. Ct. App. 2010) discusses the application of Rule 4.2 to communications between lawyers representing a defendant in a pending class action and current and potential members of the class. In *Mahoney*, the plaintiff, along with 12 other named plaintiffs, sued on behalf of themselves and all other persons who had purchased allegedly defective lawn mowers manufactured by Tomco. The plaintiffs sought a protective order to prevent Tomco's attorneys from communicating with members of the class, as well as with any potential members of the class, without first obtaining the permission of plaintiffs' counsel.

- At the time the motion was filed, the class (all persons who had purchased a Tomco lawn mower (model 350) between 2005 and 2007) had been certified. Potential class members had been given six months to let the court know if they wished to be excluded from the class (typically referred to as "opting out").

Relying on Rule 4.2, the trial court granted the plaintiffs' motion and prohibited Tomco's lawyers, or their agents or representatives, from communicating with any potential class members.

The Franklin Court of Appeal began by stating that, while courts are not bound by the Franklin Rules of Professional Conduct except in attorney disciplinary proceedings, the court found no error in the trial court's reliance on the Rule. Nevertheless, the court concluded that the trial court's order was overly broad. The court explained that Rule 4.2 prohibits communication only with persons the lawyer knows to be represented by counsel and that "knows" denotes *actual knowledge*. Applying this standard, the court determined that Tomco's counsel knew that named members of the class were represented by plaintiffs' counsel, but Tomco's lawyers had no reason to know whether *potential* members of the class were represented by counsel. To Tomco's lawyers' knowledge, potential class members had not retained counsel, nor had they entered into a lawyer-client relationship with lawyers for the class. Until the end of the "opt out" period, only the named plaintiffs were known to be represented by the class counsel.

Accordingly, the court modified the lower court's order to prohibit Tomco's counsel, or their agents or representatives, from engaging in unauthorized communications only with the named plaintiffs in the lawsuit.

II. ANALYSIS

Examinees should analyze each of the employees and the former employee with reference to Rule 4.2, Comment [7], and Ethics Opinion 2016-12 to determine whether Ashley Parks may communicate with the individual without the prior consent of Betts & Flores, AMDC's lawyers. They should conclude that the prohibitions on unauthorized communications under Rule 4.2 apply to the plaintiffs' lawyers and, when read in connection with Rule 5.3(b) and (c), to the lawyers' agents and employees.

Ron Adams: Because Ron Adams is a former AMDC employee, the plaintiffs' attorneys, as well as their employees and agents, are free to speak with him without first obtaining the permission of Betts & Flores. Comment [7] to FRPC 4.2 (Rule 4.2 does not apply to former employees). Of course, if Adams is privy to any communications protected by the attorney-client privilege, Ashley Parks may not speak with Adams about those privileged communications.

Gus Bartholomew: Gus Bartholomew is the executive assistant to the president of AMDC. He does not consult with or direct counsel, nor does he have authority, either actual or apparent, to bind the company. He was in no way involved in the manufacture or sale of the walkers at issue and thus his actions will not be imputed to AMDC for purposes of liability. Rule 4.2, Comment [7], therefore, does not prohibit plaintiffs' counsel (or their agents or employees) from speaking to Bartholomew without first getting the permission of Betts & Flores. However, given that Bartholomew sits in on board meetings and reviews some of the correspondence between AMDC's president and its counsel, he has access to information protected by the attorney-client privilege. Parks cannot attempt to seek information about the privileged communications between AMDC's counsel and either the board or the president. She must make every effort to avoid violating the privilege. So while Rule 4.2 does not prevent Parks from speaking to Bartholomew about the litigation, AMDC's counsel should be able to protect any privileged information.

Agnes Corlew: Corlew has been director of public relations for AMDC since 2017. She was not an AMDC employee at the time the walkers were manufactured or sold. Nonetheless, Rule 4.2 would prohibit the plaintiffs' lawyers from communicating with Corlew without Betts & Flores' consent if she falls under one of the classes of persons identified in Comment [7]. Corlew does not direct, supervise, or regularly consult with AMDC's attorneys. As director of public relations, Corlew merely answers questions about the litigation based on information given to her by others.

The application of Comment [7]'s second prong, which prohibits unauthorized communications with an agent or employee who is authorized to "bind" the organization, is somewhat more difficult. Corlew speaks on behalf of the company. Her comments are attributed to AMDC. But is she authorized to "bind" the organization through her comments? To bind the organization, Corlew would have to possess the authority to enter into a binding contractual settlement of the matter on behalf of AMDC. *See Ethics Op. 2016-12.* There is nothing in the facts to suggest that Corlew has been given explicit authority to do so by AMDC. While one might argue that Corlew has "apparent authority" to bind the company, the better argument is that, given Corlew's job title, a reasonable person would not believe that she had been given authority to bind the company. Finally, because Corlew was not working for AMDC when the walkers were manufactured or sold, it does not appear that her conduct in any way could be imputed to AMDC. As a result, because Corlew does not fall within any prong under comment [7], Ashley Parks may interview Corlew without Betts

& Flores' presence or consent. Parks may not, however, speak with Corlew about any privileged communications.

Elise Dunham: Dunham is the manager of the plant that manufactured the walkers at issue. Reviewing her role under prong 1 of comment [7], Dunham does not direct, supervise, or regularly consult with AMDC's attorneys. Nor does she have the authority, either actual or apparent, to obligate or bind AMDC in the matter, as would be required for her to fall under prong 2. But the facts indicate that Dunham's acts or omissions in connection with the matter may be imputed to AMDC under the third prong of Comment [7]. She is not a mere witness to the manufacture of the walkers. Rather, as plant manager, she was directly involved in the walkers' manufacture. It does not matter whether she remembers the walkers; a person could reasonably believe that the actions of the plant manager with regard to the manufacturing can be imputed to the company.

In addition, Dunham has her own legal counsel. Per Comment [7], "[i]f a constituent of the organization is represented in the matter by his or her own counsel," permission of that individual's personal attorney is sufficient to permit the communication with the constituent notwithstanding the prohibition under the rule. An astute answer might note that the Comment is not completely clear that permission by the constituent's individual lawyer overrides the right of the organization's lawyers to deny permission for opposing counsel to speak with the constituent. Nonetheless, since the Comment states that permission by the constituent's lawyer is sufficient, it can be inferred that opposing counsel need not seek permission from the organization's counsel to speak with the constituent. Importantly, too, because Dunham has instructed Parks to contact Dunham's attorney, permission should be given or denied by that attorney.

Penny Ellis: Ellis was AMDC's director of marketing from 2008 to 2016 and is now its chief financial officer. She sits on AMDC's board of directors as its treasurer. The board presumably directs the actions of counsel and consults regularly with counsel. Ellis claims that she does not know anything about the legal issues involved in the litigation and mainly listens to discussions about the *Downey* case. Nevertheless, a lawyer is prohibited from communicating with "the people who are giving and receiving information from the lawyer and directing the lawyer's actions in the matter, as well as those who have power to compromise or settle the matter in consultation with the lawyer." See Ethics Op. 2016-12. Ellis claims that her only involvement is to handle financial matters once a settlement or verdict is reached. However, she is a voting board member

and thus votes on matters related to the *Downey* litigation. And, because Ellis regularly hears what the lawyers say to the board and what the board says to its lawyers, Ellis falls squarely within the first prong of Comment [7]. In addition, because Ellis has actual authority to bind the organization through her role as a voting member of the board of directors, she falls squarely within the second prong of Comment [7].

