February 2020
MEE Question 1
Contracts

FEBRUARY 2020 MEE
QUESTION 1–CONTRACTS

A homeowner entered into two separate contracts with a contractor for the renovation of her kitchen and the remodeling of her bathroom. The homeowner has refused to pay the contractor on both contracts because of dissatisfaction with his work.

Under the kitchen contract, the contractor had agreed to renovate the homeowner's kitchen for $50,000, payable in installments. The final installment of $8,000 was due 10 days after completion of the project. The kitchen contract called for repainting the cabinets, installing new appliances bought by the homeowner from a third party, and replacing the flooring in the kitchen with linoleum, which is a floor covering made from natural materials. When the contract was negotiated, the contractor had asked the homeowner why she wanted "such old-fashioned flooring instead of more modern resilient flooring like vinyl." The homeowner had responded, "We are a green household, and it is very important to us to use linoleum, which is a green product, unlike vinyl. Moreover, I grew up in a house with a linoleum floor in the kitchen, and I really want to be reminded of my youth when I walk into the kitchen."

Despite the clear contract language, the contractor installed vinyl flooring in the kitchen. The vinyl flooring looks similar to the contractually required linoleum but is not as durable. Before the final payment was due, the homeowner discovered that the flooring was vinyl rather than linoleum and confronted the contractor. The contractor stated, "I knew that you wanted linoleum, but that's a crazy idea. Vinyl was a lot easier for my workers to install, and it looks as good as linoleum. So I made an executive decision to go with vinyl." The homeowner announced that she would not make the last installment payment unless the contractor removed the vinyl flooring and replaced it with linoleum. Removing the vinyl flooring and replacing it with linoleum would be labor-intensive and would cost the contractor approximately $10,000. The market value of the house, however, would be the same whether the kitchen had vinyl flooring such as that installed by the contractor or linoleum flooring as called for in the contract.

Under the bathroom contract, the contractor had agreed to remodel the homeowner's bathroom for $25,000. The contract called for the existing bathtub to remain along one wall and a new vanity (cabinet and sink) to be installed along the opposite wall. The contract called for a 30-inch space between the vanity and the bathtub (so that a person could easily walk between them).

After the contractor said he was finished, the homeowner measured the space between the vanity and the bathtub and discovered that it was only 29 inches. The homeowner then announced that she would not pay the last installment of the contract price ($10,000), which was due upon completion of the remodeling, unless the contractor "did something" to make the space at least 30 inches wide. The only way to make the space at least 30 inches wide would be to remove either the vanity or the bathtub and to obtain and install a smaller custom-made model. This would cost the contractor about $7,500. The market value of the house with only a 29-inch space between the vanity and the bathtub, however, would be $500 less than with a 30-inch space.

The homeowner had selected the contractor because of the contractor's reputation for high-quality installation. In both contracts, the price was based mostly on labor costs because the cost of materials and fixtures was relatively small.

Assuming that the contractor will do nothing to address the homeowner's concerns:

1. How much more, if anything, is the homeowner required to pay the contractor under the kitchen contract? Explain.

2. How much more, if anything, is the homeowner required to pay the contractor under the bathroom contract? Explain.

February 2020
MEE Analysis 1
Contracts

FEBRUARY 2020 MEE
ANALYSIS 1–CONTRACTS

This analysis addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses are expected to be and should not be construed as a model answer. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

ANALYSIS

Legal Problems:

(1) How much more, if anything, is the homeowner required to pay the contractor under the kitchen contract?

(2) How much more, if anything, is the homeowner required to pay the contractor under the bathroom contract?

DISCUSSION

Summary

The common law of contracts, rather than Article 2 of the Uniform Commercial Code, applies to these contracts because the services aspects of each contract predominate. Generally, under the common law of contracts, one party's failure to perform excuses the other party from making payment if the breaching party "materially breached" the contract or failed to "substantially perform" his obligations.

In the case of the kitchen contract, a court is likely to conclude that the contractor did not substantially perform the contract by installing vinyl flooring and not the linoleum flooring that the homeowner wanted for various reasons and that was specified in the contract, thus excusing the homeowner's final payment ($8,000) under this contract. The homeowner is therefore not required to pay more under the kitchen contract.

In the case of the bathroom contract, however, a court is likely to conclude that the contractor did substantially perform the contract even though there was a 29-inch space between the vanity and the bathtub rather than the 30-inch space specified in the contract. Thus, the homeowner owes $10,000 under this contract, subject to an offset ($500) for the diminution in value of her house.

Point One (45% total weight)

The kitchen contract was predominantly one for services and thus governed by the common law of contracts. It is likely that a court would conclude that the contractor did not substantially perform, thus the homeowner would not be required to make the final payment ($8,000) under this contract.

(15%) Dispute governed by the common law of contracts. In contracts such as those at issue here, where both goods and non-goods (such as services) are involved, most courts consider the thrust or predominant purpose of the transaction in determining whether Article 2 of the UCC or the common law of contracts governs the contract. *Milau Associates v. North Ave. Dev. Corp*., 42 N.Y.2d 482, 368 N.E.2d 1247 (N.Y. 1977). While the homeowner did acquire some goods (flooring and bathroom fixtures) under these contracts, the facts make it clear that the homeowner sought high-quality installation services and that the contract price was determined mostly by labor costs. Thus, the construction/service aspects of the contract dominate. Accordingly, the common law of contracts rather than Article 2 of the Uniform Commercial Code applies to the kitchen contract.

[NOTE: It is important for the examinee to determine whether the disputes here are governed by Article 2 of the Uniform Commercial Code (which governs transactions in goods; *see* UCC § 2-102) or the common law of contracts. This is because UCC Article 2 would resolve these disputes by applying the "perfect tender rule" under UCC § 2-601, which allows the buyer to reject goods if they do not meet the contractual specifications in any respect, while the common law of contracts applies the doctrine of "substantial performance" (see below).]

(30%) Kitchen contract not substantially performed. Under the common law doctrine of substantial performance, a party that breaches a contract is nonetheless entitled to the other party's performance if the breaching party has not "materially breached" the contract, but instead has "substantially performed." *See, e.g*., E. Allan Farnsworth, Contracts § 8.12 (4th ed. 2004) ("If one party's performance is a constructive condition of the other party's duty, only 'substantial' performance is required of the first party before that party can recover under the contract").

Courts consider several factors in determining whether there has been a "material breach" by one party that excuses the injured party's performance: (1) the extent to which the injured party will be deprived of a benefit he or she reasonably expected, (2) the extent to which the injured party can be adequately compensated for the part of the benefit of which he or she will be deprived, (3) the extent to which the party failing to perform will suffer forfeiture, (4) the likelihood that the party failing to perform will cure that failure, and (5) the extent to which the behavior of the party failing to perform comports with standards of good faith and fair dealing. *See* Restatement (Second) of Contracts § 241; *see also Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 129 N.E. 889 (N.Y. 1921).

Some courts have held that when a party's breach is "willful," that party's performance cannot be substantial, regardless of the impact of denying that party the right to enforce the obligations of the other. Farnsworth, *supra,* § 8.12. *See also Jacob & Youngs, Inc. v. Kent*, 230 N.Y. at 244 ("The willful transgressor must accept the penalty of his transgression."). Other cases, however, have held that "even a conscious and intentional departure from the contract specifications will not necessarily defeat recovery, but may be considered as one of the several factors involved in deciding whether there has been full performance." *Vincenzi v. Cerro,* 442 A.2d 1352, 1354 (Conn. 1982).

Here, the homeowner reasonably expected linoleum flooring, not vinyl flooring, for particularized non-economic reasons (having a "green" household and nostalgia for youth).

Thus, the homeowner probably cannot adequately be compensated for the part of the benefit of which she will be deprived. Moreover, the contractor willfully breached the kitchen contract by installing vinyl flooring, strongly suggesting that the contractor did not act in good faith. Thus, it is likely that a court would conclude that the contractor's installation of vinyl flooring, not linoleum flooring, was a material breach and thus that the contractor did not substantially perform the kitchen contract. The homeowner is therefore excused from making the final payment ($8,000) under the contract, unless the contractor removes the vinyl flooring and properly installs the contracted-for linoleum flooring.

