APPLICANT NO. _____

ARKANSAS BAR EXAMINATION
FEBRUARY, 2004

3 Pages
TORTS

I.

Jerry Smith is the owner of the local computer repair company, Smith, Inc. Most of his clients pay a monthly retainer to Smith for him to answer questions that may come up, to do repairs, and for installation of new equipment. In March 2003, he sued the local cleaners for some unpaid repair bills and received a judgment for $3000.00. The cleaners, owned by Bill and Mary Brown, did not pay the judgment and closed in June 2003. Prior to the Browns' closing, Smith heard from some of his clients that the Browns had made a number of negative comments about the quality of his work and about his reputation for truthfulness. The Browns had been clients of Smith's for years and had never complained to Smith about the quality of his work. In fact, on at least one occasion, Bill Brown had written "good job" on an invoice he had paid. The Browns issued a statement to the press when they closed saying the closure was due to Smith's suit, their employees were losing their jobs, and Smith had not been willing to negotiate any kind of a settlement.

Sentiments ran high in town about the cleaners' closing and suddenly Smith lost a lot of clients. Smith comes to see you and asks that you sue the Browns personally. Smith said the Browns had a lot of unpaid bills, but he was the only company singled out in the release.

Does Smith have a cause of action against the Browns? Analyze the elements of any cause of action and explain what testimony he would need to present to support his cause of action.

II.

Dorothy Brown has been a patient of Dr. Welby's for many years. On January 2, 2002, she saw him for her annual check up. She entered the examining room with Nurse Ratchett and slipped, fell, and broke her hip. Brown comes to you on February 10, 2004, and asks you about suing Dr. Welby. Her hip has still not healed properly and she is facing the prospect of another surgery before the end of the year.

Brown advises you the exam room floors were shiny and slick. She tells you her niece Andrea, a receptionist at Dr. Welby's clinic, told her that she (Andrea) had heard that others had fallen on that floor and the floors are buffed weekly. Brown further tells you she did not see any foreign substance on the floor.

1. Does Dr. Welby owe any duty to Brown? Explain your response, applying the law on this issue.

2. What, if any, action must Brown take now or can she wait until after she is released by her surgeon? Explain your reasoning.

III.

Pete Fuller, a chain smoker for 20 years, is an independent truck driver. Last month he was in Newport at a truck stop getting cigarettes and diesel fuel. He parked at the only fuel island, which happened to be near an open drain grate. Around the island was a wet substance, either oil or diesel. Fuller saw the wet substance when he got out of the truck, but slipped and fell into the open grate. He reported the spill to the clerk on duty when he went in to buy a carton of his favorite cigarettes. The clerk said the grate had been missing for several days. Fuller took some pictures of the area before he left.

Five hours later, after delivering his load, Fuller went back to the same truck stop and noticed that the grate was still open and the ground was still slick.

Fuller went to his doctor the next day and was diagnosed with a sprained back. He was unable to work for three weeks. He has no health insurance.

Fuller comes to you and asks what his options are.

Explain and analyze what cause(s) of action Fuller might bring, including the elements necessary to establish the cause of action.

ARKANSAS ESSAY
ANSWER
TORTS
February, 2004

I. DEFAMATION.

Smith's best cause of action against the Browns is for the tort of defamation. To prove defamation, Smith must show that the Browns (1) made a statement, either written or spoken, (2) of and concerning the plaintiff, (3) that was either false or was made with a reckless disregard for the truth, (4) that the defendants caused the statement to be published by communicating it to at least one person, and (5) that plaintiff suffered harm to his reputation and/or an economic interest as a result. If Smith can prove malice - i.e., intentional conduct knowing of the falsity, - he may be able to collect punitive damages. Arkansas, however imposes limitation on the recovery of punitive damages.

Smith will likely prevail in this suit. First, the Browns made statements regarding him, both spoken and written (at common law, referred to as slanderous and libelous). To this end he should present testimony of persons in the community who read or heard the press release/statement or whom the Browns made the statements to.

Second, the statements are on their face of or concerning Smith - he is explicitly mentioned by name. He should present similar witnesses to those described above.

