JULY 2014 MICHIGAN BAR EXAMINATION
EXAMINERS' ANALYSES

EXAMINERS' ANALYSIS OF QUESTION NO. 1

The elements of Larceny from the Person are:

1) the defendant took someone else's property;
2) the property was taken without consent;
3) there was some movement of the property;
4) the property was taken from a person or from a person's immediate control or immediate presence;
5) at the time the property was taken, the defendant intended to permanently deprive the owner of the property.

MCL 750.357; Mi Crim JI 23.3; *People v Chambliss*, 395 Mich 408 (1975), overruled in part on other grounds, *People v Cornell*, 466 Mich 335 (2002).

The elements of the crime of Conspiracy are:

1) an agreement, express or implied, between two or more persons;
2) to commit an illegal act; or
3) to commit a legal act in an illegal manner; and
4) specifically intending to commit or help commit the crime.

See *People v Bettistea*, 173 Mich App 106 (1988).

Dan

The chances of convicting Dan of Larceny from the Person are high. He grabbed the moneybag containing the store's

receipts. He did not have anyone's consent to take the bag, as evidenced by his wearing the gorilla mask and the manager's hollering. The bag containing the money was moved from inside to outside the store. The facts provide that the manager was present with the bag in his office, clearly indicating the bag was taken from his immediate control or presence. Dan's running away with the money and the earlier agreement with Jim to share the money proves that Dan intended to permanently deprive the store of the money.

Dan's chances of conviction of Conspiracy to Commit Larceny from the Person are also high. He entered into an express agreement with Jim to steal the moneybag. While the agreement constitutes the crime of conspiracy without an overt act, in accordance with the agreement, any such distinction is not germane here where multiple steps were taken to advance the conspiracy. See Mi Crim JI 10.1.

Jim

Jim's chances of conviction for Larceny from the Person are also high, although under a slightly different analysis. While Jim did not take the store's money, his criminal liability is as an aider and abettor, sometimes called an accomplice. The pertinent Michigan statute, MCL 767.39, states:

> Every person concerned in the commission of the offense, whether he directly commits the act constituting the offense or procures, counsels, aids or abets in its commission, may hereafter be prosecuted, indicted, tried and, on conviction, shall be punished as if he had directly committed such offense.

The elements of aiding and abetting are:

1) the crime charged was committed by the defendant or some other person;
2) the defendant performed acts or gave encouragement that assisted the commission of the crime;
3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave an encouragement.

People v Bennett, 290 Mich App 465, 472 (2010); Mi Crim JI 8.1.

Applying the foregoing to the facts presented yields the conclusion that Jim is guilty of Larceny from the Person as an aider and abettor. He shared Dan's intention to steal the store's money, was fully aware of what Dan was going to do, was to share in the fruits of the crime, and aided Dan by going with him and acting as a lookout for police so as to facilitate the crime's commission. That he botched his job by not seeing the patrol officer does not affect his criminal liability.

Jim is also highly likely to be convicted as Dan's co-conspirator. He fully entered into the agreement to commit the larceny. While originally the crime was Dan's idea, no conspiracy can exist without a second participant. Jim and Dan forged their conspiratorial agreement the day before the larceny and took specific steps to advance that agreement. Jim and Dan's dual intents – to enter into an agreement and to commit the crime – are identical.

Mike

Mike has no criminal responsibility for the charged crimes. He did not leave the car while the others went to the store. Although it could be claimed he acted as an accomplice, such a claim would fail because he had no awareness a crime was to be committed. Indeed, he was purposely left in the dark. His parking the car 75 feet away from the store was done not to aid in the commission of the crime as the "get-away" driver but because it was the closest spot to the store. Moreover, even driving Dan and Jim to the store was not done to facilitate the crime; he often drove Dan to pick up his check. Finally, to confirm Mike's non-involvement with the crime, when he reasonably became aware of the larceny (i.e. when he saw Dan running to the car with a gorilla mask on and carrying a moneybag, followed by Jim and the officer), he locked his car doors preventing Dan and Jim from getting into the car. This action, along with remaining on the scene, did not aid the boys' getaway; it foreclosed it. Mike was merely present on the scene, without the requisite knowledge to be an aider and abettor. If mere presence – even with knowledge a crime is to be committed – is insufficient to establish criminal liability, *People v Norris*, 236 Mich App 411, 419-420 (1999) *a fortiori*, mere presence *without* knowledge is also insufficient.

Similarly, Mike cannot be convicted of Conspiracy. He was not part of Dan and Jim's agreement, and no facts suggest the two varied from their understanding not to tell Mike of their

plan. While a co-conspirator need not be involved at a conspiracy's incipiency, and one may join an ongoing conspiracy, the facts indicate there was no discussion in the ride to the store about the larceny plan, nor any discussion to include Mike in the conspiracy.

Mike will not be found guilty of either crime charged.

EXAMINERS' ANALYSIS OF QUESTION NO. 2

1. Defense counsel will lose the hearsay objection regarding Bobby quoting Clarence's statement. Under MRE 801(c), hearsay is a statement, other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Clarence's statement would seem to fit the definition of hearsay and would be inadmissible under MRE 802.

However, MRE 801(d)(2)(A) provides that a statement is not hearsay if the statement is offered against a party and is the party's own statement. If a statement is not hearsay, MRE 802's ban does not come into play.

Here the statement is sought to be introduced against Clarence (after all, Clarence's counsel is trying to keep it out of the trial) and Clarence is a party to the action. Because the statement satisfies both components of MRE 801(D)(2)(A), it is not hearsay and defense counsel's request will be rejected.

2. Sam's statement to Constable presents a closer question. It appears Sam's statement is sought to be introduced for the truth of its content (it would be hard to see any other relevance) and, therefore, is hearsay because the statement was not made at the trial or hearing. Moreover, in contrast to Clarence's statement, none of the exclusions found in MRE 801(D)(1) or (2) would apply. Therefore, being hearsay, the statement may gain admissibility only if an exception to the hearsay rule applies. (MRE 802 states, "Hearsay is not admissible except as provided by these rules.")