[NOTE: The "substantial performance" determination is fact-sensitive, and it is possible (though unlikely) that a court would reach the opposite conclusion. *See* Farnsworth, *supra*, § 8.12 ("test as flexible as substantial performance sacrifices predictability to achieve justice"). If an examinee concludes that the contractor substantially performed the kitchen contract with the homeowner and thus that the homeowner must pay the remaining contract price, the examinee should also analyze whether the homeowner would be entitled to any adjustment because of the breach. Because the facts state that the homeowner's house has the same market value with vinyl flooring as it has with linoleum, such an adjustment would likely be nonexistent or only nominal.]

[NOTE: If an examinee erroneously concluded that this contract was governed by UCC Article 2 and, accordingly, analyzed this portion of the problem by applying Article 2's perfect tender rule, some credit should be given for that analysis.]

Point Two (55% total weight)

<u>The dispute concerning the bathroom contract, which was also predominantly one for services, is governed by the common law of contracts. It is likely that a court would conclude that the contractor substantially performed. Thus, the homeowner would be required to pay the remainder of the contract price ($10,000) minus the diminished value of the house because of the breach ($500).</u>

(5%) Dispute governed by the common law of contracts. As with the kitchen contract, even though the contract price included the cost of the bathroom fixtures, the facts make clear that the price turned mostly on labor costs, thus the construction/service aspects of the bathroom contract dominate. *See* Point One. Accordingly, the common law of contracts rather than Article 2 of the Uniform Commercial Code applies to the bathroom contract.

(20%) Bathroom contract substantially performed. The bathroom dispute is likely to be resolved differently from the kitchen contract dispute. *See* Point One. Here, the contractor's breach appears to be inadvertent and unintentional. Further, the benefit of the 30-inch space to the homeowner (compared to the 29-inch space created by the contractor) seems rather minimal, and there is no indication that the additional one-inch space was especially important to the homeowner. So long as the 29-inch space is usable, the breach here can probably be compensated for by damages. Moreover, the contractor would suffer a significant forfeiture if, in order to get paid, he had to remove the bathroom fixtures and obtain and install custom fixtures, all to gain a single inch of space. Accordingly, a court would likely hold that the contractor

substantially performed the bathroom contract (that is, there was not a material breach). Therefore, the homeowner would be required to pay the contractor under the contract.

(30%) Homeowner entitled to an offset. The general rule of damages for a breach of a construction contract is that the injured party may recover the reasonable cost of replacement or completion. When, however, there has been substantial performance of the contract and the cost of replacement or completion would be disproportionately high compared to the economic benefit it confers, courts have instead measured damages by the difference between the value of the property if construction had been properly completed and the value as constructed. *American Standard, Inc. v. Schectman,* 80 A.D.2d 318, 439 N.Y.S.2d 529 (N.Y. App. Div. 1981). *See also Jacob & Youngs v. Kent*, *supra* (in such a case, "the measure of damages is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing"); Restatement (Second) of Contracts § 348, comment *c*.

Here, the contractor substantially performed the bathroom contract, thus entitling him to payment under the contract. But because the contractor's breach (leaving only a 29-inch space between the vanity and the bathtub) resulted in a diminution in the value of the house, the homeowner would likely be entitled to an adjustment based on this diminution in value. The homeowner, however, would not be entitled to recover the cost of rebuilding the bathroom ($7,500), which is much higher than the diminution in value of the house ($500) resulting from the breach. The $500 diminution in value should be deducted from the $10,000 final payment the homeowner would be required to pay the contractor, netting the contractor $9,500 on the bathroom contract.

February 2020
MEE Question 2
Real Property

FEBRUARY 2020 MEE
QUESTION 2–REAL PROPERTY

Ten years ago, a woman and her husband purchased a one-story commercial building in a city in State A "as joint tenants with right of survivorship and not as tenants in common." They had a "commuter marriage." The husband lived in an apartment in State A. The woman, who worked for an international corporation, lived in a rented apartment overseas. They met one weekend each month.

Three years ago, the husband borrowed $150,000 from a friend and granted the friend a mortgage on the commercial building to secure repayment of the loan. The husband used the $150,000 to purchase a yacht. The certificate of title for the yacht was issued in his name alone.

Two years ago, the husband leased the building to a commercial tenant for a 10-year period at an annual rent of $9,000, "payable in equal monthly installments solely to" the husband.

The woman did not know about either of these transactions, and she did not join in the mortgage or the lease.

Last year, following the husband's unexpected death, the woman first learned of the mortgage and the lease.

State A applies the title theory of mortgages, and its courts strictly apply the common law four-unities test. State A does not recognize tenancies by the entirety.

1. Did the husband's execution of the mortgage sever the joint tenancy? Explain.

2. Assuming that the execution of the mortgage did not sever the joint tenancy:

   (a) Did the husband's execution of the lease sever the joint tenancy? Explain.

   (b) Assuming further that the lease severed the joint tenancy, then upon the husband's death, what rights, if any, does the tenant have in the building? Explain.

3. Assuming that neither the mortgage nor the lease severed the joint tenancy:

   (a) During the spouses' lifetimes, was the woman entitled to half of the rental income payable to her husband under the lease? Explain.

   (b) At the husband's death, what rights, if any, do the woman and the tenant have in the building? Explain.

February 2020
MEE Analysis 2
Real Property

FEBRUARY 2020 MEE
ANALYSIS 2–REAL PROPERTY

This analysis addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses are expected to be and should not be construed as a model answer. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

ANALYSIS

Legal Problems:

(1) Did the husband's execution of the mortgage sever the joint tenancy?

(2) Assuming that the execution of the mortgage did not sever the joint tenancy:

(a) Did the husband's later execution of the lease sever the joint tenancy?

(b) Assuming further that the lease severed the joint tenancy, then upon the husband's death, what rights, if any, does the tenant have in the building?

(3) Assuming that neither the mortgage nor the lease severed the joint tenancy:

(a) During the spouses' lifetimes, was the woman entitled to half of the rental income payable to her husband under the lease?

(b) At the husband's death, what rights, if any, do the woman and the tenant have in the building?

DISCUSSION

Summary

Because the building is in a "title theory" state, the grant of the mortgage is a title transaction. Thus, the husband's grant of the mortgage severed the joint tenancy.

Similarly, under the common law, a lease is a conveyance and thus a title transaction. Thus, at common law the lease by the husband to the tenant would sever the joint tenancy, although not all states adopt this view today. If the lease severed the joint tenancy, the former joint tenants would own the property as tenants in common after the severance, and then after the husband's death, the tenant's rights in the husband's undivided half interest would continue in that interest for the balance of the lease term.

If neither the mortgage nor the lease severed the joint tenancy, then even though the lease agreement between the husband and the tenant provided that the rents were to be paid solely to the husband, the woman would be entitled to half of the rental income payable under the lease before the death of the husband. Furthermore, upon the husband's death, the woman alone would own the building because she would be the surviving joint tenant. And, under the principle that a

person cannot convey more than he has, the lease would terminate upon the husband's death. Thus, the woman would own the building free and clear of the tenant's interest.

[NOTE: This question tests the examinee's understanding of the consequences of a unilateral execution of a mortgage or a lease by one of two persons holding title as joint tenants with right of survivorship.]

Point One (20%)

The husband's unilateral grant of a mortgage to his friend severed the joint tenancy because State A is a title-theory state.

States differ as to whether the grant of a mortgage is a "title" transaction. In so-called "title theory" states, the grant of a mortgage by one joint tenant severs a joint tenancy because the mortgage severs the "unity of title" requirement as between the mortgagee and the joint tenant who did not enter into the mortgage agreement. Dale A.Whitman, Ann M. Burkhart, R. Wilson Freyermuth & Troy A. Rule, The Law of Property 153 (4th ed. 2019). Here the facts state that the property is in a title-theory state. Thus, the grant of the mortgage severed the joint tenancy, and the woman and her husband, upon severance, held title as tenants in common.

[NOTE: Under the common law four-unities test, a joint tenancy is severed and converted into a tenancy in common if, subsequent to the creation of the joint tenancy, there is a severance of the joint tenants' unity of time, title, interest, or possession. The execution of a mortgage in a title jurisdiction after the creation of the joint tenancy, which is a title transaction, severs the unity of both title and time because the mortgagee and the other joint tenant no longer have interests in the property that were created at the same time or under the same instrument. In many jurisdictions, the execution of a lease has the same consequence. *See* Point Two(a).]

Point Two(a) (15%)

If the mortgage did not sever the joint tenancy, then under the common law, the husband's unilateral execution of the lease would sever the joint tenancy. However, in some states today, a lease does not sever a joint tenancy.