Third, the statements here were probably knowingly false. Smith should introduce the invoice bearing the "good work" inscription, testimony from other creditors of the Browns',and testimony of current and former employees. Smith can also proffer his own testimony and should call the Browns as witnesses. Last, he can call his attorney to the action against the Browns, waive attorney-client privilege, and have his attorney testify as to settlement negotiations, if any.

Fourth, publication should be easy to prove. Smith could use the witnesses described above to prove publication.

Fifth, damages will be more difficult to prove and may be speculative. Here, Smith can present his testimony as well as the testimony of those who heard the defamation. He could also present testimony of lost customers. Note that while reputation evidence is often inadmissible, since reputation is of issue here, the testimony should be admitted.

INTENTIONAL INTERFERENCE WITH BUSINESS RELATIONS.

Smith may also have a cause of action due to the loss of his customers being an interference with his business. He will need to show that people who otherwise would have entered into contacts with him refrained from doing so. He will need to show intentional conduct by the Browns. Same

witnesses and proof as in the defamation cause of action.

II. (1) Dr. Welby owes two duties. First, since Brown is essentially a business visitor, Dr. Welby owes her the duty of care owed on invitee. That duty is to make the premises safe, repair unforeseen defects, inspect for and discover defects, and warn of latent and patent (known) defects.

Second, Dr. Welby owes Brown a negligence duty of care. Thus, the doctor must exercise reasonable Care towards Brown and give her a reasonable warning of any known dangers in the office. Since prior patients had slipped and fallen in the office, because of the floors, Dr. Welby had notice of the danger and was negligent in failing to warn Brown of it.

(2) In Arkansas, the statute of limitations depends on the type of injury. Here, Brown has a personal injury action. The applicable statute of limitations is three years. Thus she must file her action within three years from the time she knew or should've known of the injury. Under these facts, she has until January 2, 2005 to file.

Thus, she does not need to file immediately, and can probably wait until after her surgery because that will make damages more certain. However, she should err on the side of caution and file as early as she can.

III. Fuller has a straight forward cause of action for negligence. To prove negligence he must show the service station had a duty, that it breached that duty, that the station was the proximate or legal cause and the cause in fact of his injury and that he suffered damages.

DUTY. The service station has a duty of reasonable care towards all foreseeable plaintiffs. In this case, that duty would extend to foreseeable patrons and users of the station. The duty would include the exercise of reasonable care to maintain the service station premises in a safe condition, to fix known defects, to clean up known spills, and to discover reasonably knowable dangers, defects, and spills. Here, Fuller was a patron of the business and the service station owed him a duty of reasonable care.

BREACH. The station obviously breached the duty of reasonable care by failing to clean up the spill and fix the grate. The service station attendant stated that he knew of the missing grate but failed to fix it. Spills of oil and gasoline are common of service stations, so failure to discover and clean up the spills in a reasonable manner contributes a breach of the duty of care.

CAUSATION. (1) Proximate or legal cause. A negligent tortfeasor is liable for harm caused to plaintiffs within the foreseeable zone of danger. Here, the injury caused happened at the only fuel island for the truck stop. This is clearly within the foreseeable zone of danger and the service station proximately caused Fuller's injuries. (2) Cause in fact. A party is the cause-in-fact of injury if "but for" the negligence, the plaintiff wouldn't have suffered injury. Fuller meets that test, so causation is established.

DAMAGES. To have a negligence claim, plaintiff must establish damages - namely, an injury or economic, monetary loss. Here Fuller has medical bills and lost wages for three weeks. He therefore has damages.

DEFENSES. Arkansas recognizes "pure" comparative negligence. Under this doctrine, if the plaintiff is more negligent than defendant, plaintiff cannot recover. If plaintiff was less negligent, he/she can recover but recovery is reduced to proportion to negligence.

Here, service station could raise the defense of contributory negligence because Fuller recognized that the ground was slick and failed to exercise due care. This will be an issue for the trier of fact but, realistically, probably will not bar recovery by Fuller.

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ARKANSAS BAR EXAMINATION
FEBRUARY, 2004

1 Page
WILLS, ESTATES, AND TRUSTS

Jane Rivers, an elderly retired school teacher, who had never married and had no children, died on April 10, 2002. Ms. Rivers was a lifelong resident of Newport, Arkansas. Among her effects was found a document wholly in her handwriting, signed by her, dated December 25, 1998, which was headed "Last Will and Testament of Jane Rivers." There were no witnesses to Ms. Rivers' signature. Ms. Rivers' estate consisted of her residence in Newport and the contents of it, several hundred thousand dollars in certificates of deposit at a Newport bank, and a small farm located in Jackson County, Arkansas.