Plaintiff's counsel has offered present sense impression under MRE 803(1) as a justification for admission of Sam's statement. That rule states:

> The following are not excluded by the hearsay rule even though the declarant is available as a witness:
>
> (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

As with most hearsay exceptions, admission of the statement without the test of cross-examination is tolerated because certain statements are thought to be reliable and/or trustworthy. The hallmark of the present sense impression exception is that the statement is made contemporaneously with the observation or immediately thereafter before the mind has time to fabricate. Coming hard apace after the event ensures, as best as possible, that the statement is an unvarnished description of the events, leaving no time for reflection or for calculated misstatements.

On the facts as presented, it is clear a couple of the exceptions' requirements are met. The accident is clearly an event and the statement describes the event. However, the 55-minute delay in making the statement to Constable is problematic. While the language of the rule, "or immediately thereafter", does not mean "instantly thereafter", see *Berryman v Kmart Corp*, 193 Mich App 88 (1992), the passage of 30 minutes between event and statement has been found to be too long. *Hewitt v Grand Trunk W Railroad, Co*, 123 Mich App 309 (1983). Sam's statement that "it's about time someone talked to me" further indicates enough time to fabricate or consider his statement.

Defense counsel's position is likely to prevail.

3. Defense counsel should prevail on keeping the deposition from being read at trial. The reason proffered by John for reading the deposition of Homer rather than presenting him is insufficient to allow the deposition to be read. The Michigan rules of evidence countenance the use of deposition testimony at trial. (MRE 804(b)(5), Deposition Testimony) However, the witness previously deposed must be "unavailable" for trial. MRE 804(a)(1)-(5). Relatedly MRE 801(d)(1), Prior Statement of Witness, allows the use of deposition testimony as well, if the deponent testifies at the trial or hearing.

The instant facts do not establish any of the prerequisites for usage of Homer's deposition at trial. He is not unavailable, but rather able and willing to testify. Moreover, John is not seeking to put him on the stand but rather to <u>keep him off the stand</u>. The threshold for admission of the deposition testimony – that the witness testifies at trial about the prior statement – is not established. No basis exists to have Homer's deposition read in lieu of his live testimony. Defendant's position should be sustained.

In sum, defense counsel will not prevail on Clarence's statement, will prevail on Sam's statement, and will prevail on disallowing use of Homer's deposition testimony.

EXAMINERS' ANALYSIS OF QUESTION NO. 3

1. Anita's statement to Chelsea is not testimonial hearsay. In *Crawford v Washington*, 541 US 36 (2004), the United States Supreme Court held, among other things, that the accused's Sixth Amendment right to confrontation applied only to "testimonial" statements. While the Court did not supply a complete definition for "testimonial" statements or present an exclusive list of examples, it did provide a general measuring rod for determining whether a given statement would be classified as "testimonial."

As *Crawford* stated, the Confrontation Clause applies to "witnesses" who "bear testimony." *Crawford*, 541 US at 51. "Testimony in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* (internal quotations and citation omitted). Significantly, *Crawford* observed, "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* Stated slightly differently, "In determining whether statements are testimonial, we ask whether the declarant 'intend[ed] to bear testimony against the accused . . .[such that] a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.'" *US v Johnson*, 581 F3d 320, 325 (CA 6, 2009), quoting *US v Cromer*, 389 F3d 662, 675 (CA 6, 2004).

Under *Crawford* and its progeny, Anita's statement would not be considered testimonial. It does not fit as a statement of a witness bearing testimony against the accused. It was not intended for use at trial; indeed Anita told Chelsea <u>not</u> to tell anyone about what she said she saw. Additionally, it was made at lunch, to a friend, and not to a police officer or governmental official.

2. The Sixth Amendment gives a criminally accused the right to confront the witnesses against him. This right to confrontation includes the right to cross-examination of the witness. If hearsay testimony is sought to be introduced, that testimony must be characterized as "testimonial" for the confrontation right to apply. *Crawford, supra*. The introduction of testimonial hearsay violates an accused's right

to confrontation if the declarant is unavailable and the accused had no prior opportunity for confrontation.

Harris did not forfeit his rights under the Confrontation Clause by his wrongdoing. It is true enough that an accused can forfeit his right to confrontation through wrongdoing causing the witness's unavailability. *Giles v California*, 554 US 353 (2008). The forfeiture by wrongdoing doctrine "has its roots in the common law maxim that 'no one should be permitted to take advantage of his wrong'." *People v Burns*, 494 Mich 104, 111 (2013) quoting *Giles*, 554 US at 359, 366.

The forfeiture by wrongdoing doctrine, however, requires more than just a wrongful act producing the witness's absence. Rather, "For a defendant to forfeit his confrontation right, the defendant must have had 'in mind the particular purpose of making the witness unavailable'." *Burns*, 494 Mich at 112, quoting *Giles*, 554 US at 367. This is tantamount to a specific intent to cause the witness to be unavailable by the act of wrongdoing.

Applying the foregoing principles to the facts provided in the question yields the conclusion that the prosecutor's argument for inclusion of Anita's statement is unpersuasive. Clearly the Sixth Amendment confrontation right is applicable because both prosecution and defense agree Anita's statement to police is testimonial. Second, it is clear that Harris's killing of Anita caused her to be absent and unavailable for trial. (Indeed, Harris maintains self-defense, implicitly conceding he killed her.)

But where the prosecutor's argument fails is on the question of intent. The limited facts do not come close to the demanding requirements of *Giles* that, for the forfeiture by wrongdoing doctrine to apply, the defendant must have had "in mind the particular purpose of making the witness unavailable." *Giles*, 554 US at 367. The prosecutor's argument cannot be squared with *Giles* and should be rejected.

EXAMINERS' ANALYSIS OF QUESTION NO. 4

Betty's Argument:

Betty argues that she had a valid contract with Higgins Pool. "An essential element in a contract claim is legal consideration." *46th Circuit Trial Court v Crawford County*, 476 Mich 131, 158 (2006). The best argument is that, while Higgins Pool furnished consideration by promising to provide a swim lesson, Betty furnished no consideration—the lesson was offered for free, so she incurred no detriment and conferred no benefit on Higgins Pool. The pool's offer of a free swim lesson "was merely a legally unenforceable, gratuitous undertaking . . . ." *Prentis Family Foundation v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 59 (2005). Consequently, a court should reject Betty's claim of a valid contract requiring that Higgins Pool provide her child with a free lesson. However, a cogent argument that Betty's agreement to the liability disclaimer constituted consideration will be given full credit.