At common law, a lease was treated as a conveyance of real property. Because of this, the grant of a lease by one joint tenant severed the unity of both title and interest, thereby destroying the right of survivorship. Joseph W. Singer, Property 352 (5th ed. 2017). Most states continue to follow the common law approach. *Id.*; *see, e.g.*, *Alexander v. Boyer*, 253 A.2d 359 (Md. 1969). Other common law jurisdictions, however, hold that a lease does not sever a joint tenancy.

In at least one state, a middle ground has been adopted. In *Tenhet v. Boswell*, 554 P.2d 330 (Cal. 1976), the court adopted the view that the leasing of a joint tenant's interest severs the joint tenancy only if the leasing joint tenant dies before the end of the lease term. On the other hand, if the leasing joint tenant survives the lease term and later is the first of the co-tenants to die, the survivor owns the entire property by right of survivorship.

Here, the facts do not indicate which approach State A follows.

[NOTE: Examinees should receive full credit for adopting any one of these positions. The critical score comes in Point Two(b) (severance) and Point Three(b) (no severance), where the consequences to the tenant of each of these positions is discussed.]

Point Two(b) (20%)

If the lease severed the joint tenancy, then the woman and her husband had a tenancy in common and upon the husband's death the tenant's lease would be valid with respect to the husband's undivided half interest in the building.

If the execution of the lease severed the joint tenancy, then immediately after the execution of the lease, the woman and her husband owned the building as tenants in common and the husband's undivided half interest was subject to the lease. In such a case, the lease survives the husband's death and is valid as against his half interest. Of course, because the tenant can have no greater rights than the husband had, while the tenant would be entitled to possession of the whole, the tenant cannot exclude the woman from also possessing the property should she so choose, just as the husband could not exclude her during his lifetime. Singer, *supra*, at 356–357.

Point Three(a) (20%)

Assuming that neither the mortgage nor the lease severed the joint tenancy, the woman would be entitled to half of the rental income payable under the lease during the husband's lifetime.

Joint tenants have equal rights of possession. Although possession by one tenant is not wrongful if the other tenant is not excluded, the exclusion of one joint tenant by the other is wrongful. Because possession by one joint tenant alone is not wrongful in the absence of exclusion, a joint tenant in possession is not liable to the joint tenant out of possession for the rental value of the property. *See generally* William B. Stoebuck & Dale A. Whitman, The Law of Property § 5.8 (3d ed. 2002).

However, when one joint tenant, acting alone, leases the property to a third party, each joint tenant is entitled to half of the rental income. *Id*. *See also* Singer, *supra*, at 367. If the leasing joint tenant to whom rent is paid does not share that rent with the other joint tenant, the other joint tenant may bring an accounting proceeding to compel a sharing of the rent.

Thus, the woman would be entitled to half of the rental income from the lease granted by her husband during his lifetime.

Point Three(b) (25%)

Assuming that neither the mortgage nor the lease severed the joint tenancy, then upon the husband's death the woman, as the surviving joint tenant, would own the building free and clear of the lease.

If the lease did not sever the joint tenancy, then upon the husband's death the woman alone would own the building by right of survivorship. Under the theory that the leasing joint tenant who died first effectively had only a life estate and could not convey more than he had, the lease would necessarily terminate at his death. Thus, the woman also would take the building free and clear of the rights of the tenant. *See* Singer, *supra*, at 356–358.

February 2020
MEE Question 3
Civil Procedure

FEBRUARY 2020 MEE
QUESTION 3–CIVIL PROCEDURE

During a snowstorm, a woman and a man were driving in opposite directions on a state highway when their cars collided head-on in the middle of the road. At the moment of impact, the locking mechanism on the woman's seat belt malfunctioned, and the woman was thrown from her car and seriously injured.

The woman was transported from the scene of the accident in an ambulance owned and operated by AmCo, a private ambulance company. On the way to the hospital, the ambulance driver lost control of the ambulance, which skidded off the highway, causing further injury to the woman and exacerbating the injuries she had suffered in the original accident.

Six months later, the woman filed a tort action in federal district court against the man, AmCo, and CarCo, the manufacturer of the woman's car. The complaint alleges that each defendant is liable for all or part of the woman's injuries. In particular, the complaint alleges that the man caused the original accident by swerving across the median of the highway, that AmCo's driver was driving too fast for the weather and road conditions, and that CarCo is liable because the seat belt in the woman's car was defectively manufactured. The woman's complaint properly invoked the court's diversity jurisdiction, and each defendant was properly served with process. Each defendant filed an answer to the complaint and denied liability.

Seven days after it served its answer, CarCo served a summons and complaint on LockCo, the company that manufactured and supplied the seat belt locking mechanism that CarCo installed in the woman's car. CarCo seeks to join LockCo as a party to the woman's action, alleging that LockCo must indemnify CarCo if the seat belt locking mechanism is found to have been defective and CarCo is held liable to the woman.

1. Under the Federal Rules of Civil Procedure, did the woman properly join the man, AmCo, and CarCo as defendants in a single action? Explain.

2. Under the Federal Rules of Civil Procedure, did CarCo properly join LockCo as a party to the woman's action against CarCo? Explain.

February 2020
MEE Analysis 3
Civil Procedure

FEBRUARY 2020 MEE
ANALYSIS 3 – CIVIL PROCEDURE

This analysis addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses are expected to be and should not be construed as a model answer. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

ANALYSIS

Legal Problems:

(1) Under the Federal Rules of Civil Procedure, did the woman properly join the man, AmCo, and CarCo as defendants in a single action?

(2) Under the Federal Rules of Civil Procedure, did CarCo properly join LockCo as a party to the woman's action against CarCo?

DISCUSSION

Summary

Under Fed. R. Civ. P. 20(a)(2), the woman may join all three defendants in a single action. Joinder is permitted because the woman's claims against the three defendants arise out of the same series of occurrences (the two related accidents) and because there are questions of fact common to all defendants (the nature, extent, and cause of the woman's injuries). Joinder is not barred by the fact that there are differences in the legal and factual bases for the liability of the three defendants.

Under Fed. R. Civ. P. 14(a)(1), CarCo may file a third-party complaint (impleader) against LockCo, thereby joining LockCo to the action as a third-party defendant. Here, based on CarCo's claim for indemnification, CarCo would be asserting that LockCo, as the manufacturer and supplier of the allegedly defective seat belt locking mechanism, is liable to CarCo for CarCo's liability to the woman.

Point One (50% total weight)

Under Fed. R. Civ. P. 20(a)(2), the woman may join all three defendants in a single action because her claims for relief against all three defendants arise out of a single series of related occurrences and there are questions of fact common to all defendants.

Fed. R. Civ. P. 20(a)(2) governs permissive joinder of parties. It provides as follows:

Persons . . . may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

Here, all the requirements for permissive joinder are present.

(30%) Same transaction, occurrence, or series of transactions or occurrences. The woman is asserting a right to relief against each defendant for injuries she suffered, either in the automobile accident or in the ambulance accident (which allegedly exacerbated her original injuries and caused new injuries). The basis for liability as to each defendant differs—the man's liability arises from the man's alleged negligent driving at the original accident scene, AmCo's liability arises from the alleged negligent driving of its driver triggering the second accident, and CarCo's liability is based on products liability and arises from its sale to the woman of a car with an allegedly defective seat belt. Each defendant, if found liable for his or its respective acts, would be liable for some part of the injuries suffered by the woman.

The woman's claims against the three defendants meet the "same transaction or occurrence" requirement. In determining whether claims against multiple defendants arise out of the same transaction or occurrence or series of transactions/occurrences, courts often ask whether the plaintiff's claims against the defendants are logically related. If there is a logical relationship between the claims and if it would serve judicial economy to hear the (related) claims together, the test is met. A typical situation is when an injured plaintiff joins "both the original tortfeasor and a second tortfeasor whose subsequent negligence aggravated plaintiff's original injuries." 7 Charles Alan Wright et al., Federal Practice and Procedure § 1653 (3d ed.).

Here, even though the action involves two accidents, the two accidents are clearly related. The ambulance accident would not have occurred but for the first accident and the need to rush the woman to the hospital. Moreover, the ambulance accident exacerbated injuries suffered in the first accident. Because of this close relationship, the court should conclude that the two accidents are part of a single occurrence or that they are part of a related "series of . . . occurrences," and that judicial economy would be served by allowing the court to resolve the question of the cause or causes of the woman's injuries in a single action.