In this "Will," Ms. Rivers first made several specific bequests "to my cousins Billy Smith, Bobby Jones, and Betty Tucker, $1000.00 each." The paragraph containing those specific bequests was followed by a paragraph that read as follows: "Subject to the provisions of the preceding paragraph I devise and bequeath all the remaining portion of my estate both real and personal to my cousins, Bobby Joe Edwards, Jimmy Williams, Mary Lou Smith, Violet Robinson, and Robert Nance, to share and share alike." Prior to Ms. Rivers' death, Bobby Joe Edwards and Mary Lou Smith died. Both Bobby Joe Edwards and Mary Lou Smith were survived by children.

1. Is the "Will" admissible in Probate? Why or why not?

2. What happens to the share of the Rivers Estate which would have gone to Bobby Joe Edwards and Mary Lou Smith, had they survived Rivers? Explain.

ARKANSAS ESSAY
ANSWER
WILLS, ESTATES, & TRUSTS
February, 2004

1.

A will is admissible into probate if it is brought to circuit court (since chancery and circuit courts merged in Arkansas) within thirty days of the decedent's death by an interested party, such as a beneficiary or personal representative (executor, if a valid will). The will must have three essential elements present: (1) formalities of law were observed, (2) decedent had capacity to execute a will at the time of execution, and (3) the decedent manifested her intent to execute a will at the time of the execution.

Formalities. Arkansas allows a will to be executed in two formal ways: (1) typewritten and signed by the testator and two witnesses, or (2) holographically by complete handwriting of the testator and signed by the testator. As there were no witnesses to Jane River's will, the will must be holographic to be valid. Since the will was wholly in her handwriting and signed and dated by her, her will was a valid holographic will.

Capacity. A testator is considered to have the capacity to execute a will if she is of 18 years of age or older and of sound mind such that she is able to understand the nature of the act of execution of the will and is able to understand her natural objects and bounty, i.e., an understanding of her estate and its disposition. Since Ms. Rivers was older than 18 years of age and no facts go to support any lack of capacity or unnatural disposition of her estate, she possessed the requisite capacity to execute her will.

Intent. In Arkansas, a testator is presumed to have the requisite intent to execute a will if no facts show otherwise and the will to be probated had the words "this is my last will and testament." Ms. River's will is titled "Last Will and Testament of Jane Rivers," which is likely to suffice for a showing that she manifested her intent for the holographic will to be just that.

As all three of the essential elements and their subparts have been proven and the facts do not support any defenses (such as: fraud, undue influence, mistake, improper execution, revocation, lack of capacity, or lack of intent), it is likely that this holographic will can be property probated.

2.

The interests left to Bobby Joe Edwards and Mary Lou Smith will be distributed equally among the other residuary beneficiaries of Ms. River's estate. Since Bobby Joe Edwards and Mary Lou Smith were not alive at the time of the testator's (Ms. River's) death, the gifts to them are considered "lapsed gifts." Lapsed gifts generally return to the residuary estate and are distributed on a pro rata basis to the other residuary beneficiaries, i.e., Jimmy Willliams, Violet Robinson, and Robert Nance. Since the residuary beneficiaries are to "share and share alike" this pro rata distribution will be in equal shares of one third to each. The only exception in Arkansas to lapsed gifts is under the Anti-Lapse Statute. That statute provides that gifts to descendants who in turn have descendants do not lapse and instead go to the descendant's descendants. Bobby Joe Edwards and

Mary Lou Smith both have children and as such have descendants. However, the statute does not apply in this situation since Ms. River's cousins, while family, are not her descendants, i.e., issue/children of decedent/testator.