Also relevant is Ellis’s prior work for AMDC as director of marketing. She was ultimately responsible for the sale of the walkers at issue. Rule 4.2 does not reference current or former responsibilities but focuses on current and former employees. As Ellis is a current employee, an examinee should look to see whether her conduct could be imputed to the organization. It can be argued that Ellis’s actions in her capacity as head of marketing could be imputed to AMDC because Ellis was responsible for the sale of all AMDC products and the *Downey* lawsuit challenges the manufacture and sale of the walkers.

Class Members: Examinees are also asked to determine whether Betts & Flores can contact any current or prospective class members. In *Mahoney*, the court held that counsel for the defendant manufacturer was prohibited from contacting current members of the plaintiff class but was not prohibited from contacting *potential* members of the class. The class in *Mahoney* had been certified and potential class members still had time to “opt out” of the class. Relying on Rule 4.2, the court determined that defense counsel could not speak to class representatives or plaintiffs known to be represented without prior permission of plaintiffs’ counsel. But the court noted that, under Rule 1.0(f), “known” denotes actual knowledge. Only the named plaintiffs could be “known” to be represented in the matter. Defense counsel were permitted to speak with *potential* class members—those who would be members of the class unless they “opted out” by the required date. In short, prospective members of a class may be contacted, even when the class has been certified. The class in *Downey* has not been certified. Because only the named plaintiffs are represented, the examinee should argue that none of the prospective plaintiffs are represented, and therefore counsel for the *Downey* plaintiffs cannot yet speak for the class. AMDC’s argument is stronger than that in *Mahoney* because the class has not yet been certified. Clearly, plaintiffs’ counsel has a lawyer-client relationship with the named plaintiffs, but members of a not-yet-certified class have not formed that relationship yet.

February 2020

MPT-2 File

In re Eli Doran

COOK AND STONE LLC
Attorneys at Law
872 N. Main Street
Evergreen Heights, Franklin 33837

MEMORANDUM

To: Examinee
From: Robert Cook
Date: February 25, 2020
Re: Eli Doran matter

We represent Carol Richards, the legal guardian of Eli Doran, her elderly uncle. Carol has regularly visited Eli since his wife, Janet, died four years ago. Eli is now 86 years old. Carol has observed Eli's gradual decline in cognitive abilities and, about two years ago, helped him move into an assisted living facility operated by Paula Daws.

Three months ago, Carol was shocked to learn that Eli and Paula Daws had married in January 2019 and that Eli had signed a new will on October 7, 2019, leaving his entire estate to Paula. Carol asked for our help. On her behalf, we instituted guardianship proceedings, and two months ago, the court found Eli incompetent as of that date and appointed Carol as his legal guardian. However, that determination does not resolve the issues of Eli's capacity to consent to marriage to Paula Daws more than a year ago or his testamentary capacity to execute a will four months ago.

We have filed, on Carol's behalf as Eli's guardian, two petitions: first, to annul the January 2019 marriage of Paula and Eli, and second, to set aside the October 2019 will. Yesterday the court held a hearing on both petitions. I attach excerpts of the hearing testimony. Instead of oral closing arguments, the court ordered the parties to submit written closing arguments.

Please prepare the written closing argument to be submitted to the court. Follow our office guidelines in drafting your argument. We will not have a chance for rebuttal arguments, so anticipate the arguments that Paula Daws will present and rebut them. Do not include a separate statement of facts, but be sure to incorporate the relevant facts into your argument.

COOK AND STONE LLC

OFFICE MEMORANDUM

To: All lawyers
From: Robert Cook
Date: September 5, 2017
Re: Guidelines for drafting written closing arguments

Written closing arguments are delivered to a judge. They need to address the applicable law as well as the facts. Be convincing and persuasive but avoid theatrics or overly emotional arguments. Judges respond negatively to exaggerated or unsubstantiated arguments. Convince the judge, as the trier of fact, that we have satisfied all the elements or requirements for each of our claims and have done so by meeting the required burden of proof. Organize the closing argument one claim or issue at a time.

For each claim or issue:

- Draft carefully crafted subject headings that illustrate the arguments they cover. The argument headings should succinctly summarize the reasons the judge should take the position we are advocating and should be a specific application of a rule of law to the facts of the case. For example, improper: Petitioner Is Entitled to Receive Spousal Support. Proper: Because Petitioner Is Unable to Work Due to a Permanent Disability, She Is Entitled to Receive Spousal Support.
- State the legal standards at issue.
- Marshal all the relevant evidence that has been admitted and show how the evidence satisfies the proof requirements for each claim.
- Demonstrate how the witnesses are credible and how those challenging our case are not credible.
- Do not summarize each witness's testimony but refer to the testimony and other evidence to show how they support your argument.

Be clear as to the relief requested. Finally, convince the judge that the relief requested is fair and just.

Excerpts from Hearing on February 24, 2020

Judge: This is a hearing on two matters I consolidated for the purpose of judicial economy. The petitions before me are first, to annul the January 15, 2019, marriage of Paula Daws and Eli Doran, and second, to set aside the will signed by Eli Doran on October 7, 2019.

In a previous ruling, I concluded that Eli Doran was incompetent as a matter of law and entered an order making his niece, Carol Richards, his legal guardian. A determination of incompetence is a legal finding that a person lacks the mental ability to understand problems and make decisions. Competence is similar to but not the same as capacity. The degree of capacity required for a legal transaction varies with the task at hand. Today I will hear evidence on whether Mr. Doran had the capacity to consent to marriage when he married Paula Daws in early 2019 and whether he had testamentary capacity when he signed the October 7, 2019 will.

Representing petitioner Carol Richards as guardian for Mr. Doran is Attorney Robert Cook. Representing respondent Paula Daws is Attorney Dee Andrews. The parties have stipulated that these items may be admitted into evidence: the January 15, 2019 marriage certificate, the October 7, 2019 will, and the will executed by Mr. Doran in 2016. As is the court's practice, I will require counsel to file written closing arguments. Proceed.

EXCERPTS OF TESTIMONY

DIRECT EXAMINATION OF CAROL RICHARDS BY ATTORNEY ROBERT COOK

Q: How do you know Eli Doran?

A: I am Eli's niece. Eli was married to my Aunt Janet, who died about four years ago.

Q: How often did you have contact with Eli?

A: After my aunt died, I regularly took Uncle Eli to the bank, to the barbershop, and on any other errands. We also went out for barbecue, his favorite, usually once a month. And about once a month, I took him to his church and then to dinner at my home. I also took him to his family doctor.

Q: What did you notice about Eli over time?

A: A bit over two years ago, I noticed that he asked questions that he should know the answers to—like where I worked, even though he knew I was retired, and whether I was married, even though he knew I was. He was not dressing well. He was forgetting to pay bills. I saw

them stacked up on the table. I suggested to Uncle Eli that I help him with his finances and that we find someone to help out in his home. He agreed.

Q: Did you find someone who could help?

A: Yes, I hired Vera Wilson, a friend from his church, to cook and clean for him. That worked well. But his checkbook was a mess. Some entries missing, some entered twice or three times. In January of 2018, I asked Dr. Ricci, his family doctor, about Eli.

Q: What did you learn from the doctor?

A: Dr. Ricci said that I should place Uncle Eli in an assisted living facility. I had heard that Paula Daws had a home that might work out, so I called her.