(20%) Commonality. Finally, joinder of defendants requires that there be at least one "question of law or fact common to all defendants." Here, there are several common questions. The woman's claim against each defendant raises questions of the nature and extent of the woman's injuries, the precise cause of those injuries, and whether the woman was herself responsible for causing the original accident (and thus responsible for some part of her injuries).

[NOTE: Fed. R. Civ. P. 19 ("Required Joinder of Parties") is not applicable, as the Supreme Court has held that joint tortfeasors, as here, are not required parties under Rule 19 and are only permissive parties under Rule 20. *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5 (1990).]

Point Two (50%)

Under Fed. R. Civ. P. 14(a)(1), CarCo may file a third-party complaint (impleader) against LockCo, thereby joining LockCo to the action as a third-party defendant.

A defendant in an action may bring a third person into the action under limited circumstances. Fed. R. Civ. P. 14(a)(1) provides in relevant part: "A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it."

This rule establishes two requirements for a defendant to implead a nonparty. First, the defendant must allege that the nonparty "is or may be liable" to the defendant. Second, the nonparty's liability to the defendant must be "for all or part of the claim against" the defendant.

The facts of this problem are a good example of a case in which a defendant may properly implead a third party. The woman has sued CarCo for damages based on a claim that the seat belt in the car manufactured by CarCo was defective. CarCo, in turn, alleges that LockCo is primarily responsible for any defect in the seat belt because LockCo provided CarCo with a defective locking mechanism for that seat belt. Thus, CarCo claims that LockCo must indemnify CarCo for any damages CarCo may owe to the woman. In short, CarCo has alleged (in the language of Rule 14) that LockCo "is or may be liable to [CarCo] for all or part of the claim against [CarCo]." Under such circumstances, CarCo is allowed to implead LockCo. *See* 6 Charles Alan Wright et al., Federal Practice and Procedure § 1446 (3d ed.) (indemnity claim may be brought by impleader under Rule 14).

[NOTE: It was appropriate for CarCo to serve and file its third-party complaint without first seeking court permission. Under Rule 14, a defendant can serve a summons and complaint on a nonparty without leave of court if the defendant acts within 14 days of serving its answer, as CarCo did here. Fed. R. Civ. P. 14(a)(1).

Examinees should be expected to understand that impleading a third-party defendant under Rule 14, as CarCo seeks to do here, is NOT a form of joinder governed by either Rule 19 or Rule 20 of the Federal Rules of Civil Procedure. Examinees who offer a joinder analysis should receive no credit unless they demonstrate an understanding of the test for impleader: "a nonparty who is or may be liable" to another defendant "for all or part of the claim against it."

Some examinees may discuss whether a federal district court would have subject-matter jurisdiction (most likely supplemental jurisdiction) over an indemnification claim against LockCo. Such a discussion is outside the scope of the question and should be disregarded. The call of the question asks only whether the Federal Rules of Civil Procedure allow CarCo to implead LockCo.]

February 2020
MEE Question 4
Secured Transactions

FEBRUARY 2020 MEE
QUESTION 4–SECURED TRANSACTIONS

On February 1, Construction Company borrowed $500,000 from Bank. Construction Company's president, on behalf of the company, contemporaneously signed and delivered to Bank a security agreement that included the following language:

> To secure the repayment obligation of Construction Company to Bank, Construction Company hereby grants Bank a security interest in all rights of Construction Company to be paid with respect to any contract for the construction or repair of bridges or roads, whether such right exists now or arises in the future.

On March 1, Construction Company entered into a contract with a developer to build roads for a housing development. The contract required the developer to pay $450,000 to Construction Company upon completion of the road-building project.

On September 1, Construction Company defaulted on its obligations to Bank under the loan and the security agreement. Bank immediately sent a letter to the developer. The letter, which was signed on behalf of Bank by its president, read as follows: "In accordance with a security interest granted to us by Construction Company, all payments under your contract with Construction Company should be made to us at [address of Bank]."

This letter was received by the developer on September 3.

On October 1, Construction Company completed its project for the developer and sent an invoice to the developer demanding payment. The developer's treasurer decided to pay Construction Company, and not Bank, because the developer had a contract with Construction Company but not with Bank. The developer's treasurer promptly sent a check for $450,000 to Construction Company, which deposited the check and used the proceeds to pay its employees and subcontractors.

A few days later, when Bank learned that Construction Company had completed the road-building project, Bank sent an email to the developer demanding that the developer pay Bank the $450,000 contract price. Attached to the email was a copy of the security agreement signed by Construction Company and a copy of Bank's September 1 letter to the developer directing it to make all contract payments to Bank. The developer responded that it had already paid Construction Company and was therefore discharged from its payment obligation under the road-building contract. The developer also stated that the security agreement executed on February 1 could not have encumbered Construction Company's right to be paid under the road-building contract because that contract did not exist until March 1.

1. Did Bank have a security interest in Construction Company's right to be paid $450,000 by the developer for the road-building project? Explain.

2. Was the developer discharged from its payment obligation under the road-building contract by virtue of its having paid Construction Company? Explain.

February 2020
MEE Analysis 4
Secured Transactions

FEBRUARY 2020 MEE
ANALYSIS 4–SECURED TRANSACTIONS

This analysis addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses are expected to be and should not be construed as a model answer. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

ANALYSIS

Legal Problems:

(1)(a) What is required to create an enforceable security interest?

(1)(b) Can a security agreement encumber a debtor's assets that are created or acquired after the security agreement is entered into?

(2)(a) May a secured party that has a security interest in a payment obligation notify the obligor on the payment obligation that payments should be made to the secured party?

(2)(b) If an obligor on a payment obligation pays the original obligee after having received a notice from a secured party directing payments to be made to the secured party, is the obligor discharged from its obligation?

DISCUSSION

Summary

An enforceable security interest in collateral exists when the secured party has given value to the debtor, the debtor has rights in the collateral, and the debtor has authenticated an agreement (a "security agreement") that describes the collateral and grants the secured party a security interest in it. Here, those requirements are satisfied. Further, a security agreement may create a security interest in "after-acquired collateral" such as Construction Company's right to be paid by the developer.

After default by its debtor, a secured party with a security interest in a payment right may notify the "account debtor" (the person who owes payment) that payment must made to the secured party. After receipt of such notification, the account debtor must pay the secured party, and the obligation is not discharged if the account debtor pays the assignor. Thus, the developer's payment to Construction Company did not discharge its obligation, and the developer must pay $450,000 to Bank.

Point One(a) (25%)

Bank and Construction Company entered into a security agreement that created an enforceable security interest in Construction Company's right to be paid with respect to any contract for the construction or repair of bridges or roads.

A creditor ("secured party") has an enforceable security interest in collateral when (1) the creditor has given value to the debtor, (2) the debtor has rights in the collateral, and (3) the debtor has authenticated (signed or its electronic equivalent) a security agreement describing the collateral. *See* UCC § 9-203. Here, Bank has given value by loaning money to Construction Company, Construction Company has rights in the collateral (its right to payment under its construction contract), and the company's president signed an agreement describing the collateral and granting Bank a security interest in it. The description of the collateral is sufficient because it "reasonably identifies what is described." UCC § 9-108. Thus, Bank has an enforceable security interest in that payment right. (The payment right is an "account" because it is a right to payment of a monetary sum for services rendered or to be rendered. UCC § 9-102(a)(2).)

[NOTE: In this problem, it does not matter whether the security interest is perfected or not. Examinees should not be penalized for discussing perfection in general terms or for noting the absence of any evidence of perfection. However, an answer that concludes that the bank's interest is unenforceable because it is unperfected is incorrect.]

Point One(b) (25%)

<u>The security agreement was sufficient to create a security interest in Construction Company's right to payment under the contract with the developer even though that contract, and the payment right under it, did not exist until after the security agreement was entered into.</u>

A security agreement "may create or provide for a security interest in after-acquired collateral" (i.e., collateral that is created or that the debtor acquires after the agreement is executed). UCC § 9-204(a). Thus, the fact that Construction Company's right to payment from the developer did not exist at the time the security agreement was entered into does not prevent the creation of a security interest in that right on behalf of Bank. Once Construction Company entered into the contract with the developer, all three elements of an enforceable security interest existed—value (the loan) had been given, the debtor now had rights in the collateral (the payment right), and the debtor had authenticated a security agreement containing a description of the collateral. Thus, Bank had an enforceable security interest in Construction Company's right to be paid under the later contract with the developer.