Daisy's Argument:

Daisy should argue that Higgins Pool breached its contract with her because Audrey did not "reasonably determine" that Evan was uncooperative. It is unclear how a court should respond. On the one hand, Evan was "unhappy and complied only half-heartedly with Audrey's instructions" and complained loudly about the situation. On the other hand, Audrey arguably terminated the lesson because she was "sleep-deprived and tired of dealing with unpleasant children," not because Evan was uncooperative; moreover, Evan was complying with her instructions, if only "half-heartedly." Examinees will receive credit for using the facts presented to make cogent arguments either way.

Franny's Argument:

Franny should argue that the contract was not validly modified regarding price because the parties did not mutually agree to change the price. There is no dispute that both parties agreed to substitute Franny's daughter for her son in the lesson. However, the parties did not mutually agree to modify the contract price in light of this substitution. While

Audrey may have assumed that Franny would pay the higher price, "a party alleging waiver or modification must establish a mutual intention of the parties to waive or modify the original contract." *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372 (2003); *see also Port Huron Educ Ass'n, MEA/NEA v Port Huron Area Sch Dist*, 452 Mich 309, 326-327 (1996) ("[I]n the same way a meeting of the minds is necessary to create a binding contract, so also is a meeting of the minds necessary to modify the contract after it has been made."). "This mutuality requirement is satisfied where a waiver or modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract." *Quality Products*, 469 Mich at 364-365. Here, Franny and Audrey did not discuss any change in price or make any written modification to their contract; indeed, Franny was unaware that lessons for younger children were more expensive. Because the mutuality requirement thus was not satisfied, a court should reject the pool's attempt to collect the $10. Applicants might apply the doctrine of mistake. If Franny's mistake was unilateral and Audrey knew of Franny's error but concealed it, the original contract price is not rescinded. If the mistake was mutual, equity would likely put the loss on Higgins Pool. Alternative points can be earned for this analysis.

EXAMINERS' ANALYSIS OF QUESTION NO. 5

MRPC 1.15(b)(1) requires that Larry promptly notify Carrie and Ellen of the receipt of the settlement funds. MRPC 1.15(d) requires that Larry hold funds of clients or third persons in connection with a representation separate from his or her own. Accordingly, Larry has a duty to withdraw his earned fees from the trust account promptly in order to avoid commingling his funds with those of his client. Michigan Ethics Opinion R-21 (June 8, 2012); Comment, MRPC 1.15 (lawyer shall distribute undisputed fees promptly). Larry must then distribute the funds Carrie and Ellen are entitled to receive. MRPC 1.15(b)(3).

If there is a dispute between Larry and Carrie, or between Carrie and Ellen, regarding the amount of funds each is entitled to receive, then Larry must distribute the amounts not in dispute and hold the disputed sums separate until the dispute is resolved. MRPC 1.15(c). In such situations, "the lawyer should suggest means for prompt resolution of the dispute, such as arbitration." Comment, MPRC 1.15.

Therefore, after receiving the funds, notifying Carrie and Ellen, and ascertaining that there are disputes, Larry must promptly distribute: (1) $7,000 to the firm; (2) $3,000 to Ellen; (3) and $37,000 to the client. The balance, $3,000, must be held in trust until the respective disputes are resolved.

EXAMINERS' ANALYSIS OF QUESTION NO. 6

The Commerce Clause provides that "Congress shall have the power . . . To regulate Commerce . . . among the several states." US Const Art I, § 8, cl 3. The Commerce Clause permits Congress to enact legislation regulating the prices paid to farmers for their products, *Wickard v Filburn*, 317 US 111, 128 (1942), and even permits Congress to enact laws that *prohibit* interstate commerce. *Prudential Ins Co v Benjamin*, 328 US 408, 434 (1946).

In the absence of congressional legislation of the particular subject, a state or municipality retains its authority under its general police powers to regulate local aspects of interstate commerce if the regulation does not discriminate against interstate commerce. *Maine v Taylor*, 477 US 131, 138 (1986). Thus, the "dormant" or "negative" aspect of the Commerce Clause prohibits economic protectionism and forbids "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co of Indiana v Limbach*, 486 US 269, 273 (1988).

The United States Supreme Court has adopted a "two-tiered approach" to analyzing state economic regulation under the Commerce Clause. *Brown-Forman Distillers Corp v NY Liquor Authority*, 476 US 573, 578 (1986). "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," the statute is "generally struck down without further inquiry." *Id.*; see also *Philadelphia v New Jersey*, 437 US 617, 624 (1978). However, where a statute evenhandedly concerns a legitimate local interest and has only an indirect effect on interstate commerce, the statute will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefit. *Brown-Forman Distillers*, 467 US at 597; *Pike v Bruce Church*, Inc, 397 US 137, 142 (1970).

Under very similar facts, the United States Supreme Court held that the imposed assessment was unconstitutional as violative of the Commerce Clause. See *West Lynn Creamery v Healy*, 512 US 186 (1994). Like the assessment at issue in *West*

Lynn Creamery, the cherry fund assessment is effectively a tax imposed *only* on out-of-state cherries, which in turn makes those cherries more expensive. Although the assessment is equally applicable to cherries grown in Michigan, the cost of the assessment is *more* than offset by the subsidy provided exclusively to Michigan cherry farmers. Thus, the net effect of the tax and subsidy is analogous to a tariff in that it "neutraliz[es] advantages belonging to the place of origin" and discriminates in favor of local products. See *West Lynn Creamery*, 512 US at 196, quoting *Baldwin v GAF Seeling, Inc*, 294 US 511, 527 (1935).

The *West Lynn Creamery* court rejected the argument that because each portion of the program (a nondiscriminatory tax and a local subsidy) was valid, the combination of the two must also be valid. A state subsidy funded from general revenue ordinarily assists local business and does not impose a burden on interstate commerce. Here, however, the subsidy is *not* funded from the state's general revenue, but primarily from cherries produced in other states. Thus, the law violates the cardinal principle that a state may not benefit in-state economic interests by burdening out-of-state competitors.