It should be noted that Bobby Joe Edwards and Mary Lou Smith are apparently part of a class that consists of Ms. River's cousins. The language "to my cousins" presents somewhat of a possible ambiguity if she had other cousins that she intended to list, but mistakenly did not list. If this is in fact the case, extrinsic evidence may be necessary to determine the outcome. The reason this point is relevant is that the pro rata shares taken by the cousins from the two residuary lapsed gifts would be in a different proportion if the class included additional cousins. However, it probably isn't the case here since there were specific bequests to other "cousins" that were not included in the list of residuary beneficiaries.

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ARKANSAS BAR EXAMINATION
FEBRUARY, 2004

2 Pages
EQUITY AND DOMESTIC RELATIONS

The short (6 months) tempestuous marriage of Mr. and Mrs. Smythe is coming to an end. On December 15, 2003, Mrs. Smythe moved to Tulsa, Oklahoma, where she can pursue her satisfying career as a stockbroker just as well as she did in Little Rock, Arkansas. She left Mr. Smythe behind, teaching art at a local junior high school. She filed for divorce in early January, 2004, in Pulaski County, Arkansas. She wants everything she can get in the division and distribution of the property.

Mr. Smythe is at a loss to know why his wife left him. He is an artist, a sensitive man, handsome and gentle. He worked hard to get his teaching credentials, living on canned soup and student loans. He met Mrs. Smythe at an arts center mixer when the works of his students were on exhibit there. For him it was love at first sight. For her the emotion was more akin to lust, the immediate consummation of which was legitimized by the marriage some three weeks after they met.

Mrs. Smythe, being somewhat worldly and realizing that Mr. Smythe had no ambition beyond teaching junior high school art, had insisted on a pre-nuptial agreement which would protect her IRA, her modern art and antique jewelry collections, and her anticipated large year-end bonuses from being divided in divorce proceedings (these items were simply identified as "IRA, art, jewelry, and bonuses" in the document, and no other property was mentioned). The pre-nup was a "take-it-or-leave-me" deal which the soon-to-be Mrs. Smythe slipped under Mr. Smythe's nose after they had shared a few glasses of wine at the rehearsal dinner. Of course he signed it. He was in love.

The couple owns a house in Little Rock (bought by Mrs. Smythe for them to live in after the wedding) suitably furnished and decorated. Their cars are leased (for the tax advantages, she told him), and they have no children. Mr. Smythe does not want to contest the divorce, since his wife has convinced him that he has made her life intolerable, but he does want a fair and appropriate division and distribution of the marital and all other property.

I. Can this marriage be dissolved in Pulaski County, Arkansas? Why or why not?

II. How should the court divide and distribute the property, and why?

ARKANSAS ESSAY
ANSWER
EQUITY AND DOMESTIC RELATIONS
February, 2004

1.

Based on the facts provided, Mr. and Mrs. Smythe's marriage cannot be dissolved in Pulaski County, Arkansas. There do not appear to be grounds sufficient to grant a divorce under Arkansas law.

Although jurisdiction is proper in Pulaski County, Arkansas because Mr. Smythe is still a resident of Little Rock; the albeit short marriage was celebrated in Arkansas; and Arkansas law would govern a divorce of the parties; there are insufficient grounds to grant a divorce.

For a no-fault divorce, the parties must be separated for eighteen months and not have had sexual relations during that period of time. It appears that Mr. and Mrs. Smythe are separated, because he lives in Little Rock and she lives in Tulsa. However, Mrs. Smythe moved to Tulsa in December and she filed for divorce in January, the next month. This does not constitute 18 months separation even if sexual relations had ceased.

For a divorce on fault grounds, the parties must establish: (1) adjudicated insanity; (2) one of the spouses has been convicted of a felony or other heinous crime; (3) habitual drunkenness, cruelty or general indignities; (4) adultery or (5) willful failure of one spouse to support the other. These grounds must exist within the 5 years prior to requesting the divorce.

The closest grounds related to the facts provided would be "cruelty" or "general indignities" since Mrs. Smythe has said that Mr. Smythe has made her life "intolerable." However, cruelty requires some physical injury and Mr. Smythe is described as a "sensitive" man who is also "gentle." There is no allegation of physical abuse. "General indignities" require a systematic and enduring pattern of abuse that causes the parties an alienation of affection, to the extent of actual hatred. Testimony about specific instances & episodes are required as proof for "general indignities." After a marriage of six months, this pattern would have had to have started on the honeymoon. However, it is clear that Mr. Smythe is still enamored with Mrs. Smythe.