Q: Did you meet with Paula Daws?

A: Uncle Eli and I went to Paula's home. Two men lived there, and they seemed happy. Eli's monthly pension could pay the monthly fee for the facility. Eli moved in almost two years ago. We were able to sell his home quickly. He had paid off the mortgage years ago and put the proceeds of the sale into his savings account. His pension went directly into his checking account. We arranged for monthly direct payments from his checking account to Paula so that he did not have to worry about his finances.

Q: At the time Eli moved into Paula's home, were you his legal guardian?

A: No. I asked Uncle Eli if he wanted to live in a place where someone could help him, and he said yes. There was no court involved.

Q: After Eli moved in, did you continue to see him?

A: Yes. After he moved into Paula's, I brought him to my home for dinner almost every Sunday. He was becoming ever more forgetful. He frequently asked me what day it was, when I had gotten the new car, when I had bought the house. A few minutes later, he would ask the same questions all over again, numerous times during the visit. He often did not recognize my husband or children, though he had known them for years.

Q: When did you learn of the marriage between Eli Doran and Paula Daws?

A: One Sunday, about three months ago, I called Paula to say that I would take Uncle Eli to my home for Sunday dinner. She told me they had married.

Q: Did she say when they had married?

A: Yes, she said some time ago. In fact, I later found out it was a year ago, in January 2019.

Q: Did you discuss this matter with Paula?

A: Not for a while. I was shocked and worried. Eli had once asked Vera, his cleaning lady and cook, to marry him. So I wasn't sure what it meant that Eli and Paula were married. But I became quite worried when Paula told me that Eli had signed a will giving her everything.

Q: Why did that concern you?

A: For one thing, I knew that Eli had had a serious decline in his cognitive abilities and did not know what he was doing. Plus, I had seen Eli's will from 2016. After my aunt died, Eli saw his attorney and executed a will leaving his estate to his church. He loved that church. And I knew that now, having sold his house, he had some savings that could benefit the church. That is when I called you.

Q: Did Eli ever tell you that he and Paula were married?

A: Not at all.

CROSS-EXAMINATION OF CAROL RICHARDS BY ATTORNEY ANDREWS

Q: Since Eli moved into Paula's home, she has become more important to him than you, and you are jealous of Paula, aren't you?

A: No. I wanted him to be safe and cared for and was glad to find a place for him until I learned how Paula was taking advantage of him.

* * *

DIRECT EXAMINATION OF DR. ANITA BUSH BY ATTORNEY COOK

Q: Dr. Bush, what is your specialty?

A: I have a Ph.D. in clinical psychology and practice as a forensic clinical psychologist. I work with patients who have cognitive or mental disorders.

Q: How do you know Eli Doran?

A: Eli Doran was referred to me by his family doctor, who asked me to assess Eli for cognitive functioning. I first saw Eli on May 3, 2018. I interviewed Eli, who was then 85 years old. He did not understand why he was seeing me. He said he was healthy and needed no medicine, though I knew that he took several medications to address some chronic conditions. Eli was not oriented to time. He did not know what day it was or what year it was. He said he lived in his home with his wife, Janet, though I knew she had died two years earlier. Later in the interview, he said he was married to Vera Wilson. I asked who Vera was, and he said she took care of him. I later learned that Ms. Wilson cleaned and cooked for him and that they had never been married. It appeared he equated marriage with

being cared for. His niece Carol Richards came to the appointment with him. I asked who she was, and he replied that she was family and drove him places. I also relied on the medical records from Eli's family doctor, Dr. Leon Ricci.

Q: What did you learn from the medical records that you relied on?

A: Dr. Ricci was Eli's physician and had seen him regularly over 15 years. Dr. Ricci described Eli as a retired federal meat inspector, attentive to his medical conditions and usually accompanied by his wife until she died. Soon after her death, Dr. Ricci noticed that Eli was forgetting his medications. Then, about three years ago, Dr. Ricci had conducted the Mini-Mental State Exam, MMSE as we call it. The MMSE score for someone of Eli's age, education, and health should be at least 23, but Eli's score was 21, showing some cognitive deficiencies. About two years ago, Dr. Ricci learned from Carol Richards that Eli was becoming even more forgetful. Dr. Ricci diagnosed Eli as having dementia, type unspecified. Dr. Ricci recommended that Carol find a place where Eli could receive daily care and supervision of his medications.

Q: Did you conduct any assessments when you saw Eli on May 3, 2018?

A: I conducted several assessments that are recommended for testing intellectual capacity. I conducted the MMSE, and Eli's score had declined to 19, a significant drop from when Dr. Ricci tested him. I also evaluated him on the Independent Living Scale. I found that Eli could not pay a bill or verbalize a reasonable understanding of a will. He did not know what it meant to call 911 in an emergency or what a fire alarm was.

Q: What did you conclude from these assessments?

A: Eli suffered from multiple cognitive dysfunctions. These included memory impairment that was severe. He had a significant disturbance in executive functioning, including no ability to plan, problem-solve, reason, or think abstractly.

Q: Doctor, can you explain what that means in terms of Eli's ability to live and function?

A: Eli was incapable of any abstract thinking and incapable of ordinary judgment or reasoning. He lacked the ability to meet his most basic needs and provide for his safety and health. He could not live alone, drive, or manage his medicine or his money. Eli was significantly impaired in his ability to care for himself. He needed 24-hour supervision. I learned that he had moved into an assisted living home where he was cared for. That was a good idea.

Q: Did you continue to see him and assess him?

- A:** Yes, I saw Eli again on June 21, 2019. I continued to assess his mental state, asking where he lived. He again said that he lived with his wife, Janet. He said that his parents lived in Ohio and that he might visit them sometime, but in fact his parents had been deceased for many years. I asked who had brought him to the appointment, knowing that it was Carol. Eli said that she was his driver. He denied that he was related to her.
- Q:** How did his performance compare with the first visit?
- A:** His memory was worse. His cognitive abilities had declined. I repeated the MMSE and his score had dropped to 17, another significant drop.
- Q:** Did your conclusion about Eli change from the first visit?
- A:** The only change was that Eli's cognitive deficiencies were far worse. Eli has a permanent, progressive condition. It only gets worse.
- Q:** Does Eli have periods of being lucid?
- A:** I doubt that he has moments of lucidity but if he does, that is not the same as having the ability to exercise judgment.
- Q:** Doctor, considering Eli's condition in January 2019, do you have a professional opinion as to whether Eli possessed the mental capacity to consent to marriage?
- A:** I have an opinion. He did not possess the mental capacity to consent to marriage. He cannot think abstractly about anything or make any rational judgments. Eli equates marriage with being cared for.
- Q:** Do you have a professional opinion, considering Eli's condition on October 7, 2019, whether Eli had the capacity to execute a will?
- A:** He did not.
- Q:** In October 2019, did Eli know who his relatives were or who might have a claim on his estate?
- A:** No. He did not know who his niece was. He thought he lived with Janet, his deceased wife.
- Q:** Doctor, in October 2019, did Eli know the nature and extent of his property, his estate?
- A:** No.

CROSS-EXAMINATION OF DR. BUSH BY ATTORNEY ANDREWS

- Q:** Doctor, you did not see Eli on January 15, 2019, did you?
- A:** No. I saw him twice: May 3, 2018, and June 21, 2019.
- Q:** And you did not see him on October 7, 2019, did you?
- A:** No.