Point Two(a) (20%)

<u>Because Construction Company had defaulted under the loan and security agreement, Bank had the right to direct the developer to make payment to Bank.</u>

Bank had a security interest in all rights of Construction Company to be paid with respect to any contract for the construction or repair of bridges or roads. That collateral constitutes "accounts" (UCC § 9-102(a)(2)), and the developer is the "account debtor" with respect to amounts owed by the developer under its contract with Construction Company. UCC § 9-102(a)(3).

Because the debtor (Construction Company) had defaulted under the loan and security agreement, the secured party (Bank) had the right to notify the account debtor (the developer) to make payment of the account directly to Bank. UCC § 9-607(a)(1).

Point Two(b) (30%)

Once the developer received the September 1 letter from Bank, it could discharge its payment obligation under its contract with Construction Company only by paying Bank.

The developer was an "account debtor" on an "account." *See* Point Two(a). An account debtor may discharge its obligation on an account by paying its original obligee only until the account debtor has received a notification that is authenticated by that obligee or its assignee (including a secured party) that an assignment has occurred and that payment should be made to the assignee; thereafter, the account debtor may discharge its obligation only by paying the assignee and is not discharged by paying the original obligee. UCC § 9-406(a). (The term "assignment" includes the grant of a security interest. *See* UCC § 9-102, cmt.) On September 3, the developer received a letter, signed on behalf of Bank, informing the developer about the security interest and directing it to make payment of its obligation to Bank. From that point forward, the developer could not discharge its obligation by paying Construction Company. Thus, the obligation is still owed and Bank is entitled to payment.

[NOTE: Examinees may note that the developer has a right to request reasonable proof that the assignment of the claim was made to Bank. UCC § 9-406(c). This is an accurate statement of law, but the issue is not raised by the facts.]

[NOTE: Because the effect of Bank's security interest on the developer's payment obligation is governed by UCC Article 9 as described in Points Two(a) and Two(b), analysis of that effect under the common law of contracts is displaced by UCC Article 9 and should not be given credit. However, an examinee who incorrectly concludes in response to call #1 that Bank does not have a security interest in Construction Company's right to be paid by the developer for the road-building project might then analyze call #2 under general contract law principles; in that case, the examinee should be given some credit for a thoughtful analysis.]

February 2020
MEE Question 5
Agency

FEBRUARY 2020 MEE
QUESTION 5–AGENCY

Linda owned and operated a clothing store as a sole proprietorship. To increase sales, she decided to offer a same-day delivery service to local customers. Rather than hiring an employee to make deliveries, she decided to use a driver who was an independent contractor to make deliveries on an as-needed basis. Because she did not know anyone who could do this work, she searched a website that listed local delivery drivers.

The website included the drivers' names, their hourly rates, and customer reviews of their work. A driver on the list with the lowest hourly rate by a wide margin used his own delivery van for making deliveries. But 40 recent customer reviews of this driver on a scale of 1 (low) to 5 (high) rated him as 1.5, citing specific instances of misbehavior, untrustworthiness, and bad driving. The website also reported that in the last couple of years, the driver had been sued three times for negligent driving and had been found liable in each case. Nonetheless, Linda decided to use this driver to make deliveries because of his inexpensive hourly rate and because he had his own delivery van.

When she hired the driver, Linda told him that, when making deliveries for the store, he would have to place self-sticking, removable signs advertising the store on both sides of his delivery van. He agreed, but because such signs ranged in price from $100 to $500 per pair, he told Linda that she would have to purchase them for him to use. Because she was too busy to do that, Linda asked him to purchase the signs but not to spend more than $300 for the pair when doing so. Linda gave the driver one of the store's cards, and as a means of identifying the driver as acting for the store, she wrote on the back, "This is my agent to purchase signs for my store."

The driver then went to a local sign shop, showed the shop owner the business card that Linda had given him (including her handwritten note on the back), and purchased a pair of custom-made signs for $450 on credit. Because the signs were custom-made, they were not returnable or refundable. When the completed signs were delivered to Linda, she refused to take possession of them or pay the sign shop for them because their cost exceeded the amount she had told the driver to spend by $150. The driver then made two smaller signs with the store name on them and, with Linda's approval, put them on his van when making deliveries.

Three weeks ago, Linda called a customer and told her, "My driver is on his way to make a delivery to you in a van with the store's name on its side." The customer kept watch at her window, and when she saw the van with the store's signs on it, she went out to the driveway through her garage. As she started to walk toward the van, the driver negligently hit the accelerator pedal, causing the van to hit the customer, who sustained substantial injuries.

Assume that there was an enforceable contract to buy the signs from the sign shop, that the driver's negligence proximately caused the customer's injuries, and that the driver was acting as Linda's independent-contractor agent.

1. Is Linda liable to the sign shop for the purchase price of the signs? Explain.

2. Is the driver liable to the sign shop for the purchase price of the signs? Explain.

3. Even though the driver was an independent contractor, is Linda vicariously liable to the customer for the injuries resulting from the driver's negligence? Explain.

4. Is Linda directly liable to the customer for the injuries the customer sustained? Explain.

February 2020
MEE Analysis 5
Agency

FEBRUARY 2020 MEE
ANALYSIS 5–AGENCY

This analysis addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses are expected to be and should not be construed as a model answer. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

ANALYSIS

Legal Problems:

(1) Is Linda liable to the sign shop for the purchase price of the signs?

(2) Is the driver liable to the sign shop for the purchase price of the signs?

(3) Even though the driver was an independent contractor, is Linda vicariously liable to the customer for the injuries resulting from the driver's negligence?

(4) Is Linda directly liable to the customer for the injuries the customer sustained?

DISCUSSION

Summary

Linda (the principal) is liable to the sign shop even though the driver (her agent) acted without actual authority. The driver had apparent authority to enter into the contract because the business card given to the sign shop owner at Linda's direction manifested Linda's consent to having the driver purchase signs as agent for her store. Further, given that the card had no stated limitation on price or mode of purchase, the driver had apparent authority to enter into a contract at a reasonable price on credit.

Even though the driver (the agent) exceeded his actual authority, he is not liable to the sign shop because Linda (the principal) was disclosed and is solely liable to the sign shop.

Linda probably is vicariously liable to the customer for injuries resulting from the driver's negligence because the driver was acting for Linda with apparent authority; the customer, based on conversations with Linda, believed that the driver was Linda's agent; and the driver's negligent actions occurred while he was making a delivery to the customer. Linda's vicarious liability arises even though the driver was acting as an independent contractor, not as Linda's employee.

Linda is also directly liable to the customer because of her negligent selection of the driver as an agent for her store, given that she was aware of his record of negligent driving.

Point One (25%)

Linda is liable to the sign shop on the contract to buy the signs because the driver, although he did not have actual authority to purchase the signs for $450, acted with apparent authority when purchasing the signs on credit at a reasonable price.

Generally, an agent has actual authority when he reasonably believes, based upon the principal's manifestations to him, that the principal wants him to act. Restatement (Third) of Agency § 2.01; Restatement (Second) of Agency § 7. Here, although Linda (the principal) clearly manifested to the driver (the agent) that he was to purchase signs for the delivery van, she made clear that he was not to purchase signs for more than $300. Thus, the driver had no actual authority to bind Linda to a contract for the purchase of signs for $450.

Nonetheless, an agent has apparent authority to bind a principal to a third party when the third party reasonably believes that the agent has authority to bind the principal and that belief is based upon the principal's manifestations to the third party. *See* Restatement (Third) of Agency § 2.03 ("belief is traceable to the principal's manifestations"); Restatement (Second) of Agency § 8 ("in accordance with . . . manifestations to such third persons"). In particular, "apparent authority . . . is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." Restatement (Second) of Agency § 27; *accord*, Restatement (Third) of Agency § 2.03. If the principal manifests to the third person that the agent is authorized to conduct a transaction, "there is apparent authority in the agent to conduct it in accordance with the ordinary usages of business . . . unless the third person has notice that the agent's authority is limited." Restatement (Second) of Agency § 49 cmt. b; *see also* Restatement (Second) of Agency § 61 cmt. a (ordinary usage includes the purchase of goods at any reasonable price).