While it is true that a nondiscriminatory evenhanded tax is generally upheld despite its adverse effects on interstate commerce, this is true in part because burdening local economic interests serves as a safeguard against legislative abuse. "However, when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy." *West Lynn Creamery*, 512 US at 200.

It is also irrelevant that cherry wholesalers (the entities who pay the assessment) are not competitors of Michigan cherry farmers. The imposition of a differential burden on *any* part of the stream of commerce is invalid, because a burden placed at any point will result in a disadvantage to the out-of-state producer.

Thus, under the facts of *West Lynn Creamery*, GGS will prevail, and the assessment will be found to violate the Commerce Clause.

EXAMINERS' ANALYSIS OF QUESTION NO. 7

The question posits whether the watch is a gift to Charlie or is abandoned property first found by Laura.

Although perhaps not a winning one as against Laura's claim, Charlie's strongest argument is that the pocket watch was a gift from Jordan to him. The elements required for a valid gift are (1) that the donor possess the intent to pass gratuitously title to the donee; (2) that actual or constructive delivery be made; and (3) that the donee accept the gift. *Osius v Dingell*, 375 Mich 605, 611 (1965).

Charlie should argue that Jordan expressed an intent that Charlie have the watch. Because Jordan was rich, and Charlie was obviously poor, Charlie should contend that Jordan stopping directly in front of Charlie and dropping the watch, coupled with Jordan's statement that he was "too rich," and did not want the watch anymore, is indicative of intent to transfer, rather than abandon the property, which he could have done anywhere. This contextual view of the facts helps to support Charlie's claim that the watch was intended as a gift to him.

Delivery is made where the donor "place[s] the property within the dominion and control" of the donee, "with the intent to transfer title to" the donee. *In re Herbert's Estate*, 311 Mich 608, 612-613 (1945). Charlie should argue that Jordan's act of dropping the watch within his reach constitutes delivery. Although Laura grabbed the watch first, it was dropped within Charlie's immediate vicinity—within his "dominion and control." This likely would be the hardest element for Charlie to prove, because Laura seized the watch first.

Finally, "[a]cceptance is presumed if the gift is beneficial to the donee." *Davidson v Bugbee*, 227 Mich App 264, 268 (1997), citing *Osius*, 375 Mich at 611. The facts specify that the pocket watch is "valuable," so it is beneficial to the donee and presumed accepted by Charlie. Additionally, Charlie reached for the watch, indicating that he was accepting it.

Laura, on the other hand, should argue that Jordan abandoned the property and that she is the finder. Two

requirements must be met to establish abandonment: (1) an intent to relinquish the property and (2) a showing of acts that put that intention into effect. *Log Owners' Booming Co v Hubbell*, 135 Mich 65, 69 (1903); *Sparling Plastic Indus, Inc v Sparling*, 229 Mich App 704, 718 (1998); 1 Am. Jur. 2d Abandoned, Lost, and Unclaimed Property § 3.

Laura should argue that Jordan intended to abandon the watch as evidenced by his act of simply dropping it on the ground, while declaring that he did not want it anymore. Laura should contend that the watch was not intended as a gift to Charlie because Jordan's action in simply dropping the watch to the ground did not direct the watch to anyone in particular. Instead, Jordan intended only to relinquish the watch, *not* that someone else receive it. If Jordan intended the watch as a gift, he could have made some further outward indication that Charlie was the intended recipient. For example, he could have handed it to Charlie, or verbally addressed Charlie specifically. Indeed, simply dropping the watch on the ground might well have damaged it, consequently undercutting a donative intent.

Thus, Laura should argue that the watch is rightfully hers because it was abandoned, and she was the first person to take possession. The finder of abandoned property acquires an absolute ownership interest. 1 Am Jur 2d Abandoned, Lost, and Unclaimed Property § 24; *Cf*. *Wood v Pierson*, 45 Mich 313, 317 (1881). Laura is both the person who first saw the watch after Jordan dropped it, and the person who first took physical possession of the watch. Thus, she should argue that she was the first finder and her interest is superior to Charlie's.

A well-prepared applicant will recognize that the common law of abandoned property has been altered by various statutes, but that the personal property at issue here is not governed by any of them. The pocket watch is not abandoned property discovered by law enforcement, so it is not subject to the Stolen or Abandoned Property Act, MCL 434.181 et seq., nor is it abandoned personal property coming under the Disposition of Lost, Unclaimed, or Abandoned Personal Property Act, MCL 434.151 et seq., nor is it unclaimed property within the ambit of the Uniform Unclaimed Property Act, MCL 567.221, et seq.

EXAMINERS' ANALYSIS OF QUESTION 8

This question requires examinees to understand Michigan's race-notice recording statute and apply it to a scenario involving after-acquired title. Examinees must determine which of the transferees' claims prevails.

As a threshold matter, examinees should recognize that Michigan is a race-notice state. MCL 565.29. Owners of interests in land can protect their interests by properly recording them. *Conventry Parkhomes Condominium Ass'n v Federal Nat'l Mort Ass's*, 298 Mich App 252, 256 (2012). When a purchaser fails to record their interest in property, that interest is void against any subsequent purchaser so long as the subsequent purchaser acts in good faith and takes the interest without notice of the prior interest. MCL 565.29; *Michigan Nat Bank & Trust Co v Morren*, 194 Mich App 407, 410 (1992). Because Investor failed to promptly record his interest, that interest is void against Buyer's if Buyer acted in good faith without notice.

Notice

Despite recording first, in order for Buyer's interest in the site to prevail over Investor's interest, Buyer must have purchased the site without notice of Investor's prior interest. Notice can be either actual or constructive. *Richards v Tibaldi*, 272 Mich App 522, 539 (2006). Constructive notice exists, "[w]hen a person has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries concerning the possible rights of another in real estate . . . ." *Kastle v Clemons*, 330 Mich 28, 31 (1951); see also *Royce v Duthler*, 209 Mich App 682, 690 (1995). Stated differently:

> Notice is whatever is sufficient to direct attention of the purchaser of realty to prior rights or equities of a third party and to enable him to ascertain their nature by inquiry. Notice need only be of the possibility of the rights of another, not positive knowledge of those rights. [*Schepke v Dep't of Natural Resources,* 186 Mich App 532, 535 (1990).]