- Q:** You are not a medical doctor, are you?
- A:** No, I am not. His medical doctor sought my expertise to evaluate Eli's cognitive status.
- Q:** Doctor, under Franklin law, if an elderly person is in danger of being abused or exploited, you are required to call Franklin Elder Protective Services, are you not?
- A:** Yes.
- Q:** You did not make that call, you did not report Eli as in need, did you?
- A:** No. He was getting the care he needed.

* * *

DIRECT EXAMINATION OF PAULA DAWES BY ATTORNEY ANDREWS

- Q:** When did you meet Eli Doran?
- A:** Almost two years ago, Carol Richards and Eli Doran came to my home to see if Eli could live there. I had two other men living there; they needed assistance in their daily living.
- Q:** Other than providing a room, what other services do you offer?
- A:** I provide a very clean home, three meals a day, and laundry service, and I supervise their medications. Each man has a bedroom, and there is a TV room where they eat, watch TV, and socialize.
- Q:** What did Eli and Carol tell you when you met with them?
- A:** Carol did most of the talking and said that Eli's doctor wanted him to live somewhere where he would be sure to take his medicine. We discussed the fee, and Carol said he could afford that. Carol and Eli arranged for direct payment to me each month, and he moved in.
- Q:** Tell us about the marriage.
- A:** Eli was always very pleasant and kind to me. One night as I brought his laundry to him, he said, "You take good care of me. We should get married." I laughed it off. But a few days later, he took my hand and said, "We should get married." I asked if he was serious, and he said, "You are nice. I love you." The next day, I called my minister and got a license, and we were married on January 15, 2019.
- Q:** And tell us about the will.
- A:** One day, I said, "Eli, you have a lot of stuff in your room," and he said, "When I am gone, I want you to have it all." Again, I laughed it off, but for several days, he said, "I want you to have what I have." I asked him, "Do you want to make a will?" and he said, "Yes." I went online and found a will kit for him, but he said, "You do it," so I filled it in. My daughter and son-in-law witnessed Eli signing it—two witnesses as required!

Q: Did you force Eli to make this new will?

A: Of course not. I have had several men living in my home, and none of them ever signed a will while they lived with me. Eli kept saying, “I want you to have what I have—you are so kind.”

CROSS-EXAMINATION OF PAULA DAWS BY ATTORNEY COOK

Q: Ms. Daws, isn't it true that when Carol Richards first met with you, she told you that Eli had had serious memory loss and could no longer make his own decisions?

A: Well, I don't remember that she said he could not make his own decisions, but she did say that he could not live on his own.

Q: You did not go to Eli's minister for the wedding, did you?

A: I did not know who his minister was.

Q: You did not invite his niece, Carol Richards, to the wedding, did you?

A: No.

Q: In fact, you did not tell Carol or anyone about the marriage until very recently, correct?

A: Yes, that is correct. Eli is a private man and doesn't like a lot of fuss about things.

Q: The will that you filled out for Eli on October 7, 2019, provided that all of Eli's estate was to go to you, isn't that right?

A: Yes. Like I said, Eli said he wanted me to have everything.

Q: You did not take Eli to his lawyer to have a new will drafted, did you?

A: I did not know he had a lawyer.

Q: Ms. Daws, you have quite a bit of credit card debt, don't you? About \$15,000 or so?

A: Yes, but so does everyone.

* * *

DIRECT EXAMINATION OF REV. JOSEPH SIMMS BY ATTORNEY ANDREWS

Q: Rev. Simms, how did you meet Eli Doran?

A: Paula Daws, a longtime member of my congregation, told me that she had met a gentleman who brought her much happiness and that she was in love. She said that she and Eli, the gentleman, wanted to marry. I met them on Wednesday in the church parlor. Eli seemed to be very pleasant and very much in love. I told them I would marry them.

Q: Explain what you mean.

A: After a few pleasantries, I asked Eli how they met, and he said that he was living at Paula's and that she was taking good care of him and he loved her. I asked why they wanted to marry. He said that he loved her and the way she cared for him. Later that week I married them with my wife and my secretary as witnesses.

Q: Would you have married them if you questioned Eli's mental capacity?

A: Of course not. Eli seemed to be very aware that he was getting married. Older people need companionship, and marriage can provide that.

CROSS-EXAMINATION OF REV. JOSEPH SIMMS BY ATTORNEY COOK

Q: Rev. Simms, you have not been trained to diagnose cognitive functioning, have you?

A: No, but I have counseled many folks and am aware of conditions associated with aging. Eli seemed to know what he was doing as well as many others I have married.

Q: You did not conduct any assessments to determine Eli's cognitive abilities, did you?

A: No. I am not a doctor.

Q: The extent of your contact with Eli was these two visits in January of 2019, correct?

A: Yes.

* * *

DIRECT EXAMINATION OF MARY DAWS JOHNSON BY ATTORNEY ANDREWS

Q: Were you present when Eli Doran signed his will?

A: Yes, I was.

Q: Was he aware of what he was doing?

A: I said, "Eli, do you want my mother to have your stuff when you die?" and he said, "Yes, she takes good care of me."

Q: What, if anything, have you observed about your mother since her marriage to Eli?

A: She is very happy. She loves taking care of him.

CROSS-EXAMINATION OF MARY DAWS JOHNSON BY ATTORNEY COOK

Q: If this will is valid and something were to happen to your mother after Eli's death, you would inherit what your mother inherited from Eli, right?

A: I guess so. I don't really understand this legal stuff.

* * *

February 2020
MPT-2 Library

In re Eli Doran

In re the Estate of Carla Mason Green
Franklin Court of Appeal (2014)

Leslie Beck, the personal representative of the estate of Carla Mason Green (Mason), appeals from a trial court order denying her petition to annul the marriage of her sister Carla Mason and Michael Green.

On October 10, 2012, Carla Mason, age 50, was in the hospital with stage-IV cancer. That evening Mason married Michael Green. The only issue raised by Beck is whether Mason lacked the capacity to consent to the marriage because of the medications she was taking and their effect on her ability to make decisions.

A marriage that complies with the licensing and officiating requirements of the Franklin Uniform Marriage and Dissolution Act (FUMDA) is presumptively valid. This presumption comports with strong public policy favoring the validity of marriage. It can be overcome only with clear and convincing evidence. This is a more demanding standard than the standard for a preponderance of the evidence because the right to marry is constitutionally protected. Evidence is clear and convincing in a case such as this if it establishes that it is substantially more likely than not that a party lacked capacity to consent to marriage.

The capacity to consent to marriage, a requirement of a valid marriage, is defined as the ability to understand the nature, effect, and consequences of marriage and its duties and responsibilities. Each party to the marriage must freely intend to enter the marital relationship and understand what marriage is. Capacity to consent is measured at the time of the marriage.

The trial court appropriately ruled that the petitioner was required to present clear and convincing evidence. After a hearing, the trial court concluded that petitioner Beck had failed to present clear and convincing evidence that Mason did not possess the capacity to consent to the marriage. The reviewing court will overturn the trial court's conclusions only if they are clearly erroneous. A summary of the testimony follows.

For several weeks, Mason, who had terminal cancer, had taken medications to control the pain from the cancer. On the morning of October 10, Mason and Leslie Beck met with Mason's oncologist in Mason's hospital room to discuss terminating treatment and beginning hospice care in her home. Mason was alert; she participated in the discussion and made the decision to terminate treatment.