Here, although the driver did not have actual authority to spend $450 to purchase the signs, he had apparent authority to do so. The business card given to the sign shop owner was a manifestation traceable to Linda that the driver had authority to purchase signs for her store. Thus, the sign shop owner could reasonably rely on this card and assume that the driver had authority to purchase goods on credit at a reasonable price. The $450 price was reasonable because such signs range in price from $100 to $500 per pair.

[NOTE: An examinee who attempts to distinguish the liability of Linda and that of the store should receive no credit. Linda operates her store as a sole proprietorship. Thus, for purposes of liability, Linda and the store are the same.

An examinee who discusses ratification by Linda of the sign-shop contract should receive no credit. Here, there was apparent authority for the sign-shop contract, and furthermore, there are no facts to support that there were any subsequent actions by the woman that represented an affirmance of an unauthorized transaction. *See* Restatement (Third) of Agency § 4.01(1), (2); Restatement (Second) of Agency §§ 82, 83.

An examinee might note that the sign contract is governed by UCC Article 2. This is accurate but does not change the analysis. Even in contracts governed by Article 2, common law agency principles apply. UCC § 1-103(b).]

Point Two (25%)

<u>The driver (the agent) is not liable to the sign shop on the contract because Linda (the principal) was a disclosed principal and is liable on the contract, even though the driver breached an implied warranty of authority when he entered into the contract on Linda's behalf.</u>

When an agent with actual or apparent authority contracts on behalf of a disclosed principal, a contract arises between the principal and the third party, but not between the agent and the third party unless they otherwise agree. Restatement (Third) of Agency § 6.01 (agent not a party if he had actual or apparent authority); Restatement (Second) of Agency § 328 (agent not liable if he has power to bind principal). Here, although the driver exceeded his actual authority when he contracted to purchase a pair of signs for $450, he nonetheless had apparent authority to enter into the contract with the sign shop on behalf of Linda's store, which was a disclosed principal (*see* Point One). Thus, the driver is not liable on the sign-shop contract.

This conclusion is not affected by the driver's lack of actual authority. Generally, if a person who purports to contract with a third party on behalf of another has no power to act for the other, the person is liable to the third party for breach of implied warranty of authority. Restatement (Third) of Agency § 6.10; Restatement (Second) of Agency § 329. But the comments to section 6.10 note: "If a principal is bound to a third party on the basis of an agent's apparent authority, the agent is not subject to liability to the third party on the agent's implied warranty of authority, although the agent acted without actual authority." Restatement (Third) of Agency § 6.10, cmt. b. *Accord*, Restatement (Second) of Agency § 329. Thus, even though the driver acted without actual authority, he is not liable for breaching an implied warranty of authority because Linda is bound based on the driver's apparent authority.

Point Three (25%)

Linda probably is vicariously liable to the customer because the driver was acting with apparent authority at the time he negligently injured the customer, given that the customer reasonably believed that the driver was acting as agent for Linda, and the driver's negligence occurred while he was making a delivery to the customer.

Under the doctrine of respondeat superior, an employer (master) is vicariously liable—that is, strictly liable regardless of the employer's fault—for the physical torts of an employee (servant) where the tort is committed within the scope of employment. *See* Restatement (Third) of Agency § 7.03(2)(a); Restatement (Second) of Agency § 219(1). Although a principal generally is not vicariously liable for the physical torts of non-employee agents (*see* Restatement (Third) of Agency § 7.07 cmt. f ("Definition of employee"); Restatement (Second) of Agency § 250), a principal can be vicariously liable under some circumstances to a third person for torts committed by a non-employee agent where the agent acts with apparent authority. Restatement (Third) of Agency § 7.08; Restatement (Second) of Agency § 265.

Under the Restatement (Third), a principal "is subject to vicarious liability for a tort committed by an agent in dealing . . . with a third party on . . . behalf of the principal when actions taken by the agent with apparent authority constitute the tort . . . ." Restatement (Third) of Agency § 7.08. Under the Restatement (Second), the non-employer principal is liable only where the third party *relies* upon the appearance of agency. Restatement (Second) of Agency § 265 (Illustration 4) (emphasis added). While the blackletter of the Third Restatement omits the reliance language found in the Second Restatement, comment b indicates that reliance is built into the liability rule because of the apparent authority requirement. It states: "An agent acts with apparent authority with regard to a third party when the third party reasonably believes that the agent or other actor has authority to act on behalf of the principal and that belief is traceable to manifestations made by the principal."

Here, although Linda is not vicariously liable for the driver's negligence under the doctrine of respondeat superior because the driver is an independent-contractor agent and not an employee, Linda is likely to be held vicariously liable to the customer because the driver's actions in making the delivery to the customer with apparent authority constituted the tort, and the customer clearly relied upon the appearance of apparent authority.

Here, the customer was negligently struck by the van after the customer went into the driveway to wait for the van that Linda had said would be arriving. Given that the customer went to the driveway when she saw the signs on the sides of the van, the customer reasonably believed that the van that struck her was the van sent by Linda. Both facts are more than sufficient to create apparent authority and the necessary reliance to support a finding of vicarious liability on the part of Linda.

Point Four (25%)

Linda is directly liable to the customer for the driver's negligent act because Linda was negligent in the selection of the driver as her agent, and her negligence was the cause of the harm to the customer.

Whether or not a principal is vicariously liable for actions of an agent, "[a] principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent." Restatement (Third) of Agency § 7.05(1); *see also* Restatement (Second) of Agency § 213(b) ("person conducting an activity through servants or other agents is subject to liability . . . if he is negligent or reckless . . . in the employment of improper persons . . . in work involving risk of harm to others.")

The comments to the Restatement (Third) of Agency explain this "negligent selection" rule:

> A foreseeable risk of harm may be created when one person conducts an activity through another person. For example, the actor chosen for a task may lack competence to perform it without endangering others. A task may require using an instrumentality that is dangerous to others unless the user has appropriate skill or supervision. Some tasks require performance in settings that pose a foreseeable risk of criminal or other intentional misconduct against third parties or their property unless the actor is chosen with due care in reference to that risk.
>
> Restatement (Third) of Agency § 7.05(1) comment b.

Here Linda had reasons to suspect that the driver she hired was prone to driving negligently. The website that Linda searched showed recent customer complaints about the driver's poor driving and reported that he had been sued three times for negligent driving and held liable in each case. Linda ignored these warning signals because the driver's hourly rate was low, enabling her to reduce her delivery costs, and because the driver had his own van. Further, the driver's negligent driving of the van was the cause of the customer's injuries. Thus, there is a sufficient basis for finding that Linda's negligent selection of the driver was the cause of the customer's injuries. Under the "negligent selection" rule, Linda is directly liable to the customer.

February 2020
MEE Question 6
Evidence / Criminal Law

FEBRUARY 2020 MEE
QUESTION 6–EVIDENCE / CRIMINAL LAW

A man and a woman were waiting in line at a public park for tickets to attend an outdoor performance of a play. They soon began arguing about sports, and as their conversation became more animated, the man began shouting at the woman and poking her shoulder with his finger. As the man poked harder and harder, the woman responded by punching the man in the nose.

The woman was arrested at the scene and charged with battery.

At trial, the prosecutor intends to elicit the following testimony from an eyewitness who was standing in the line:

> Before the man arrived, I saw the woman talking to a friend. The friend said to the woman, "You and I have waited so long for these tickets, if anyone annoys us today they will not be seeing this play—they'll be going to the hospital!" The woman nodded her head and gave the friend a thumbs-up signal.
>
> I recognized the woman. I live in her neighborhood, and I probably see her at least twice a week. Every time I see her, she is arguing with people, acting out, and generally causing problems.

Assuming that the eyewitness is permitted to testify for the prosecution, defense counsel plans to

> (1) cross-examine the eyewitness about her five-year-old conviction for shoplifting, a crime punishable by a maximum sentence of six months in jail; and
>
> (2) cross-examine the eyewitness about a letter recently written by the eyewitness to the man saying, "Thanks for 10 years of a great friendship."

The jurisdiction's rules governing crimes and affirmative defenses follow common law principles. The evidence rules of the jurisdiction are identical to the Federal Rules of Evidence.

The woman's friend is unavailable and will not testify at trial.

1. Assuming that the prosecution proves the elements of battery, can the woman establish a common law affirmative defense based on these facts? Explain.

2. What portions of the eyewitness's testimony, if any, would be admissible? Explain.

3. What portions, if any, of the defense counsel's cross-examination should the court permit? Explain.

Do not discuss any constitutional issues.