Based on the facts, Mrs. Smythe may want to have the marriage annulled in Pulaski County if she doesn't want to wait until the parties have been separated for eighteen months. She will have to prove that the marriage is "voidable" on the basis that one or both of them did not have the capacity to marry. Those grounds include non-age and a prior undissolved marriage (probably not applicable here), mental incapacity (no intent to form a union) or physical incapacity (the physical inability to have sexual intercourse). The absence of children in this marriage can establish this ground. Also, if there was fraud, duress or misrepresentations made with respect to why the parties were married, there are grounds for an annulment.

As it stands, Mr. and Mrs. Smythe are probably not able to dissolve their union in Pulaski County, Arkansas based on having insufficient grounds for divorce or annulment.

II.

If the court were to divide the assets of Mr. and Mrs. Smythe, the Arkansas standard is to make an equitable (i.e., equal) distribution of marital assets unless the court decides that other factors are relevant to justify an unequal distribution. Separate property would remain with the party who brought it into the marriage.

In a union in Arkansas, the property of the marriage consists of marital property and separate property brought into the marriage by either spouse. If separate property has not been transmuted (i.e., co-mingled) into marital property, it remains the separate property of the spouse who brought it into the marriage.

The house owned by the Smythes is marital property. Although, Mrs. Smythe purchased the property with her funds, it became marital property when the couple became joint owners. The furnishings and decorations are also marital property since they were purchased after the marriage. The Smythes do not own their cars, the leasing company does, so there is no interest to divide amongst the parties.

Mrs. Smythe would assert that the house belongs to her because the court can "trace" her separate assets that purchased the property. Based on the short length of the marriage, the court may be inclined to accept Mrs. Smythe's position; but over any extended period of time, the home could be considered a marital asset.

The property covered under the pre-nuptial agreement would all belong to Mrs. Smythe if the prenuptial agreement is considered valid and enforceable. The court would look to several factors regarding the agreement: (1) was it fair or unconscionable?; (2) was there full and fair disclosure?; (3) did the party burdened have an opportunity to consult counsel on the agreement?; (4) was consent voluntary or made under duress?

Based on these facts: (1) the pre-nuptial was slipped under Mr. Smythe's nose at the rehearsal dinner; and (2) the assets were simply identified as "IRA, art, jewelry and bonuses"; the court would probably disregard the pre-nuptial agreement.

The art and jewelry and any portion of the IRA Mrs. Smythe brought into the marriage would remain her separate property. The bonus she received in December 2003 however would be marital property and the court would have the power to divide that asset.

Although alimony is not awarded for fault; the court may award Mr. Smythe periodic alimony or lump sum alimony so that he can reestablish a lifestyle after the divorce. He was living on canned soup.

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ARKANSAS BAR EXAMINATION
FEBRUARY, 2004

2 Pages

PROPERTY

Until a few years ago, John Doe and his wife, Mary Roe, lived all of their married life in Texas. Texas is a community property state. Mary Roe is a physician and, therefore, for professional reasons, never used her husband's surname. From their combined income, which was community property, they purchased a marital residence in Texas. At their retirement, they decided to leave Texas for quieter and greener lands in Arkansas. They sold their residence in Texas. They then established domicile in Arkansas. After acquiring an Arkansas domicile, they used the proceeds of the sale of their Texas property to purchase a farm in Arkansas. The important part of the deed to the Arkansas farm reads as follows:

> "I, Grantor, for and in consideration of Ten and No/100 Dollars ($10.00) and other good and valuable consideration, do hereby grant, bargain, sell and convey unto John Doe and Mary Roe, and unto their heirs and assigns forever the following described lands:"

After moving to Arkansas, John is very happy being retired and pursuing his hobbies of hunting and fishing. Mary Roe, on the other hand, dislikes retirement and has established a medical practice in Arkansas. She and Dr. Richard Physician have purchased an office building together. The important part of that deed reads as follows:

> "I, Grantor, for and in consideration of Ten and No/100 Dollars ($10.00) and other good and valuable consideration do hereby grant, bargain, sell and convey unto Dr. Richard Physician and Dr. Mary Roe, and unto their heirs and assigns forever, the following described lands:"

Drs. Physician and Roe rent out part of their office building to another doctor. Dr. Roe has taken her share of the rent payments to a local stockbroker who has invested it for her in stocks and

mutual funds. The name of her husband, John Doe, is not on the stocks and bonds or the brokerage account.