Typically, the open, manifest and unequivocal possession of property constitutes constructive notice. *Kastle*, 330 Mich at 31.

In this case, the site was located in a small town and the Buyer was the local developer. The general publicity surrounding the site's purchase and proposed development by a high-profile developer was likely sufficient to put Buyer on notice of Investor's interest. Even if Buyer was unaware of the general publicity surrounding the development, Investor's highly conspicuous signs are likely sufficient to demonstrate to the world his possession. Because possession is sufficient to establish constructive notice, Investor's interest will probably prevail over Buyer's under Michigan's race-notice recording statute.

After-Acquired Title

Even though Investor's interest will most likely prevail under Michigan's race-notice recording statute, examinees should still address whether Investor even holds a valid interest. At the time of the conveyance to Investor, Seller was *not* the legal titleholder of the property. Under the doctrine of after-acquired title, when a grantor conveys an estate by warranty deed owned by another, and the grantor later acquires title to that estate, the title inures to the benefit of the grantee. *Donohue v Vosper*, 189 Mich 78, 87-88 (1915); *Richards*, 272 Mich App at 541. The after-acquired estate passes by direct operation of law to the grantee, and the grantor is estopped from denying the grantee's title. *Id.* Because Seller executed a *warranty deed* conveying the site to Investor and subsequently acquired title to the site, Investor holds a valid interest in the site. Accordingly, Investor would likely prevail in a quiet title action.

An exceptionally well-prepared candidate might note the distinction between quitclaim and warranty deeds with regard to after-acquired title. Because a quitclaim deed warrants no title and conveys only what the grantor owns at the conveyance, a quitclaim deed is incapable of conveying after-acquired title. However, because Seller conveyed the site by *warranty deed*, not a quitclaim deed, Investor had a valid interest in the site. See *Richards*, 272 Mich App at 541.

EXAMINERS' ANALYSIS OF QUESTION NO. 9

Establishment: In order to establish a trust (a prerequisite to its funding), all of the following must apply: (a) the settlor has capacity to create a trust; (b) the settlor indicates an intention to create the trust; (c) the trust has a definite beneficiary or is a charitable trust, has a non-charitable purpose, or is for the care of an animal; (d) the trustee has duties to perform; and (e) the same person is not the sole trustee and sole beneficiary. MCL 700.7402(1). Here, all are satisfied. There is no indication that Hope did not have capacity as settlor; her signature and label "My Trust" indicates intent to create the trust; there are definite beneficiaries; Erin has duties to perform as trustee in distributing the assets; and Erin is the sole trustee, but has a co-beneficiary in April. Accordingly, the trust was validly established.

Funding: A will may fund a trust. One of the ways that a will may validly devise property to the trustee of a trust is at the testator's death, so long as the trust is identified in the testator's will and the trust terms are set forth in a written instrument other than the will. MCL 700.2511(1)(b); MCL 700.7401(1)(a). In this case, the trust was specifically identified in the will, and the trust document was attached to the will and labeled a trust. Additionally, its terms were included in that separate trust document. Moreover, it does not matter that the trust predated its funding because a trust can be executed before, concurrently with, or after the execution of the will which funds it. MCL 700.2511(1)(b). Finally, a trust does not need any property prior to its funding by operation of the death of the settlor. MCL 700.2511(1)(b); MCL 700.7401(2). Thus, the trust was properly funded by Hope's will.

Terror Clause: In Michigan, "terror" clauses (also known as "*in terrorem*" clauses or "no-contest" clauses) are generally valid and enforceable. *Schiffer v Brenton*, 247 Mich 512, 520 (1929); *In re Perry Trust*, 299 Mich App 525, 530 (2013). Terror clauses must be strictly construed. *Id.*; *Saier v Saier*, 366 Mich 515, 520 (1962). Thus, a terror clause that expressly forbids unsuccessful challenges to "any provision" of a trust will apply to a very broad class of challenges. April's

objection to her sister's appointment as trustee certainly qualifies as a challenge to that provision of the trust.

However, the terror clause here was unenforceable. Under MCL 700.7113, "[a] provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust *shall not be given effect if probable cause exists for instituting a proceeding contesting the trust* . . . ." (Emphasis added). Based upon the evidence that Erin was exploiting her position as trustee in order to misappropriate assets, probable cause to contest the trust existed under MCL 700.7706(2)(a), which permits removal of the trustee for "a serious breach of trust."

EXAMINERS' ANALYSIS OF QUESTION NO. 10

This question raises two issues under Michigan's no fault statute, MCL 500.3101 *et seq*: (1) did Peter suffer a serious impairment of body function such that he can recover noneconomic damages against the driver, and (2) should these questions be decided by the court or the jury.

In *McCormick v Carrier*, 487 Mich 180, 215-216 (2010), the Supreme Court summarized the applicable steps and standards for deciding the issue of whether an individual has suffered a serious impairment of body function:

> To begin with, the court should determine whether there is a factual dispute regarding the nature and the extent of the person's injuries, and, if so, whether the dispute is material to determining whether the serious impairment of body function threshold is met. MCL 500.3135(2)(a)(*i*) and (*ii*). If there is no factual dispute, or no material factual dispute, then whether the threshold is met is a question of law for the court. *Id.*
>
> If the court may decide the issue as a matter of law, it should next determine whether the serious impairment threshold has been crossed. The unambiguous language of MCL 500.3135(7) provides three prongs that are necessary to establish a "serious impairment of body function": (1) an objectively manifested impairment (observable or perceivable from actual symptoms or conditions) (2) of an important body function (a body function of value, significance, or consequence to the injured person) that (3) affects the person's general ability to lead his or her normal life (influences some of the plaintiff's capacity to live in his or her normal manner of living).
>
> The serious impairment analysis is inherently fact- and circumstance-specific and must be conducted on a case-by-case basis. As stated in the *Kreiner* dissent, "[t]he Legislature recognized that what is important to one is not important to all[;] a brief

> impairment may be devastating whereas a near permanent impairment may have little effect." *Kreiner*, 471 Mich at 145 (CAVANAGH, J., dissenting). As such, the analysis does not "lend itself to any bright-line rule or imposition of [a] nonexhaustive list of factors," particularly where there is no basis in the statute for such factors. *Id.* Accordingly, because "[t]he Legislature avoided drawing lines in the sand ... so must we." *Id.*

1. Using these standards, an applicant should first determine if there are disputed material facts regarding the nature and extent of Peter's ankle and back injuries. The best conclusion is that there are not, as nothing provided reveals inconsistent or differing conclusions about the nature and extent of Peter's injuries. There is no conflicting expert testimony or other conflicting evidence on these facts. Thus, the court should rule on the issue as a matter of law.