February 2020
MEE Analysis 6
Criminal Law

FEBRUARY 2020 MEE
ANALYSIS 6–CRIMINAL LAW

This analysis addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses are expected to be and should not be construed as a model answer. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

ANALYSIS

Legal Problems:

(1) Under the common law, what affirmative defenses to battery are available to the woman?

(2)(a) If the eyewitness testifies, should the judge permit the eyewitness to repeat out-of-court statements made by an unavailable witness (the friend) and to describe the woman's nonverbal responses (nodding her head and giving a thumbs-up signal)?

(2)(b) If the eyewitness testifies, should the judge permit the eyewitness to testify that she has seen the woman frequently and that the woman is always "arguing with people, acting out, and generally causing problems"?

(3)(a) If the eyewitness testifies, should the judge permit cross-examination about the eyewitness's five-year-old shoplifting conviction?

(3)(b) If the eyewitness testifies, should the judge permit cross-examination about a letter from the eyewitness to the man?

DISCUSSION

Summary

On these facts, under the common law, the woman may be able to establish that she acted in self-defense. This affirmative defense will succeed if the woman can prove that (1) the man's shouting and poking her in the shoulder with his finger caused her to have a reasonable belief that she was in imminent danger of unlawful bodily harm from the man and (2) her punching him in the nose was the amount of force reasonably necessary to prevent such harm.

Testimony from the eyewitness recounting the friend's out-of-court statement to the woman and the woman's nonverbal responses is relevant because it makes the woman's self-defense claim less probable. The friend's statement is nonhearsay because it is offered for the purpose of providing context for the woman's assertive conduct. Testimony describing the woman's assertive conduct, if it is offered to prove the truth of the matter asserted, should be admitted either (1) as a nonhearsay opposing party's adopted statement, *see* Fed. R. Evid. 801(d)(2)(B), or (2) under the hearsay exception for statements of intent, *see* Fed. R. Evid. 803(3).

The eyewitness's testimony that the woman frequently argues with people, acts out, and generally causes problems is inadmissible character evidence. *See* Fed. R. Evid. 404(a) and 405. This testimony is not admissible as a prior crime, wrong, or act. *See* Fed. R. Evid. 404(b).

Cross-examination about the eyewitness's five-year-old shoplifting conviction to impeach her character for truthfulness probably should not be permitted. *See* Fed. R. Evid. 609(a)(2). Here, the conviction was for a crime punishable by imprisonment for less than one year, and the elements of the crime of shoplifting, as proved or admitted, usually do not require an act of dishonesty or false statement.

Defense counsel should be permitted to cross-examine the eyewitness about her letter to the man to show the eyewitness's bias.

Point One (20%)

Under the common law, the woman may be able to establish that she acted in self-defense.

At common law, a person charged with a crime involving the use of force (*e.g.*, battery) can raise the affirmative defense of self-defense. *See generally* Wayne LaFave, Criminal Law § 10.4 (6th ed. 2017). Self-defense provides a defense when "a person reasonably believes that force is necessary to protect himself . . . from what he reasonably believes to be unlawful physical harm about to be inflicted by another . . . ." *United States v. Milk*, 447 F.3d 593, 598 (8th Cir. 2006). To establish a claim of self-defense based upon the use of non-lethal force, a defendant must prove that she (1) reasonably believed that the force was necessary to protect her from another person's imminent use or attempted use of unlawful force and (2) used an amount of force proportionate to the force encountered. *See, e.g., Stralow v. State*, 2016 WL 625239 (Tex. Ct. App. 2016); *see also* Model Penal Code § 3.04 (noting that the use of force is "justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion"). In some jurisdictions, a defendant also must prove either (1) that she was not the initial aggressor or (2) if she were the initial aggressor, that she withdrew from or abandoned the conflict before acting in self-defense.

First, the woman should be able to establish that she had a reasonable belief that force was necessary to protect her from the man's unlawful use of force against her. At the time she punched the man in the nose (the act constituting the charged crime of battery), the man was using unlawful force against her by repeatedly poking her shoulder with increasing force. *See, e.g., State v. Glassman*, 772 A.2d 863, 867 (Me. 2001) (evidence that victim pushed defendant was sufficient for jury instruction on self-defense). The repeated shoulder poking was an actual, rather than threatened, use of unlawful force. Because the poking involved increasing force, the man's actions were already causing or were reasonably likely to cause the woman imminent physical harm. In general, self-defense is warranted when a defendant reasonably fears imminent physical harm. However, defendants have also successfully argued self-defense in cases where they confronted unlawful force of a type not likely to cause physical harm (*e.g.*, a non-injurious but offensive touching). *See, e.g., Whisman v. State*, 2012 WL 4513773 (Nev. 2012) (a person may use reasonable force to resist any offense against their person, including an "unlawful touching that does not result in a physical injury"); *State v. Bruder*, 676 N.W.2d 112, 115 (S.D.

2004) (same). Accordingly, on these facts, the woman can establish that she reasonably believed that she needed to use physical force to protect herself from the man's unlawful use of force.

Second, the woman must prove that her response (punching the man in the nose) involved force proportionate to the unlawful force encountered. *See generally* Wayne LaFave, Criminal Law, Self-Defense: Amount of Force, Chapter 10.4(b) (6th ed. 2017) ("In determining how much force one may use in self-defense, the law recognizes that the amount of force which he may justifiably use must be reasonably related to the threatened harm which he seeks to avoid.") The man used his hand (rather than a weapon) to poke the woman, and the woman used her hand (rather than a weapon) to punch him in the nose. Ultimately, the question of whether a punch is a proportionate response to increasingly forceful poking is a factual question, *see, e.g.*, *In re Savannah B.*, 2004 WL 119922 (Cal. App. 2014) ("[T]he question of whether a closed-fist punch in the face constitutes an excessive reaction to a push or shove is a factual question.").

Finally, in some jurisdictions self-defense requires a defendant to also prove either (1) that she was not the initial aggressor or (2) if she were the initial aggressor, that she withdrew from or abandoned the conflict before acting in self-defense. Here, the facts do not support a finding that the woman was the initial aggressor.

[NOTE: An examinee should not discuss self-defense in the context of a "stand your ground" statute because the call of the question requires a common law analysis. However, the analysis under many "stand your ground" statutes would be substantially similar.]

Point Two(a) (30%)

<u>The eyewitness's testimony recounting the friend's out-of-court statement and the woman's responsive nodding of her head and giving a thumbs-up signal is relevant and not inadmissible hearsay.</u>

The eyewitness's testimony recounting the friend's out-of-court statement to the woman ("If anyone annoys us today they will not be seeing this play—they'll be going to the hospital!") and describing her observation that the woman responded by nodding her head and giving a thumbs-up signal is relevant. Assuming that the woman argues that she acted in self-defense, as noted in Point One, the jury must decide whether her punch was justified under the circumstances. The eyewitness's testimony and the woman's response are relevant because they have some tendency to make "a fact of . . . consequence" (her reasonable belief that she needed to punch the man to protect herself) "less probable than it would be without the evidence" because together the evidence suggests that the woman might have punched the man simply because he annoyed her and with the intention of hurting him rather than stopping him from poking her. *See* Fed. R. Evid. 401.

The woman's nodding her head and giving a thumbs-up signal is assertive conduct. The friend's out-of-court statement is nonhearsay because it is offered for the purpose of providing context for the woman's assertive conduct. *See, e.g, United States v. Woods*, 301 F.3d 556, 561 (7th Cir. 2002) (noting that statements that prompt an adoptive admission are admissible either because they were adopted or to provide context). The friend's statement, if it is offered to prove the truth of the matter asserted, is a hearsay statement. *See* Fed. R. Evid. 801(c)(2).

However, the woman's statement (her assertive conduct) is admissible for two reasons. First, a statement is not hearsay if "[t]he statement is offered against an opposing party and . . . is one the party manifested that it adopted or believed to be true." *See* Fed. R. Evid. 801(d)(2). Here, the prosecution is offering a statement by the opposing party—the woman—against the opposing party to show that she adopted the friend's statement and/or believed it to be true. *See, e.g., United States v. Tocco*, 135 F.3d 116, 129 (2d Cir. 1998) (finding that a head nod in response to a statement constituted an adoptive admission).