On the evening of October 10, respondent Michael Green arrived at the hospital, along with a minister, who had a marriage license. Mason signed the license application, and the minister married Mason and Green, witnessed by a nurse and a medical assistant. These steps met the requirements of FUMDA. On October 11, Mason went home under hospice care. On October 12, Mason executed a Power of Attorney (POA) giving her sister, Leslie Beck, authority to make medical decisions for her. Green regularly visited Mason while she was in the hospital and while she was at home under hospice care. On November 1, Mason died.

Mason's oncologist testified that the prescribed pain medication had a high probability of creating mental changes in any patient. These changes could interfere with the patient's thought processes, including the decision to marry. On cross-examination, he admitted that while confusion can arise in patients receiving these medications, patients can and do have periods of lucidity and alertness. The oncologist also testified that on the morning of October 10, when he met with Mason and her sister to discuss transfer to hospice, he believed that Mason had the capacity to make decisions about her medical care and treatment.

The nurse on duty at the hospital on the evening of October 10 testified that Mason was "oriented to person, place, and time and that her mood was appropriate to the situation." The nurse testified that Mason's mood brightened when Green arrived and that Mason asked the nurse to witness the marriage.

The hospice nurse present when Mason executed the POA on October 12, two days after the wedding, testified that Mason was "alert and oriented." Mason told the hospice nurse, "I want Leslie to make decisions so that I can die in peace." Mason then signed the POA without any objection from Beck as to Mason's capacity to consent to the POA.

To support her petition, Beck relies on *In re Marriage of Simon* (Fr. Ct. App. 2005), in which the court annulled the marriage of Henry and Nancy Simon after Henry married Nancy while she lived in a residential facility. Beck reads the *Simon* case as concluding that Nancy's medication made her unable to consent to marriage. However, critical to the court's decision in the *Simon* case was not the medication but the fact that three weeks prior to the marriage, Nancy suffered the fourth of a series of strokes. Her doctors determined that the strokes were disabling and that she was incapable of receiving or evaluating information and should not make any decisions for herself or others. The doctors testified to this at trial.

Unlike in *Simon*, the evidence here supported the trial court's finding that Mason had the capacity to make decisions such as to consent to marriage. Mason's oncologist believed she had the capacity to consent to stopping medical treatment and going home. Her sister, the petitioner here, apparently believed that Mason had the capacity to make decisions when Mason signed the POA. The trial court's findings were not erroneous.

Also, in the *Simon* case, Nancy and Henry knew each other for only a few weeks prior to Nancy's fourth stroke. Henry was a medical technician employed at the facility where Nancy lived; he administered a few treatments to Nancy before her final stroke when the doctors ceased these treatments. Nancy and Henry had no prior romantic or other relationship. Henry arranged for them to marry after Nancy's fourth stroke and just two weeks before Nancy's death. The court found that not only was Nancy incapable of consenting to marriage but at the time of the marriage, she had no understanding of what marriage is.

In contrast, Mason and Green had been engaged to be married for two years. They had planned for marriage and a life together. They had discussed where they would live in retirement. Mason broke off the engagement when Green was transferred to another town, but they stayed in contact. Later, Mason contacted Green for support when she learned of the cancer. The evidence supported the court's finding that Mason understood what marriage was and what it involved.

Petitioner failed to present clear and convincing evidence that Mason lacked the capacity to consent to marriage. Therefore, the presumption that the marriage is valid is not rebutted.

Affirmed.

In re the Estate of Dade
Franklin Court of Appeal (2015)

Petitioners Jill and Samuel Dade appeal from the trial court's decision denying their petition to set aside the 2010 codicil to Matthew Dade's will. As claimants, the Dades had the burden of proving that Matthew lacked testamentary capacity when he executed the codicil.

In 1999, Matthew executed a will leaving his estate to his adult children, the petitioners. In 2010, he drafted a codicil to his will in which he provided bequests of \$100,000 each to his nephew William Speck, his niece Ann Murphy, and his housekeeper Tanya Hall. The codicil did not disturb the gift in the will of the "rest and residue of the estate" to Samuel and Jill. Matthew died in 2012. The estate has been valued at \$1,000,000; the three gifts created in the codicil were the only specific bequests. The Dades contended that Matthew lacked testamentary capacity when he executed the 2010 codicil due to a long history of alcoholism. They asked the court to set the codicil aside and probate only the 1999 will.

The law requires that the testator have testamentary capacity. That means that the testator must, at the time of executing the will, be capable of knowing the nature of the act he is about to perform, the nature and extent of his property, the natural objects of his bounty, and his relation to them. A will executed by a testator who lacks testamentary capacity is void. The time for measuring testamentary capacity is the time when the instrument, in this case the codicil, is executed. A party who seeks to prove the lack of testamentary capacity must do so by a preponderance of the evidence.

Jill and Samuel each testified at trial that Matthew had a history of alcoholism, beginning in 2000, two years after his wife (their mother) died. They testified that Matthew had a noticeable decline in cognitive ability, a loss of short-term memory exhibited by the inability to recall names, places, or events during periods of inebriation as well as abstinence from alcohol; that during the last 10 years their father often spoke to their mother as though she was present in the home, even long after she had died; and that their father forgot to pay bills and sometimes forgot to keep appointments such as for the doctor or oil changes for the car.

Dr. Rosemary Cooper testified that in 2005, she had diagnosed Matthew with alcoholism, primarily based on his report that for weeks at a time he would drink from noon until he fell asleep. She testified that Matthew reported that he had these drinking periods around holidays and his wedding anniversary. At other times, he did not drink at all. On cross-examination, Dr. Cooper

stated that she was Matthew's family doctor and was not an expert in cognitive decline. Dr. Cooper also testified that she did not question Matthew's report of his long periods of sobriety.

Murphy and Speck did not dispute that Matthew was an alcoholic, but each testified to visits with their uncle when he was quite lucid. They each testified that they often visited with him, separately, between 1999 and 2012. During those visits, Matthew discussed his finances and correctly stated his worth, identifying the extent and value of his investments. Murphy testified that Matthew regularly provided updates about Jill and Samuel, and their spouses and children. Speck testified that on several occasions between 2005 and 2012, Matthew expressed the need to reward Hall, his housekeeper, for her years of service.

Matthew's lawyer, who drafted both the 1999 will and the 2010 codicil, is deceased.

The Dades argued that the diagnosis of alcoholism was sufficient proof of Matthew's legal incompetence and inability to execute the codicil. This argument is unpersuasive. In *In re the Estate of Tarr* (Fr. Sup. Ct. 2011), the court held that a determination of legal incompetence alone was not sufficient to find that the testator lacked testamentary capacity. A determination of incompetence is a legal finding that a person lacks the mental ability to understand problems and make decisions. Competence is similar to but not the same as capacity. The degree of capacity required for a legal transaction varies with the task at hand. Thus, even if the testator was legally incompetent, the petitioner still had to prove that the testator lacked testamentary capacity.

Assessments of credibility are critical to determinations of testamentary capacity; we will defer to trial court determinations of credibility. The trial court made a credibility determination that because Samuel and Jill Dade were interested in protecting the original gift to them, their testimony about their father's ability when he drafted the codicil was colored by their interest.

