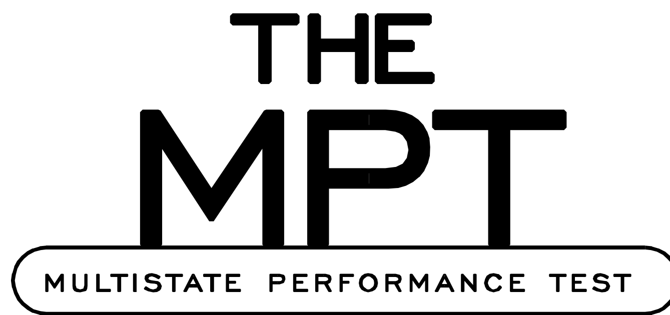

1997 Point Sheets

Alexander v. BTI and Bell
In re Hayworth and Wexler
In re Kiddie-Gym Systems, Inc.
State v. Devine

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Alexander v. BTI and Bell

DRAFTERS' POINT SHEET

The task given to the applicant is to draft a persuasive brief in support of defendants' motion for summary judgment in a personal injury case. The applicant must persuade the court that the doctrine of primary assumption of the risk bars plaintiff's recovery.

At the threshold, the brief must conform to the office memorandum that tells the applicant what the brief is supposed to look like: (1) it must contain a statement of facts (which means that the applicant must extract from the file the undisputed facts and set them forth concisely in a way that favors the defendants' position); (2) the headings must apply the facts to the principle of law being contended for; and (3) the text must argue logically and persuasively.

The case turns on whether BTI and Bell owed plaintiff a duty of care under the circumstances. If not, the doctrine of primary assumption of the risk completely bars plaintiff's recovery. If, on the other hand, they did owe plaintiff a duty of care, the doctrine of secondary assumption of the risk will operate only to limit plaintiff's recovery on notions of comparative negligence.

The outcome sought by the drafters is this: Under the case law, co-participants in a sporting event do not owe a duty of care to each other to guard against risks inherent in the game. The facts make it clear (at least, clear enough to permit a strong argument) that the instructional (i.e., coach/student) phase of the encounter between Bell and the plaintiff was over and that they had embarked upon the competitive, real tennis match phase (i.e., as co-participants) at the time plaintiff was struck in the eye with the ball. Accordingly, defendants owed plaintiff no duty of care and, thus, the doctrine of primary assumption of the risk is a total bar to plaintiff's claim.

The cases in the library make the point quite clearly, and the applicants should have no trouble picking this up. In fact, they should not miss this point because they are specifically told in the file memo from Mr. Calomen that it is the theory of the case "that neither BTI nor Bell owed Alexander a duty of care." The difficulty they will experience is in distinguishing the facts in the cases from the facts given to them in the file and reaching the conclusion that Alexander and Bell were co-participants rather than coach and student.

The key points the applicants should make, in the statement of facts, where appropriate, or woven into the argument, are:

- The doctrine of primary assumption of the risk bars recovery in these circumstances

only if the parties were co-participants in a sporting event. The case to cite for the proposition is *Knight v. Jewett*, which is cited internally in *Galardi* and *Watt*.

- The fine legal point to be derived is that, as between co-participants, no duty of care ever arises, so there is no need to engage in an analysis of whether there has been a breach of a duty. (Again, a big hint to this effect is given to the applicants in the instructional memo from Mr. Calomen when he says that the theory he wants to put forth is "that neither BTI nor Bell owed Alexander a duty of care.")
- The relationship of Alexander and Bell started out as a coach/student relationship, but at the point Alexander asked to practice under real game conditions, she and Bell became co-participants. The excerpts from the depositions make it an undisputed fact that the "usual" practice is that an actual match is preceded by warm-ups such as they were engaged in at the time the ball struck Alexander. Thus, the argument goes, the warm-up was part of a competitive match, not a continuation of the coach/student training.
- One of the risks inherent in any tennis match, which Alexander as a thoroughly experienced player must have understood, is that one of the co-participants might be struck and injured by a ball hit by the other. Also, it is an inherent risk in any sporting match that one of the active participants will be negligent, but, unless the negligent actor acted recklessly or intentionally to increase the risk, no liability attaches. (*Galardi* and *Watt*.) The fact that something on the sideline "distracted" Alexander makes it clear that Bell did nothing to increase the risk.
- Although the applicants have to cite *Galardi* and *Watt*, the holdings in those cases are distinguishable (and the applicants should affirmatively distinguish them) on the basis that, as distinct from the present case, the parties there stood in the coach/student relationship.
- BTI's liability, or freedom therefrom, is derivative, i.e., it depends on the doctrine of *respondeat superior*. If Bell has no liability, neither has BTI.