Dr. Roe and her husband have one son, Richard Doe, who has recently quarreled with his father. Dr. Roe wants to transfer some property to her son but doesn't want her husband to know about it.

She has come to you for advice.

Discuss and contrast her respective interests in real and personal property in Arkansas. Ignore the effects that divorce may have on any of her property interests.

Can she transfer any of this property to her son without her husband's knowledge? Why or why not?

ARKANSAS ESSAY
ANSWER
PROPERTY
February, 2004

Dr. Roe can probably transfer the stocks, mutual funds, her share of the office building and the rents received therefrom to her son, but she cannot transfer the interest she owns in the farm to her son. The first issue, is whether Dr. Roe can transfer her interest in the farm to her son. She may not because the farm is held as tenants by the entirety with her husband. A tenancy by the entirety is created whenever two people purchase or are conveyed property as husband and wife. The language on the instrument does not have to specify the couple as husband and wife as long as they are in fact married at the time of the purchase or conveyance. Here, Dr. Roe and her husband John purchased a farm when they moved to Arkansas. Although the deed lists them individually, and makes no mention of their marital status, they still own the property as tenants by the entirety because they are married. This is true even though their last names are different on the deed. Since neither a husband or wife can convey his or her interest in a tenancy by the entirety without the express written consent of the other, Dr. Roe may not lawfully convey her interest in the farm to her son. Therefore, this property can be excluded from consideration of transfer.

Second, Dr. Roe may be able to convey her interest in the medical building to her son. At issue is whether the building is owned by Drs. Roe and Physician as joint tenants with rights of survivorship or as tenants in common. (Note that the building could be owned under a partnership agreement for the benefit of the partnership. In that case, Dr. Roe would only be able to transfer her economic interest in the rents the partnership receives from its tenants by way of an assignment to her son.)

This property could be owned by Drs. Roe and Physician as joint tenants with rights of survivorship or tenants in common. A joint tenancy with right of survivorship is created when 2 or more persons intend to purchase property with the understanding that as an owner dies, his/her interest is extinguished and the surviving tenants absorb his/her share. Therefore, only the surviving tenant can dispose of the property by will or intestacy. To successfully create a joint tenancy with rights of survivorship there must also be unity of time, title, interest. If either is missing or broken, there is no joint tenancy. Conveying one's interest in a joint tenancy breaks the unities and leaves a tenancy in common.

A tenancy in common is created when 2 or more persons purchase or receive property and are not married or do not otherwise obtain rights of survivorship in the property. Each owner has the right to convey or sell her interest at any time. Here, the language of the deed is silent as to its intent to create a joint tenancy with rights of survivorship. The language suggests a tenancy in common was created ("to their heirs and assigns forever"). If the doctors hold as tenants in common, Dr. Roe can transfer her share to her son successfully, however John Doe will be able to assert his curtesy rights in the property at her death. Curtesy is a husband's right to his wife's property upon her death. In this case, John would be entitled to a one-third life estate in the office building upon the death of Dr. Roe. This would mean one-third of the rents would belong to him

until his death and then son will be able to receive the entire interest.

The same holds true for the personal property except John Doe would get one-third full ownership of the mutual funds and stocks at Dr. Roe's death, but if she makes an intervivos gift of the mutual funds and stocks, the son's interest would not be subject to curtesy claim of John Doe at Dr. Roe's death. Therefore, Dr. Roe should make an intervivos gift of the mutual funds and stocks to her son; she could also transfer her interest in the office building with the understanding that John would be able to assert his curtesy rights at her death.

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ARKANSAS BAR EXAMINATION
FEBRUARY, 2004

1 Page
CRIMINAL LAW AND PROCEDURE

Freddy Felon has been charged with theft and assault for the purse-snatching of Cindy Citizen's purse as Ms. Citizen was walking home from work. On that evening, Ms. Citizen heard a noise behind her, felt a tug on her purse, turned around and confronted a man who was attempting to snatch her purse. A brief struggle ensued; Ms. Citizen was knocked to the ground and the man fled with her purse.