Here, the trial court did not err in finding that the Dades failed to show that Matthew did not know the natural objects of his bounty, that is, those individuals likely to receive a portion of his estate based on their relationship to him. While adding the new bequests, Matthew did not disturb the provision giving the majority of the estate to his children. The evidence also showed that Matthew was informed about his children and their families and aware of the value of his estate. The court found that even if Matthew was periodically disabled due to alcoholism, Matthew told his physician that he had long periods of sobriety between 1999 and 2010, and the physician's testimony was credible. The trial court properly found that the Dades failed to meet their burden of proof.

Affirmed.

February 2020

MPT-2

Drafters' Point Sheet

In re Eli Doran

The MPT point sheet addresses the factual and legal points encompassed within this MPT. The point sheet presents the expected issues that might be addressed by an examinee in a thorough answer to the problem, but it should not be construed as a model answer.

In re Eli Doran

DRAFTERS' POINT SHEET

In this performance test, the examinee must draft the written closing argument following a hearing in which the petitioner seeks to annul a marriage and invalidate a will. The examinee's law firm represents petitioner Carol Richards, the recently appointed legal guardian of Eli Doran. Carol is Eli's niece. After noticing a decline in his cognitive abilities and consulting his family doctor, she placed Eli in a home operated by Paula Daws.

Carol sought legal help upon learning that Paula had married Eli and assisted Eli in executing a will leaving all his estate to Paula. Two months ago, after a hearing, the court found that Eli was incompetent as a matter of law and entered an order making Carol Richards his legal guardian. Carol then filed petitions to annul the marriage and invalidate the will. Yesterday, the court heard evidence on whether Eli had the capacity to consent to marriage when he married Paula Daws and whether he had testamentary capacity when he signed the will.

The File contains the memorandum from the assigning partner, an office memo on drafting written closing arguments, and excerpts of the hearing testimony of Carol Richards and several other witnesses: Dr. Bush, a forensic clinical psychologist who evaluated Eli; Paula Daws; Rev. Simms, the minister who married Eli and Paula; and Mary Daws Johnson, Paula's daughter and a witness to the will. The Library contains two Franklin cases, one defining the legal capacity to consent to a marriage and one addressing the standard for testamentary capacity.

The following discussion covers all the points that the drafters intended to raise in the problem.

I. OVERVIEW

The examinee's work product should be in the form of a written closing argument to the court. The office memo instructs the examinee that the purpose of the closing argument is to convince the judge, as the trier of fact, that the petitioner has satisfied all the elements or requirements of each claim and has done so by meeting the required burden of proof. The examinee should state the legal standards at issue, marshal the relevant evidence, and show how the evidence satisfies the proof requirements for each claim. In doing so, the examinee should show how the witnesses are credible or how the other side's witnesses are not credible. Examinees should be convincing and persuasive that the relief requested is fair and just without relying on theatrics or overly

emotional arguments. In addition, examinees should anticipate and rebut the likely arguments that Paula Daws will present, as there will be no opportunity to file a rebuttal.

Examinees are told to organize the closing argument one claim or issue at a time. The work product should include subject headings that succinctly summarize the reasons the court should take the position being advocated.

Examinees may choose whether to challenge the marriage first and then the will or vice versa. The evidence that proves the two claims is similar. For example, the testimony that Eli suffered from a disturbance in executive functioning may be used to show that he could not understand the nature of marriage as well as of a will. Examinees need not repeat the entire testimony for each issue, but they should refer to it in support of each issue. Examinees need to be attentive to the timing of the marriage one year ago, the execution of the will four months ago, and the findings made during the two visits to Dr. Bush, 21 and 8 months ago.

A. Facts

Carol Richards is Eli's niece by marriage. After Eli's wife, Janet, died four years ago, Carol visited Eli twice a month. Over time she noticed a decline in his cognitive functioning. She assisted him with his finances and found Vera Wilson to clean and cook for him. Despite these steps, Carol noticed a further decline. About two years ago, Eli's family doctor recommended that Carol find a place for Eli to live with assistance. Carol and Eli met with Paula Daws, who operates a home for those needing assistance in daily living. Carol helped Eli move into the home soon after the visit. Three months ago, Paula told Carol that she and Eli were married in January 2019 and that he had executed a will leaving his estate to her. Carol was surprised because she did not believe Eli was competent to do these things, and she began legal proceedings.

Following a referral from Eli's family physician, Dr. Bush, a forensic clinical psychologist specializing in cognitive disorders, saw Eli twice (on May 3, 2018, and again on June 21, 2019); she interviewed him and conducted several cognitive assessments. Dr. Bush concluded that Eli suffered from multiple cognitive dysfunctions, including severe memory impairment and a significant disturbance in executive functioning, such as the ability to plan, problem-solve, reason, or think abstractly. Eli's scores on the Mini-Mental State Exam (MMSE) decreased from 21 when Dr. Ricci, Eli's personal physician, had conducted the test, to 19 on May 3, 2018, and then to 17

at Eli's last visit on June 21, 2019. A normal score for Eli should have been at least 23. Based on the MMSE scores and other assessments, Dr. Bush found that Eli was incapable of abstract thinking as well as ordinary judgment or reasoning. He could not live alone, drive, or manage his medicine or his money. In short, Eli was significantly impaired in his ability to care for himself.

The following is a summary of the chronology of events:

- Four years ago, in 2016, Eli's wife Janet died. Shortly afterward, Eli saw his attorney and made a will leaving his estate to his church.
- About three years ago, in 2017, during an exam with his personal physician, Dr. Ricci, Eli's score on MMSE was 21 when it should have been 23.
- In January 2018, Dr. Ricci referred Eli to Dr. Bush. Around the same time, Eli moved into Paula Daws's home.
- In May 2018 (21 months ago), Eli's score on MMSE had dropped to 19.
- About one year ago (January 15, 2019), Eli married Paula.
- In June 2019, Eli saw Dr. Bush again; Eli's MMSE score had dropped to 17.
- Four months ago, on October 7, 2019, Eli signed a new will; shortly thereafter, Paula told Carol about the marriage and the new will.
- Two months ago, in December 2019, the court found Eli incompetent and appointed Carol as his guardian.

B. Legal Standards

A marriage conducted in accord with the licensing and officiating requirements of the Franklin Uniform Marriage and Dissolution Act (FUMDA) is presumptively valid. The presumption can be overcome only with clear and convincing evidence that one of the parties was unable to consent to the marriage because capacity to consent is required. The capacity to consent to marriage requires the ability to understand the nature, effect, and consequences of marriage and the duties and responsibilities it creates. It is measured at the time of the marriage. The higher standard of proof is required because of the constitutional protections to the right to marry. These standards are laid out in *In re the Estate of Carla Mason Green* (Fr. Ct. App. 2014).

Embedded in *Green* is *In re Marriage of Simon* (Fr. Ct. App. 2005). The court in *Simon* found that a woman lacked the capacity to consent to marriage because, having suffered four strokes, she was incapable of receiving or evaluating information and should not make any decisions for herself.

Moreover, she had no prior relationship with her would-be husband, who had been one of her health care aides. By contrast, in *Green*, a terminally ill woman was found to have the capacity to marry when medical personnel accepted her decisions regarding health care, decisions she should not have made unless she was capable of consent. In addition, Green had an understanding of what marriage is, had planned for a married life, and had had a two-year relationship with her spouse.