2. The next step is for the applicant to discuss whether Peter suffered a serious impairment of body function. Clearly Peter's ankle and back injuries qualify as an objectively manifested impairment as they were observable from their conditions, i.e., broken bones and seeing the back injuries through the MRI. *Hunter v Sisco*, 300 Mich App 229, 242 (2013). Additionally, both the ankle and back are important body functions, as they are necessary for full ambulatory movement, which is of consequence to Peter and his active lifestyle.

3. Finally, the best argument (but by no means an absolute one) is that Peter's impairments did affect his ability to lead a normal life. The ankle and back injuries precluded Peter from engaging in work, travel, and hobbies – essentially limiting him from doing all the things in life he enjoyed on a daily basis prior to the accident. *Hunter*, 300 Mich App at 242-243. And, the fact that these conditions were temporary, and thus so were his limitations on leading a normal life, is not dispositive. *McCormick*, 487 Mich at 203. Although this is a fact-intensive inquiry, the most reasonable analysis is that Peter has established a serious impairment of a body function. However, the temporary nature of these injuries and limitations could lead one to reasonably conclude that these injuries did not preclude Peter from leading his normal life.

A reasoned analysis and conclusion that utilizes the controlling law and facts, despite the ultimate conclusion, should get full points.

EXAMINERS' ANALYSIS OF QUESTION NO. 11

(1) Venue

The trial court erred by denying David's motion for change of venue to Grand Traverse County.

In Michigan, the court rules and statutory provisions instruct practitioners regarding venue. See *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 309, 313-314 (1999) (opinion by Kelly, J). MCR 2.223 provides, in relevant part:

> (A) Motion; Court's Own Initiative. If the venue of a civil action is improper, the court
>
> (1) shall order a change of venue on timely motion of a defendant, or
>
> (2) may order a change of venue on its own initiative with notice to the parties and opportunity for them to be heard on the venue question.
>
> If venue is changed because the action was brought where venue was not proper, the action may be transferred only to a county in which venue would have been proper.

MCL 600.1629 governs the determination of venue in personal injury cases, and it provides in relevant part:

> (1) Subject to subsection (2), in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, all of the following apply:
>
> (a) The county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:
>
> (i) The defendant resides, has a place of business, or conducts business in that county.

(ii) The corporate registered office of a defendant is located in that county.

Here, David's motion for change of venue was timely under MCR 2.221(A) and the trial court erred in denying David's motion for change of venue as required by MCR 2.223(A)(1) when venue is improper. Peters claimed damages due to personal injuries suffered in an accident, which occurred in Grand Traverse County. David resides in Grand Traverse County. Accordingly, pursuant to the unambiguous language of MCL 600.1629(1)(a)(i), venue properly rested in Grand Traverse County. The trial court should have transferred venue to Grand Traverse County.

(2) Collateral Estoppel

David was not precluded by collateral estoppel from challenging venue when Peters re-filed his complaint. The trial court erred by holding that its first ruling on venue was binding on David after Peters re-filed his complaint.

Collateral estoppel, also known as issue preclusion, is a doctrine which prevents issues from being relitigated. To apply collateral estoppel, a party must show that (1) the issue was actually litigated and determined by a valid and final judgment, (2) a determination of the issue was necessary to the outcome of the proceeding, and (3) the parties in the prior proceeding are the same as in the present proceeding. *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 520 (2014); *McMichael v McMichael,* 217 Mich App 723, 727 (1996); *Porter v Royal Oak,* 214 Mich App 478, 485 (1995). MCR 7.202(6)(a)(i) provides, in relevant part, that a final judgment "disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order." The Court of Appeals recently explained, "'Final judgments are such as at once put an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for."' *Wells Fargo*, 304 Mich App at 521, quoting *Wurzer v Geraldine*, 268 Mich 286, 289 (1934). Moreover, "[A] decision is final when all appeals have been exhausted or when the time available for an appeal has passed." *Bryan v JP Morgan Chase Bank*, 304 Mich App 708, 716 (2014), quoting *Leahy v Orion Twp*, 269 Mich App 527, 530 (2006). "To be necessarily determined in the first action, the issue must have been essential to the resulting judgment; a finding

upon which the judgment did not depend cannot support collateral estoppel." *Bd of Co Rd Comm'rs for the Co of Eaton v Schultz*, 205 Mich App 371, 377 (1994) (emphasis added).

Here, although the parties in each proceeding are the same, no final judgment was entered in Peters' first-filed action. The venue decision, itself, did not dispose of all the claims and adjudicate the rights and liabilities of the parties and therefore cannot be considered a final judgment. MCR 7.202(6)(a)(i). Moreover, Peters and David agreed to a dismissal of the first action in an effort to resolve the case through an alternative dispute process; that dismissal was voluntary and without prejudice. Because no judgment was entered on the first action, the trial court's first ruling on venue could not have been necessary to the outcome of the proceeding. Therefore, the trial court erred by holding that David was collaterally estopped from challenging venue a second time because of its first venue ruling.