Second, because the statement that the woman adopted was a statement of intent or plan, it would also be admissible under the hearsay exception for statements related to a declarant's "then-existing state of mind." *See* Fed. R. Evid. 803(3). For more than a century, courts have applied the *Hillmon* doctrine, which permits the use of such statements of intent by a declarant to prove the declarant's future conduct. *See Mut. Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285 (1892); *Coy v. Renico*, 414 F. Supp. 2d 744, 766–771 (E.D. Mich. 2006). Here, the friend's statement, which the woman adopted, can be used to prove that the woman intended to physically injure anyone who annoyed her and her friend, which makes her self-defense claim less probable. *See* Fed. R. Evid. 803(3).

[NOTE: If the woman's assertive conduct is not offered to prove the truth of the matter asserted, it would still be relevant and can be admitted as circumstantial evidence of the woman's state of mind (i.e., frustration, anger, hostility). Such evidence of the woman's state of mind would be relevant to show that the woman acted out of pique and not because she reasonably believed it was necessary to defend herself against a threat from the man. Examinees should not discuss the confrontation clause because they are instructed not to discuss constitutional issues. Therefore, examinees should not receive credit for discussing confrontation clause precedent, including *Crawford v. Washington*, 541 U.S. 36 (2004).]

Point Two(b) (25%)

<u>The eyewitness's testimony about the woman's public behavior should not be permitted because it is inadmissible character evidence.</u>

Although the eyewitness's testimony that the eyewitness recognized the woman would be relevant, under Rule 404(a)(1) evidence of a person's wrongs or other acts is "not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Here, Rule 404(a)(1) bars admission of the eyewitness's testimony that the woman is always "arguing with people, acting out, and generally causing problems" because this character evidence would be relevant only to support the impermissible propensity inference. *See, e.g., Delozier v. Evans*, 763 P.2d 986, 991 (Ariz. Ct. App. 1988) ("The trial court excluded testimony offered to show that Delozier was combative and aggressive when intoxicated.").

Although character evidence may be admissible against a criminal defendant, this occurs only after a defendant presents evidence of her own good character (e.g., evidence that she has a "peaceable" disposition) or evidence of the victim's bad character (e.g., evidence that the victim has a "violent" disposition). *See* Fed. R. Evid. 404(a)(2)(A) & (B). Here, the woman has not offered any evidence that would "open the door" to the eyewitness's testimony. The woman's affirmative defense of self-defense does not depend on showing good character.

Finally, evidence of prior bad acts of any party or witness can be admitted for non-propensity purposes (i.e., to prove motive, opportunity, intent, plan, etc.). *See* Fed. R. Evid. 404(b)(2). However, the circumstances here afford no reasonable argument that the eyewitness's testimony could be used for any relevant non-propensity purpose.

Point Three(a) (15%)

Cross-examination about the eyewitness's five-year-old shoplifting conviction should probably not be permitted to impeach her character for truthfulness.

Rule 609 governs the impeachment of witnesses using prior convictions. Under Rule 609(a)(1), criminal convictions may be used to attack a witness's character for truthfulness if the crime was punishable by death or by imprisonment for more than one year. Fed. R. Evid. 609(a)(1). Here, the shoplifting conviction does not satisfy Rule 609(a)(1) because it was punishable by a maximum possible sentence of just six months in jail.

Under Rule 609(a)(2), "for any crime regardless of the punishment, the [conviction] evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement." Most courts have found that shoplifting normally does not satisfy Rule 609(a)(2) because it is a crime that can be completed without an act of dishonesty or false statement. *See, e.g., United States v. Dunson*, 142 F.3d 1213, 1215 (10th Cir. 1998) (perceiving no error in district court's conclusion that a shoplifting conviction fell outside the scope of Rule 609(a)(2)). In fact, some have held that most theft crimes do not satisfy Rule 609(a)(2) because they involve acts of stealth and not dishonesty. *See, e.g., United States v. Washington*, 702 F.3d 886, 893 (6th Cir. 2012) ("Theft is a prime example of a crime of stealth, and it has been distinguished from crimes of dishonesty in most federal circuits"); *United States v. Sellers*, 906 F.2d 597, 603 (11th Cir. 1990) ("crimes such as theft, robbery, or shoplifting do not involve 'dishonest or false statement' within the meaning of Rule 609(a)(2)"); *United States v. Yeo*, 739 F.2d 385, 387 (8th Cir. 1984) ("Theft, which involves stealth, . . . is not characterized by an element of deceit . . ."); *United States v. Entrekin*, 624 F.2d 597, 598–99 (5th Cir. 1980) (shoplifting does not involve dishonesty or false statement within the meaning of Rule 609(a)(2)). A court taking this view would normally not allow the eyewitness's five-year-old shoplifting conviction to be used for impeachment.

However, Rule 609(a)(2) is not an absolute bar to the use of a shoplifting conviction to impeach a person's character for truthfulness. If the woman's counsel can establish that the eyewitness's shoplifting conviction required proof of, or admission to, a dishonest act or false statement by the eyewitness, the court may admit that conviction for impeachment purposes. *United States v. Veater*, 2012 WL 4882300 (D. Utah 2012) (citing *Dunson*, 142 F.3d at 1215–16) (noting that "shoplifting convictions are not automatically a crime involving dishonesty or false statement within the meaning of Rule 609(a)(2)," but that "shoplifting convictions are also not automatically excluded if it can be shown that it involved fraudulent or deceitful conduct" and that "the court need not ferret it out; that responsibility [to prove that a prior conviction required proof of, or admission to, a dishonest act or false statement by the defendant] falls squarely on the proponent's shoulders").

[NOTE: Although the majority view is that a shoplifting conviction could not be used for impeachment absent proof that it was accomplished by "fraudulent or deceitful conduct," there are some jurisdictions whose courts take the view that theft is inherently a crime involving dishonesty or false statement. *See, e.g, State v. Page*, 449 So. 2d 813, 815 (Fla. 1984); *People v. Spates*, 395 N.E.2d 563, 568 (Ill. 1979); *State v. Johnson*, 460 N.E.2d 625, 629 (Ohio Ct. App. 1983) (stealing is a dishonest act); *Cline v. State*, 782 P.2d 399, 400 (Okla. Crim. App. 1989) (stealing is "universally regarded as conduct which reflects adversely on a man's honesty and integrity"). In such jurisdictions, the eyewitness's shoplifting conviction could be used to impeach the eyewitness's character for truthfulness.]

Point Three(b) (10%)

Defense counsel should be permitted to cross-examine the eyewitness about her letter to the man to show the eyewitness's bias in favor of the man.

Although impeachment by showing bias is not addressed by the Federal Rules of Evidence, it predates the creation of the Rules and has traditionally been widely permitted. In *United States v. Abel*, 469 U.S. 45 (1984), the Supreme Court held that bias has always been a legitimate and permissible form of impeachment.

Here, the eyewitness's letter thanking the man "for 10 years of a great friendship" suggests that the eyewitness is biased in favor of the man, meaning that defense counsel could use it to impeach her. *See, e.g., Varnado v. Yates*, 2009 WL 2045981 (C.D. Cal. 2009) ("Of course, Nunley could have been impeached for possible bias because he was a longtime friend of [petitioner's] and he knew Bryan."). Use of the letter for these purposes does not raise hearsay concerns. Here, the letter would be offered to prove the eyewitness's bias based on her belief that she and the man had shared "10 years of a great friendship," a belief that has relevance to the eyewitness's bias independent of the truth of the matter asserted. *See, e.g., United States v. Hudson*, 970 F.2d 948, 957 (1st Cir. 1992) ("As [the statements] were not being offered for the truth of the matter asserted, they were not hearsay in any respect.").

[NOTE: Defense counsel would not be using the letter to establish the eyewitness's *general* propensity for lying, so Rule 608(b)'s prohibition on the admission of extrinsic propensity impeachment evidence would not apply. *See, e.g., United States v. Thorn*, 917 F.2d 170, 176 (5th Cir. 1990) ("An exception to the prohibition against the use of extrinsic evidence to attack the credibility of a witness exists in cases in which the evidence tends to show bias or motive for the witness to testify untruthfully.")

Finally, it is not necessary for an examinee to discuss the Best Evidence Rule (Rule 1002) because the question does not ask about the admissibility of the letter. However, an examinee who properly addresses the issues discussed above and also considers the possibility that, if the letter is offered in evidence the Best Evidence Rule applies if the contents of the letter must be proved, demonstrates an accurate understanding of the law.]