A valid will requires that the testator have testamentary capacity, meaning that the testator is capable of knowing the nature of the act he is about to perform, the general nature and extent of his property, the natural objects of his bounty, and his relation to them. The party contesting a will on a claim of lack of capacity bears the burden of proof by a preponderance of the evidence that the testator lacked testamentary capacity; a finding of legal incompetence alone is not sufficient. See *In re the Estate of Dade* (Fr. Ct. App. 2015). The time for measuring testamentary capacity is the time when the instrument is executed. *Id.*

In *Dade*, the trial court found that even if Dade was an alcoholic, he had testamentary capacity when he left intact the large gift to his natural children, gave smaller gifts to family and a longtime caretaker, and voiced an understanding of the size of his estate. The *Dade* case also noted that an appellate court will defer to determinations of witness credibility made by the trial court.

II. ANALYSIS

A. The challenge to the marriage

The presumptive validity of the Doran-Daws marriage can be overcome only with clear and convincing evidence that Eli was unable to consent to the marriage because of his impaired cognitive abilities. When he married Paula Daws, he was unable to understand the nature, effect, and consequences of marriage and confused marriage with people being nice or taking care of him.

Examinees should concede that Eli and Paula were married, thus creating the presumption of validity. A thorough answer might analyze the requirements for a marriage under FUMDA and acknowledge that Paula and Eli were married before a minister presumably licensed to perform marriages. They should concede that Rev. Simms believed that Eli had the capacity to consent to marriage. They should concede that since the marriage, Paula has been very happy, according to her daughter, and her minister testified that she was in love and that Eli brought her much

happiness. This evidence undercuts the supposition that Paula may have married Eli for his money due to her own debt. As the petitioner, Carol Richards bears the burden of rebutting the presumption that the marriage was valid and must do so by clear and convincing evidence showing that Eli lacked the capacity to consent to marriage.

While examinees should concede that no test of Eli's cognitive abilities was done on the date of the marriage, the evidence shows that Eli did *not* have the capacity to consent to marriage:

- Dr. Bush testified that in her professional opinion, Eli did not have the capacity to consent to marriage when he married Paula Daws.
- Dr. Bush is a forensic clinical psychologist and is the only witness with the training and ability to assess Eli's cognitive functioning and the only person to conduct numerous tests of his cognitive abilities.
- Dr. Bush's testimony is unrebutted by any expert in cognitive functioning.
- Dr. Bush is a disinterested witness: She did not conduct the exam for the purpose of litigation, but upon referral from Dr. Ricci, Eli's family doctor.
- Dr. Bush reviewed the medical records of Dr. Ricci. A year or so before Dr. Bush saw Eli in May 2018, Dr. Ricci had been concerned about Eli's forgetfulness. On some unspecified date, but before the first visit with Dr. Bush, Dr. Ricci diagnosed Eli as having dementia and recommended that Eli be placed in a location where his daily care and medication would be supervised. Dr. Bush relied on Dr. Ricci's records.
- Dr. Bush examined Eli on May 3, 2018, and June 21, 2019. She conducted several assessments, including the Mini-Mental State Exam (MMSE) and the Independent Living Scale. While a score of 23 would be normal on the MMSE, Eli scored 21 when Dr. Ricci conducted the MMSE earlier. Later, Eli's scores on the MMSE dropped to 19 and 17. When the Independent Living Scale was administered, Eli could not verbalize a reasonable understanding of a will or what to do in emergencies. Based on these assessments, her interviews with Eli, and her review of the family doctor's notes, Dr. Bush concluded that Eli suffered from multiple cognitive dysfunctions, including no ability to problem-solve, reason, or think abstractly.
- Even though Dr. Bush did not examine Eli on the date of the wedding, she did examine and test him eight months before the wedding and four months after. She also testified

that Eli's condition was permanent, progressive, and deteriorating. She doubted that he would have lucid periods, but if he did, he was not capable of exercising judgment. It is a reasonable conclusion that Eli did not have the capacity to consent to marriage eight months after the first exam.

- Eli told Dr. Bush that he was married to Vera Wilson, but he was not.
- Eli believed that his wife Janet was still alive. Eli's statement that he was still married to Janet supports Dr. Bush's conclusion that Eli suffered from poor executive functioning and could not reason or make judgments, such as to consent to marriage.
- If Eli truly believed he was married to Janet or to Vera, he would have been unable to marry Paula.
- Several facts undermine Rev. Simms's opinion that Eli had the capacity to consent to marriage. Simms lacks the professional qualifications to assess Eli's mental abilities, met Eli only twice, and did not conduct any standard assessments of Eli's abilities.
- Paula kept the marriage a secret for months, did not involve Eli's minister in the wedding, and did not invite Carol, his only relative. These facts create the suspicion that Paula knew that Eli did not have the capacity to consent to marriage.
- Eli does not understand the nature of marriage and what it entails but equates it with people being nice to him:
 - When asked by Rev. Simms why he wanted to marry Paula, Eli responded that "she was taking good care of him" and that "he loved her and the way she cared for him." These statements refer to the fact that Eli needed care and Paula provided that. They do not reflect the type of love associated with marriage.
 - On one occasion, Eli told Dr. Bush that he was married to Vera Wilson. He was not. Vera was the person who cleaned and cooked for him. Eli's statement shows that he equates marriage with people who are nice to him or take care of him.
 - Mary Daws Johnson testified that Eli agreed that he wanted Paula to have his stuff and that "[Paula] takes good care of me." Eli's response is another indication that he views Paula not as a wife but as someone who is nice to him and cares for him.
 - Unlike the situation in *Green*, in which the couple had a two-year relationship and engagement, Eli and Paula did not have a long-standing dating relationship.

- Eli’s situation is more like that in *Simon*, in which the marriage was annulled because the woman was unable to make decisions for herself after several strokes, and she and her spouse had no prior relationship—he was a medical assistant at the facility where she was a patient. See *In re Estate of Simon*, cited in *Green*.
- The wedding of Eli and Paula took place just days after Eli first said “we should get married” and not after a period of engagement and preparation for marriage.
- There is no evidence from Paula or any witness that Paula and Eli prepared for a life together or discussed what life would be like after marriage. There is also no evidence of any change in their lives after the marriage.
- Unlike the relationship in *Green*, the relationship between Paula and Eli was one of caregiver and care-receiver.

B. The challenge to the will

A valid will requires that at the time of the execution of the will, the testator possesses testamentary capacity, meaning that he is capable of knowing the nature and extent of his property, the nature of the act he is about to perform, the names and identities of the persons who are the natural objects of his bounty, and his relation to them. See *In re the Estate of Dade* (Fr. Ct. App. 2015).

Examinees should acknowledge that while the court found Eli legally incompetent two months ago, that determination is not proof that Eli lacked testamentary capacity at the critical time—when he executed the will on October 7, 2019. See *In re the Estate of Tarr* (Fr. Sup. Ct. 2011) (cited in *Dade*). Here, testimony by Mary Daws Johnson, a witness to Eli’s will, indicates that Eli showed some awareness of making a gift to Paula when he was asked “[D]o you want my mother to have your stuff when you die?” and responded, “Yes.”

Examinees should concede that no doctor or psychologist examined Eli at the time he executed the will. However, they should cite Dr. Bush’s testimony that on June 21, 2019, months before the will was executed, Eli already lacked testamentary capacity and that his condition was permanent and progressively worsening. Dr. Bush doubted that Eli would have lucid periods.