Three days after Ms. Citizen's ordeal, a policeman telephoned Ms. Citizen and asked her to come to the police headquarters. There, the police showed Ms. Citizen a mug shot of Mr. Felon, who had been arrested the day before when he attempted to snatch the purse of a policewoman. The police asked Ms. Citizen if she could identify the man in the mug shot as the man who took her purse. Ms. Citizen positively identified Mr. Felon as the man who took her purse and assaulted her.

Mr. Felon, who was still in custody following his attempted purse-snatching of the policewoman's purse, was questioned by police officers concerning the theft of Ms. Citizen's purse immediately following Ms. Citizen's identification of Mr. Felon's photograph. (On the preceding day Mr. Felon had been questioned concerning his attempted theft of the policewoman's purse; he had requested counsel after he was given *Miranda* warnings and counsel had been present in the interview.) In the interview concerning Ms. Citizen, Mr. Felon confessed to the theft of Ms. Citizen's purse.

You have been retained to represent Mr. Felon. Mr. Felon has now recanted (taken back) his confession to assault and to the theft of Ms. Citizen's purse, and the case concerning Ms. Citizen has been set for a pre-trial hearing. Identify the pre-trial issues and discuss the relevant law presented by these issues.

ARKANSAS ESSAY
ANSWER
CRIMINAL LAW AND PROCEDURE
February, 2004

State v. Freddy Felon

Pre-trial Identification - The first issue presented in this case involves the pretrial identification made by Ms. Citizen based on viewing the mug shot. The general rule of criminal procedure covering pretrial identifications such as line-ups, show ups or photo identification requires that the presentation of the suspect not be done in an overly suggestive way. Examples of this would be line-ups where the earlier description indicated a defendant who is Caucasian who is made to line-up with non-Caucasian suspects, thus making it more likely that the Caucasian would be identified as the perpetrator. Likewise, where the police present the victim with only one photograph, this also raises concerns for undue suggestion. Under these facts, it appears the police called victim in for the purpose of identifying her attacker. The officers showed her only one photograph and asked if this was the attacker. The facts do not specify exactly what other communication, verbal or nonverbal, took place, facts which would impact on how a court would rule. However, the facts do indicate that victim confronted her assailant, which would lend more credibility to her pretrial identification. If she were found to have "gotten a good look" at her attacker, her later ID based on the photo would likely be admissible. Of course, any in-court identification would be allowed based on her personal observation above. Therefore, this is not the strongest issue to base our defense.

Custodial Interrogation - Of greater concern, and potentially greater benefit to my client, is the confession obtained from him while in police custody. The 5th Amendment as interpreted in Miranda v. Arizona requires that a suspect be advised of his rights prior to any custodial police interrogation. As commonly known, a suspect has the right to remain silent, anything he says can and will be used against him in a court of law, he has the right to an attorney, and if he can't afford one, the court will appoint one for him. The Miranda warnings are mandatory. Any confessions, admissions or other statements made by a suspect without the warnings are subject to the exclusionary rule, meaning the prosecution may not introduce them in their case in chief (although they may be used to impeach a defendant, if he takes the stand). The warnings must be given prior to each custodial interrogation, especially when the subsequent questioning relates to a separate offense. Here, my client was undisputedly in police custody and was subjected to an interrogation. Although he had been mirandized the day before and apparently invoked his right to an attorney, that warning would not be sufficient to cover the separate questioning concerning Ms. Citizen. The officers should have re-read my client his rights to ensure he understood he was under no obligation to talk with them about the separate incident.

6th Amendment Right to Counsel - It is unclear frm the facts whether a 6th Amendment right to counsel has attached here. The rule is that once a defendant has been charged with an offense, he has a right to have his attorney present at any subsequent proceedings including custodial interrogations. The facts do not specify whether he's been charged, so I can't assume the absence of an attorney during the second interrogation is an issue.

5th Amendment Right to Counsel - Likewise, the facts do not specify whether he asked for his attorney to be present at the second interrogation. Presumably he knew he had an attorney as he was present the day before. If he had requested his attorney, all questioning must have ceased until the attorney arrived. However, without more specific information, this point can't be effectively argued.