There are many refinements and finer points that applicants might pick up from the facts and the cases, but any applicant who discusses the foregoing reasonably well deserves to pass handily.

In re Hayworth and Wexler

DRAFTERS' POINT SHEET

This performance test deals with the subject of professional responsibility. The setting is one in which a long-time client of the office (Hank Hayworth) asks the responsible partner to draft a premarital agreement to be signed by the client and his prospective wife (Wendy Wexler). Coincidentally, Wendy was once a client of the office in an unrelated personal injury matter. The partner has concluded that, because of the firm's long-standing relationship with Hank, she cannot serve as "intermediary" in the transaction.

Hank is insisting on a very one-sided agreement. Wendy is reluctant to consult another attorney. The partner is concerned that, because of controlling case law and the Rules of Professional Conduct (which are included in the materials given to the applicant), she may have some obligation to advise Hank as to the effect of Wendy's interests on the agreement and to advise Hank of the effect of Wendy's refusal to get independent advice.

The applicant is asked to write a memo telling the partner what advice she should give Hank (1) on the effect of Wendy's interests on the enforceability of the agreement and (2) about problems arising because of Wendy's being unrepresented and how to resolve the problems.

The applicants should recognize the "two-pronged" approach of the *Watson* case, i.e., (1) that the premarital agreement must be facially fair, and (2) if not, it must have been entered into "intelligently and voluntarily" with full knowledge by both parties of the nature and extent of the property and an understanding of their rights.

With that as the premise, the applicants should cover the following points:

1. Effect of Wendy's rights and interests:

- Under *Watson*, Wendy has the right to a fair agreement, or, at the very least, a knowing and intelligent waiver after full disclosure and advice of independent counsel, factors clearly not present here.
- In order to ensure enforceability of the agreement, Wendy's interests must be taken into account, either by ensuring that the agreement itself gives her a fair division of the property or that she knowingly waives her rights.
- Wendy would ordinarily be entitled to an equitable share of the property acquired during marriage, a share of the increase in value of the property brought into the marriage, and alimony.

- The agreement as it is now (partly) drafted is all one-sided; it deals principally with Hank's property and only tangentially refers to Wendy's; it gives Wendy no benefit of property acquired or of whatever growth in the value of the assets may occur during the marriage; and it cuts her off from any share of Hank's income during the marriage and from alimony upon divorce.
- When Hank's current assets are contrasted with Wendy's, it is clear that Hank has and will retain the lion's share.
- The wedding is scheduled to take place in two weeks, and this raises the question whether there is enough time for Wendy to digest and fully understand the impact of the agreement Hank wants her to sign.
- Hank must be made to understand that this is not an arms-length transaction between business persons but it is rather a transaction that gives rise to a fiduciary relationship in which full disclosure is essential and overreaching is prohibited.
- Under the current state of the law, Wendy's rights and interests cannot be ignored. The distinction that applicants should be able to draw is that the partner's obligation to advise Hank about Wendy's interests arises <u>not</u> because of any undertaking to represent Wendy but, because of her obligation to advise Hank of the risks that the agreement may end up not being enforceable under the circumstances.
- The whole object, from Hank's perspective, is to be sure that the agreement is ultimately enforceable in case of a later divorce.

2. Problems arising because of Wendy's being unrepresented and how to resolve the problems: This segment of the answer invokes both a discussion of the decision in the *Watson* case and the Rules of Professional Conduct, weaving in the facts given in the file. Not all the Rules contained in the file are relevant to the issues in the case; part of the job for the applicants is to sort through the Rules and determine which ones are important.

- The *Watson* court's "two-pronged" approach confers on Wendy the right to a contract that contains (1) facial fairness and, if that is lacking, (2) full disclosure, intelligent and voluntary waiver with full knowledge of the rights being waived.
- The *Watson* case does not decree that a premarital agreement is <u>per se</u> unenforceable if the party who subsequently challenges it was not represented by independent counsel, but it severely proscribes the circumstances under which an agreement

entered into without benefit of counsel will be upheld:

  - The division of the property must be fair on its face. Here that is not so. As drafted, it is all one-sided; from what we know about the property, Hank's interests are vastly disproportionate to Wendy's; Wendy is giving up all rights to claim any future interest in Hank's property.
  - This is a radical departure from the law of Franklin, which ordinarily requires equitable division of marital property.