EXAMINERS' ANALYSIS OF QUESTION NO. 12

The Board of Directors has a fiduciary duty to exercise its best judgment in the management of the affairs of the corporation. See generally, *Marvin v Solventol Chemical Products*, 298 Mich 296, 301-302 (1941). According to MCL 450.1541a(1), directors must discharge their duties to the corporation (a) in good faith; (b) with the care that an ordinarily prudent person in a like position would exercise under similar circumstances; and (c) in a manner he or she reasonably believes to be in the best interests of the corporation. Thus, the board has an affirmative duty to mitigate the damage caused by Dwayne to the corporation.

This does not mean, however, that the board can remove Dwayne. If Dwayne had been appointed *by the board*, he could be removed by the board with or without cause. MCL 450.1535(1). However, Dwayne was not appointed by the Board of Directors – he was elected *by the shareholders*, and can *only* be removed by the shareholders. *Id.* Therefore, Dwayne cannot be removed by the board.

However, the Board of Directors can suspend Dwayne's authority to act as President, provided the board has cause. *Id.* As described in the facts, Dwayne's "rude and pompous" behavior negatively affects clients, employees and the corporation's profits, providing ample cause for the suspension of Dwayne's authority to act as President. While Dwayne would continue to collect his salary, his ability to cause further damage to the corporation by acting as President would be discontinued. Additionally, the board may call a special meeting of shareholders in order to seek Dwayne's removal by the shareholders. MCL 450.1403.

EXAMINERS' ANALYSIS OF QUESTION NO. 13

Because Carol and Henry's divorce judgment contains all required provisions under Michigan law, it contains the following language from MCR 3.211(C)(1):

> A judgment or order awarding custody of a minor must provide that the domicile or residence of the minor may not be moved from Michigan without the approval of the judge who awarded custody . . .

Carol has properly sought the court's approval. This rule requires the court's approval but does not require an evidentiary hearing. Henry is incorrect that the Michigan statute pertaining to a change of domicile requires the court to conduct an evidentiary hearing. The statute only comes into play where the judgment or order awards shared or joint legal custody. MCL 722.31(1) provides in relevant part that:

> . . . a parent of a child whose custody is governed by a court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued.

While Carol's request to move 150 miles away to Ohio would seem to be encompassed by this statute, MCL 722.31(2), states:

> A parent's change of a child's legal residence is not restricted by subsection (1) if the other parent consents to, or if the court, after complying with subsection (4), permits the residence change. *This section does not apply if the order governing the child's custody grants sole legal custody to one of the child's parents.* (Emphasis added.)

Because Carol had sole legal custody, the statute Henry wishes to employ is inapplicable. *Spires v Bergman*, 276 Mich App 432, 437 (2007), (statutory factors need not be considered where parent has sole legal custody). Accord, *Brausch v Brausch*, 283 Mich App 339, 349-350 (2009) ["Simply stated, when

a parent with sole legal custody desires to relocate, he or she must first obtain the trial court's approval but the factors . . . codified in MCL 722.31(4) do not apply . . ."]. See also *Brecht v Hendry*, 297 Mich App 732, 743 (2012) (If 722.31 does not apply, a proper request should be granted "without further ado.").

Carol, the sole legal custodian of the minor children, did what was required to relocate the children. Henry's demand for an evidentiary hearing must be denied.

As to the second inquiry, the process would be considerably different if the parties shared joint legal custody because MCL 722.31 would be fully applicable to Carol's request. Because Carol was moving more than 100 miles away, she would need the court's approval. MCL 722.31(1) and (2). Before ruling on Carol's request, the court would have to hold an evidentiary hearing to consider the factors in MCL 722.31(4), which provides:

> Before permitting a legal residence change otherwise restricted by subsection (1), the court shall consider each of the following factors, with the child as the primary focus in the court's deliberations:
>
> (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
>
> (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.
>
> (c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each

parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

(e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

The party requesting the change, Carol, would have to prove by a preponderance of the evidence that the change is warranted, *Rains v Rains*, 301 Mich App 326-327 (2013), or the request would be denied.

In sum, the existence or absence of a joint custody award in the judgment or order will determine the process by which a requested change of residence or domicile is made.

EXAMINERS' ANALYSIS OF QUESTION NO. 14

1. Did Sally Dexter have a security interest in the television and was it perfected?

a. Is there a security interest in the TV? Article 9 of the Uniform Commercial Code applies to security interests in consumer goods. A security interest is a legal claim on collateral that has been pledged, usually to obtain a loan. MCL 440.1201(2)(ii). For a security interest to exist there must be a secured party (the lender of credit) and a debtor (the borrower). There also must be collateral, which is property in which the debtor has an interest, and which is subject to the security interest of the secured party. MCL 440.9102(l). A consumer good is a good that is used or bought for personal, family or household use. MCL 440.9102(1)(w).

Here, Sally and Jane entered into an agreement where Sally agreed to loan Jane $2,500. Sally is the lender and Jane is the debtor. The Sharp Smart HDTV is the collateral. The facts indicate that Jane borrowed the money from Sally and purchased the television on February 1, 2013.

After the purchase, Jane had an interest in the television, which was to be used in her home and which therefore qualifies as a consumer good. Thus, there is a security interest in a consumer good (the television).

b. Was the security interest perfected? A security interest is not enforceable unless it has attached. There are three requirements that must be met in order for attachment to occur. The three requirements can occur in any order but they must coexist before the security interest attaches.

> (1) The parties must have an agreement that is **written, signed by the debtor** and contains a **description of the property**. MCL 440.9203(2)(c)(*i*). Here, Sally and Jane entered into a written agreement. It was signed by Jane, the debtor, and the television was identified as a Sharp 70 inch Smart HGTV. The description of the property need only reasonably identify the property. MCL

440.9108(1). The description provided the brand name, size and the type of television. This is sufficient. Therefore, there is a valid agreement.

(2) There must be value given. MCL 440.9203(2)(a). Here Sally gave Jane $2,500 to purchase the television. This element is met.

(3) The debtor must have rights in the collateral. MCL 440.9203(2)(b). This means that the debtor must have some ownership interest in the property. Here, Jane bought the television on February 1, 2013, from TV, Inc. TV, Inc. transferred its ownership rights to Jane upon the sale. Therefore, Jane had an interest in the TV and this element is met.

All three elements are satisfied, therefore the security interest attached and Sally's security interest in the television are established.