Note that on cross-examination, Dr. Bush admitted that Eli was “getting the care he needed” and that she did not notify Franklin Elder Protective Services about his situation, as she is required to

do if she believes that an elderly person is in danger of being abused or exploited. However, when she met with Eli, Dr. Bush was unaware of the marriage between Eli and Paula Daws.

The following evidence supports the position that Eli lacked testamentary capacity:

- Dr. Bush testified that in her professional opinion, Eli did not have testamentary capacity when he executed the will on October 7, 2019.
- Dr. Bush is a forensic clinical psychologist. She is the only witness with the training and ability to assess Eli's cognitive functioning. She and Dr. Ricci are the only persons to have conducted tests of Eli's cognitive abilities.
- Dr. Bush's testimony is the only expert testimony regarding Eli's cognitive abilities.
 - Dr. Bush is a disinterested witness: She does not take under either will, nor did she conduct the exam for the purpose of litigation.
- Dr. Bush examined Eli twice and conducted assessments. There was a significant drop in Eli's MMSE scores between the first visit in May 2018 and the second in June 2019. On the Independent Living Scale, Eli could not verbalize a reasonable understanding of a will. Based on these assessments, her interviews with Eli, and her review of Dr. Ricci's notes, Dr. Bush concluded that Eli suffered from multiple cognitive dysfunctions, including no ability to problem-solve, plan, or think abstractly.
- Two years before Dr. Bush saw Eli, Dr. Ricci had been concerned about Eli's forgetfulness. Sometime before the 2018 visit with Dr. Bush, Dr. Ricci diagnosed Eli as having dementia and recommended that Eli be placed in a location where his care and medication would be supervised. Dr. Bush relied on Dr. Ricci's records.
- Dr. Bush concluded that, as of June 21, 2019, Eli's condition had worsened. She opined that his condition was permanent and progressive and that he was unlikely to have periods of lucidity.
- Even though Dr. Bush did not examine Eli on October 7, 2019, the day of the execution of the will, she had examined him four months earlier and testified that at that time, Eli's condition was permanent, progressive, and deteriorating. He would not have been capable of having testamentary capacity on October 7, 2019.

- Dr. Bush's opinion is consistent with the many examples from other witnesses of Eli's lack of memory and cognitive abilities.
- Carol Richards observed many instances of Eli's cognitive decline:
 - He needed help cleaning and cooking at home.
 - He made numerous errors in maintaining his checkbook.
 - He repeatedly asked the same questions about her car and what she did for a living.
 - He failed to recognize her family.
 - Carol is a disinterested witness. She is not a blood relative likely to inherit from Eli, nor does she take under either will. Her observations of Eli are not colored by a desire to benefit from his death.
- The 2019 will was not the result of independent legal advice and counsel.
 - It came from an online kit.
 - It was prepared by Paula, who is also the sole beneficiary.
 - It was witnessed by Paula's daughter and son-in-law. Paula's daughter could benefit from the gift to her mother under the will.
 - It varied significantly from the will Eli drafted, with the assistance of legal counsel, after the death of his wife. In the 2016 will, Eli left his estate to his church.
 - A major change between the two wills is that Eli's cognitive abilities have declined to the point where he cannot live alone and cannot plan or problem-solve.
 - Another change from 2016 is that Eli is now a resident in Paula's home and has become dependent on her for his daily needs.
 - When Mary, Paula's daughter and a witness to the will, asked Eli whether he wanted her mother to "have [his] stuff," Eli said, "[Paula] takes good care of me."
 - His response is that of someone paying for or rewarding someone for a service.
 - His response was not unprompted.
 - Mary is not a disinterested witness because she stands to inherit from her mother, the beneficiary of Eli's 2019 will.
- Eli did not understand the nature and extent of his property.
 - Dr. Bush testified that Eli cannot manage his money, from which the court should conclude that Eli could not understand the nature and extent of his estate.

- Dr. Bush testified that she conducted the Independent Living Scale assessment and found that Eli could not pay a bill.
- Dr. Bush testified that Eli had no ability to plan, problem-solve, or think abstractly.
- Carol Richards testified to Eli's inability to manage his checkbook as of two years ago—long before his execution of the 2019 will.
- Paula testified that Eli said, "When I am gone, I want you to have it all." And "I want you to have what I have."
 - Eli did not make reference to his savings account.
 - Eli did not describe what he meant by "it all."
 - The context of his statement is Paula's prior statement that "you have a lot of stuff in your room."
- Mary Daws Johnson testified that she asked Eli if he wanted Paula to have his stuff when he died and he simply said, "Yes."
 - Eli did not describe what he thought would be included as "[his] stuff."
 - Eli's response was not unprompted. Rather, it was prompted by Mary, Paula's daughter, asking "[D]o you want my mother to have your stuff when you die?"
- Eli did not know the natural objects of his bounty (his heirs):
 - Eli sometimes believes that relatives who are long deceased are still living.
 - Eli twice told Dr. Bush that his wife Janet was still alive.
 - Eli told Dr. Bush that his parents were alive, even though they died years ago.
 - On one occasion, Eli told Dr. Bush that he was married to Vera Wilson, but he was not. Vera was the person who cooked and cleaned for him for a time.
 - In June 2019, when Dr. Bush asked Eli who Carol was, Eli did not recognize her as his niece but described her as his driver. Carol is his only living relative.
 - Eli is not like Matthew Dade, who was found to have testamentary capacity. Dade bequeathed most of his estate to his adult children and told others about his adult children and their families, even while executing a codicil providing for additional gifts to others. *In re Estate of Dade*.
- Eli did not know the nature of the act he was performing in executing the will:

- Carol Richards had seen the will Eli drafted, with the assistance of legal counsel, after the death of his wife four years ago. The 2019 will varied significantly from the earlier one in which Eli left his estate to his church, which he loved.
- When planning the wedding, Paula did not involve Eli's minister. Had she done so, that might have triggered some memory of his church as the object of his estate.
- Between the drafting of the 2016 will and the 2019 will, Eli's cognitive abilities declined to the point that he cannot live alone, plan, or problem-solve.
 - Eli has become dependent on Paula for his daily needs.
- Paula is not the natural object of Eli's estate.
 - Except for the marriage (which should be annulled), Paula is not related to Eli.
 - Eli's only living relative is his niece, Carol, who is related by Eli's marriage to her aunt Janet, not by blood to Eli.
 - When Mary asked Eli whether he wanted Paula to have his stuff when he died, Eli said "[Paula] takes good care of me." This is another indication that he may have thought he was paying for Paula's care or rewarding her for her care of him rather than providing an inheritance for Paula.
 - Paula's credibility should be challenged. She is an interested witness who has \$15,000 in credit card debt, which she could pay off with the money in Eli's estate.

C. Relief requested

Examinees should state the relief requested. They should conclude their argument by stating that because the clear and convincing evidence shows that Eli did not have the capacity to understand what marriage was, he was incapable of consenting to marriage, and that the marriage between Paula and Eli should be annulled. Examinees should argue that where the state-of-mind requirement for marriage is absent, the only appropriate relief is annulment.

Likewise, examinees should conclude that the evidence shows that more probably than not Eli did not know he was making a will, did not know the natural objects of his bounty, and did not know the extent of his estate. As a result, the will that Paula prepared and Eli signed in October 2019 should be set aside. The will that he executed four years ago, in 2016, will be valid, assuming there is no evidence to the contrary. A complete conclusion should remind the court that when the testator lacks testamentary capacity, the only just relief is to set aside the instrument.