- Thus, a court in which a challenge is brought will move to the second "prong" and consider whether the agreement was "intelligently and voluntarily" made by Wendy. The inquiries on this issue are whether Wendy had enough time to examine and digest the agreement and whether she had the sophistication to appreciate it. At this point, whether she consulted independent counsel becomes an important factor.
  - The wedding is only two weeks away, and Hank is insisting that the agreement be signed before the wedding.
  - Hank has not yet told Wendy about the waiver of alimony and property distribution.
  - The fact that Wendy doesn't want to consult an attorney because she is "embarrassed" about the fact that Hank is seeking a premarital agreement is an indication that her decision may be less than fully voluntary.
  - Although Wendy is well educated and has had business experience in her capacity as Director of Nursing Education, it seems clear that Hank has had superior business experience; whether they are on equal footing on this score is open to debate. It seems clear that Wendy is far more sophisticated than was Ms. Watson in the *Watson* case, but somewhat less so than was the wife in the *In re Knoll* case cited in *Watson*.
  - The fact that schedules containing what is apparently a full disclosure of Hank's property will be attached to the agreement is helpful in establishing that Wendy will have had a full understanding of the nature and extent of the property; but there is nothing to indicate that she fully understands the extent of what she is giving up, and the fact that Hank hasn't yet told her diminishes the likelihood that Wendy will have had time to fully appreciate the waivers.

- The prudent advice to Hank would be that the indicia that Wendy will be entering into this agreement "intelligently and voluntarily" are not clearly present.

- Notwithstanding that the partner has decided not to represent Wendy and that Wendy has decided not to consult independent counsel, the holding in *Watson* and the Rules of Professional Conduct probably require the partner to take affirmative steps to ensure that Wendy is aware of the correct state of affairs.
  - The partner should advise Hank that she (the partner) must inform Wendy, preferably in writing, that (a) the partner does not represent her in this matter but rather represents only Hank's interests, (b) she would have the right to share in Hank's property and to receive alimony upon divorce, but under the agreement as drafted she will be waiving all such rights, (c) she should get the advice of an independent attorney, and (d) Hank has agreed to pay the fees of an independent attorney to advise her on whether she should enter into the premarital agreement.
  - This should invoke discussion of a number of the Rules of Professional Conduct - e.g.:
    - To ensure that Wendy is not misled by the partner's role, the letter should make it clear that the partner's interests are aligned with Hank's and not Wendy's. (Rule 4.3.)
    - The partner must refrain from giving Wendy legal advice. The partner's communication to Wendy about her rights absent the agreement and the effect of the waiver of alimony and property division provisions of the draft agreement are not legal advice, but rather fall into the category of providing "accurate statements of the law" allowed by the comments to Rule 4.3 re <u>Dealing with Unrepresented Person</u>.
    - The partner should also make demonstrable efforts to urge Wendy to obtain the advice of independent counsel. *See, Watson* and comments to Rule 4.3.

- The partner should inform Wendy that, although it is all right for Hank to pay the fees of an independent attorney, it will be necessary for Wendy to consent and be sure the payment by Hank won't compromise that attorney's independence. (Comment to Rule 1.7 re <u>Interest of Person Paying for a Lawyer's Service.</u>)

- If Hank refuses to acquiesce in the partner's advice to inform Wendy, as indicated above, the partner might have to refuse to undertake the representation of Hank. That is to say, if the partner does have an ethical obligation to inform Wendy of her rights and Hank refuses to consent, the comments to Rule 1.7 suggest that this presents a conflict of interest. ("Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests.")
- There is lurking in the problem the issue whether there is a conflict of interest arising from the fact that the partner had previously represented Wendy in a personal injury action. (C.f., Rule 1.7.) Probably not, for several reasons: the matter has been closed; it was not a "related" matter; and the partner had sent Wendy what is probably an effective termination letter.

In re Kiddie-Gym Systems, Inc.

DRAFTERS' POINT SHEET

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

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

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

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

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

- Then, applicants should look at the numbers and determine that the bulk of the KGS/Cornet contract price is for the playground equipment, i.e., "goods" within the meaning of § 2105. Of the $120,000 contract price, $75,000 (and perhaps even more after a mark-up by KGS), well more than half, is to cover the cost of the equipment that KGS is obligated to install. Under *Coakley & Williams*, a decision of the Franklin Court of Appeal, the contract is clearly one for the sale of goods. Also, it is clear from the interview notes that only one day was devoted to installing the playground equipment. This would indicate that the service component is fairly minimal.