In order to acquire maximum priority over other parties who have rights in the collateral though, the secured party (Sally), must also perfect the security interest. Generally, this involves filing a financing statement in the appropriate state or county office. However certain transactions are perfected by attachment without taking any additional steps. A purchase-money security interest (PMSI) in consumer goods is a qualifying transaction. MCL 440.9309(a). A PMSI in consumer goods can be given to a person other than the seller when the security interest is taken to secure the giving of value (money) to the debtor to enable him to purchase (acquire rights in) the collateral, if the debtor actually uses the money to acquire the collateral. MCL 440.9103(2)(a). Here, Sally gave Jane money specifically to allow her to purchase the Sharp Smart HDTV. Jane purchased the television. The security agreement reflects this precise transaction. Therefore, Sally has a PMSI and her security interest is perfected.

2. Did Neighborhood Bank have a security interest in the computer equipment and, if so, was it perfected?

a. Here the facts indicate that Neighborhood Bank had a valid security interest in Jane's computer equipment.

b. Was it perfected?

(1) As mentioned previously, the security interest must first attach to the collateral. In order to attach, there must be an agreement, value given and the debtor has to have rights in the collateral. Here, there was an agreement that was written and signed by Jane, the debtor. There was a reasonable description of the property in that the agreement pertains to all of Jane Dexter's computer equipment. The bank gave $50,000 to Jane. So value was given. Lastly, Jane had rights in the computer equipment because she was the owner of the equipment.

(2) Next, did Neighborhood Bank perfect its interest in the computer equipment? A financing statement must be filed to perfect all security interests unless the Code provides an exception. MCL 440.9310(1). Here the facts indicate that on April 18, 2014, Neighborhood Bank filed a financing statement in the appropriate governmental office. Therefore, Neighborhood Bank's security interest was perfected on that date.

3. Who has the superior claim with regard to the television and the computer equipment?

(a) Television (Sally v Judgment Lien Creditor): "A security interest is subordinate to the rights of . . . a person that becomes a lien creditor before . . . the time the security interest is perfected." MCL 440.9317(1)(b)(*i*). A PMSI in consumer goods is perfected automatically without filing. The facts indicate that Sally earned a perfected PMSI on February 1, 2013. The judgment lien creditor's levy was not authorized until April 10, 2014. Sally perfected first and did not need to file. Therefore, she has priority over the judgment lien creditor with regard to the television.

(b) Computer equipment (Neighborhood Bank v Judgment Lien Creditor): An unperfected security interest is subordinate to the rights of a person who becomes a lien creditor before the security interest is perfected. MCL 440.9317(1)(b)(*i*). Here the judgment lien creditor was given authority to levy on Jane's property on April 10, 2014. Neighborhood Bank perfected its security interest on April 18, 2014. Neighborhood Bank's

security interest is subordinate to the rights of the judgment lien creditor because the judgment lien creditor's rights were actionable on April 10, 2014, 8 days prior to when Neighborhood Bank filed its financing statement. Therefore, the judgment lien creditor has priority over the computer equipment.

EXAMINERS' ANALYSIS OF QUESTION NO. 15

With respect to the first question, to be eligible for worker's compensation benefits a person must be an "employee," as opposed to an independent contractor, because only "employees" can receive worker's compensation benefits. MCL 418.301(1); MCL 418.161(1). The test for determining whether a person is an "employee" is "the 20-factor test announced by the internal revenue service of the United States department of treasury." MCL 418.161(1)(n) (second sentence). This test is, in large part, a test whether sufficient control is present to establish an employer-employee relationship. This test for determining who is and who is not an employee applies to injuries "(o)n or after January 1, 2013." *Id.* Prior to that date other tests applied. The change in the law occurred approximately 2½ years ago, with the passage of 2011 PA 266. Because the test considers 20 factors, examinees are not asked to apply the test, just demonstrate that they know what the governing test is.

With respect to the second question, Derek's injury clearly arose "in the course of" his employment, MCL 418.301(1). The question is designed to test whether the examinee knows that such cases involving degenerative arthritis also require consideration of the more demanding "significant" contribution standard recited in MCL 418.301(2). See generally, *Farrington v Total Petroleum, Inc,* 442 Mich 201, 216-217 (1993), and *Lombardi v Beaumont Hospital (On Remand),* 199 Mich App 428, 435-436 (1993) (for discussions of "significant manner" test). The general rule is that, because employers take employees as they are, *any* contribution by work toward an injury renders the resultant condition entirely work related. See, *Riddle v Broad Crane Engineering Co,* 53 Mich App 257, 260-261 (1974). But, for certain enumerated conditions *any* contribution does not suffice; rather the employee must prove there was *significant* contribution from the workplace. MCL 418.301(2) lists the conditions requiring the heightened "significant manner" standard, saying in pertinent part: "Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions and degenerative arthritis, are compensable if contributed to or aggravated or accelerated by the employment in a significant manner." Application of the

"significant manner" test requires a comparative analysis of work and non-work related explanations for the resultant condition. *Farrington*, 442 Mich at 216-217; *Lombardi*, 199 Mich App at 435-436.

Under the sparse facts given, work likely did contribute "in a significant manner" to Derek's knee problem, but the ultimate answer is not as important as demonstrating awareness of the "significant manner" standard and offering some comparative analysis. In responding to this question, some examinees may mention the necessity of Derek also proving that the work incident caused a new problem (torn meniscus) that is "medically distinguishable" from his prior degenerative condition. *Rakestraw v Gen Dynamics Land Sys Inc*, 469 Mich 220, 234 (2003). That observation is correct, but it is a given under the facts (*i.e.*, a torn meniscus is medically distinguishable from a degenerative knee condition). The employee must still meet the "significant manner" standard for the condition to be compensable. See, e.g., *Hill v DaimlerChysler Corp,* 2008 ACO #238; *Carrigan v DaimlerChrysler Corp,* 2000 ACO #51.

Finally, with respect to the third question, MCL 418.354(1) prevents Derek from "double dipping," such that any weekly worker's compensation benefits Derek might receive will be coordinated with Overland's disability insurance payments so as to reduce Derek's weekly worker's compensation benefits for the same weeks he receives the other employer-provided benefit.