- Next, the applicants should turn to the risk of loss issue:
  - It is clear from the notes of the interview with Jerry Martin that KGS had substantially performed the first installment of the contract. The installation of the playground system at the Bradley Center Mall had been completed except for the final "tune-up" which, because of the fire, became impossible to perform. At this juncture, there is a minor issue as to whether the contract is divisible so that the issues at the Bradley Center Mall can be treated separately from the yet to be completed performance at the other malls. The contract calls for separate "site price" payment, separate delivery dates, and different sites, so it seems clear enough, to the extent that it is relevant, that performance at each site can be treated distinctly. Thus, any speculation that Cornet can base a refusal to pay on an argument that there has not been substantial performance of the entire contract is misplaced.
  - The key to resolution of the risk of loss issue lies in FCC § 2509: that, absent breach, "the risk of loss passes to the buyer on his <u>receipt</u> of the goods if the seller is a <u>merchant</u>" and that it is "<u>subject to contrary agreement</u> of the parties."

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

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

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

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

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

  - The *Album Graphics v. Craig Adhesive* case is analogous and the applicants should draw heavily upon it.
  - Under this analysis, the "shipping and handling" term in Poly-Cast's form of acknowledgment is an "additional" or "different" term and therefore drops out of the contract. The acceptance is then on KGS's terms and KGS is not liable for the charges.

- The analysis under § 2207(3):
  - This subsection assumes that the parties have effectively performed their contract without even thinking about the conflicting terms. In that case, they have "recognized the existence of a contract," and the effect is that the contract is deemed to consist of the terms on which their writings do agree. The differences are ignored, and the "gaps" are filled by importing the relevant terms of the Code, if any. *Album Graphics v. Craig Adhesive* lays this out quite plainly, and the applicants should have no trouble understanding it.
  - In this case, both the order form and the acknowledgment form agree on delivery (shipment) to Cornet's job site. Thus, that term prevails.
  - The facts the applicants need in order to support this argument are found in the interview notes and the file documents: KGS ordered a particularly

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

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

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

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

State v. Devine

DRAFTERS' POINT SHEET

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

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

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

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

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

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

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

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

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

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

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

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

The headings might be as follows:

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

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

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

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

why it is prejudicial under Rule 403.

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

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

- Applicants will also have to deal with and harmonize the factual differences, e.g.:
    - The Ripka incident is very proximate and therefore easily "linked in time."
    - The Fusco incident is less so, but rendered more proximate by the fact that, although the Fusco arrest was 18 months ago, Devine had only been out of jail for 6 months at the time of the current arrest.
    - On the two prior occasions, the drugs dealt by Devine were packaged for distribution, i.e., in small, individual packages. In the current incident, the drug was in a single, larger zip-lock bag, not readily saleable to individual users. To reconcile these differences, applicants should draw upon Ripka's testimony regarding the probability that Devine just hadn't yet gotten around to cutting it for distribution.
    - In the Fusco incident, the drug was heroin, whereas, in the Ripka incident, it was cocaine. To deal with this difference, the applicants should point out that both were "controlled substances," which is what the charged statutory violation deals with.

- The "Danger Of Undue Prejudice" And "Needless Presentation Of Cumulative Evidence" Aspect Of The Objection: Under Rule 403, the defense objection would be that, although the evidence might be marginally relevant, its admission creates "undue prejudice" and, assuming that the proffered Ripka evidence is admitted, the admission of the additional Fusco testimony would be needlessly cumulative and wasteful of time.
    - As to the "prejudicial" side of the objection, applicants should argue the compelling relevance coupled with the necessity for the evidence. It is not "prejudicial" in the sense that it is remote or tangential, i.e., under the circumstances, it is evidence of conduct and the strongest evidence available to show intent.
    - With limiting instructions, the jury can be made to understand the narrow purpose for which the evidence is to be considered.
    - As to the "cumulative" side, it is not duplicative, in the sense that it is two

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

- In light of the ambiguity injected on the issue of Devine's intent during cross examination of Ripka, this evidence of Devine's conduct becomes all the more necessary as evidence of his intent, and, as here, where it is unquestionably related recent conduct, its probative value is plainly outweighed by whatever prejudice it may have on defendant's case.

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