



SEPERAC FEB 2019 EXAM MPT FORMAT BIBLE
RELEASE DATE: DECEMBER 4, 2018

The MPT Format Bible is an efficient means of learning the different MPT formats and understanding what is required of answers to each MPT format. This MPT Format Bible contains 112 above average examinee answers illustrating the proper response/format/style for 22 different MPT types. The types (listed in alphabetical order) are:

Argument Section of a Persuasive Brief, Articles of Association, Brief Objective Memorandum/Closing Argument, Case Planning Memorandum, Demand Letter, Demand Letter/Brief Memo, Draft part of an Early Dispute Resolution statement, Leave Behind (Persuasive Memorandum), Letter to Client, Letter to Opposing Counsel, Memorandum of Contract Redraft, Memorandum/Cause of Action, Memorandum/Liability Waiver, Objective Memorandum, Opinion Letter, Persuasive Brief, Persuasive Letter, Persuasive Letter Brief, Persuasive Memorandum, Proposed Findings of Fact and Conclusions of Law, Response to a Demand Letter, and a Two-Part Memorandum.

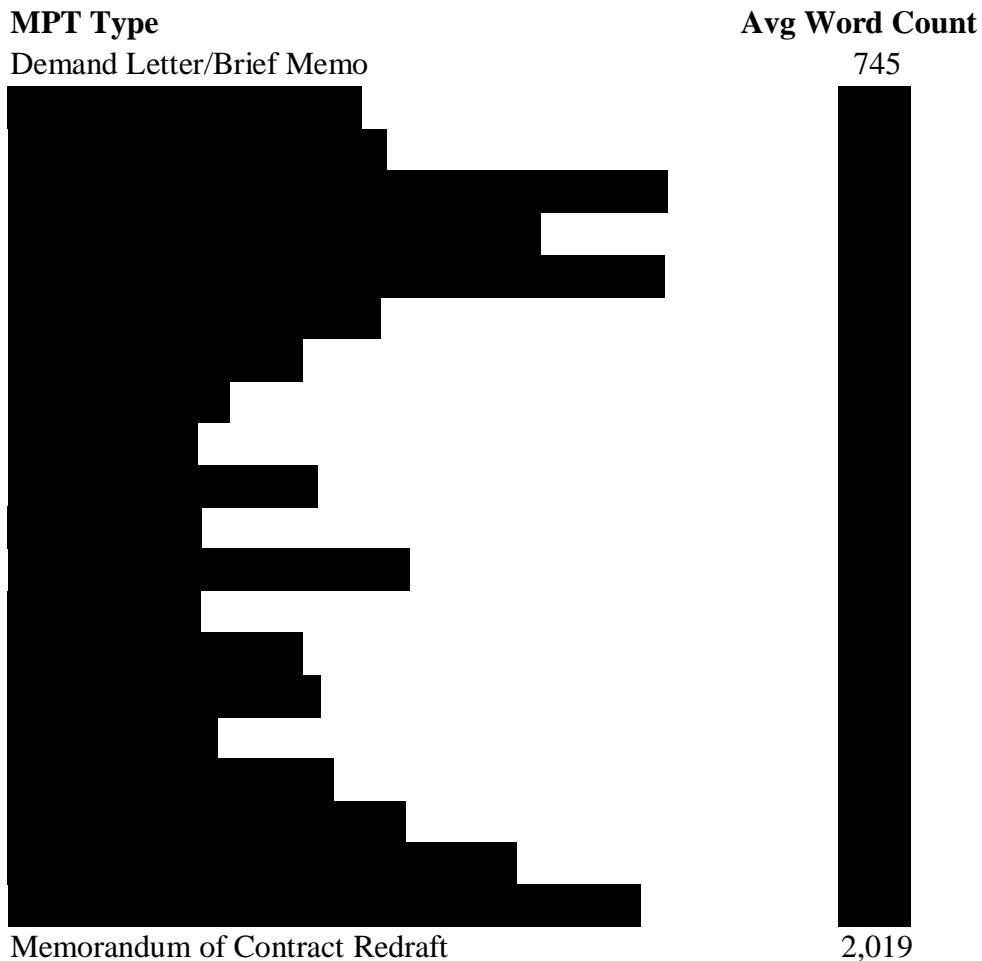
The MPT answers are ranked in order of most frequently tested format (Objective Memorandum) to least frequently tested formats (e.g. Response to a Demand Letter, Two-Part Memorandum, etc). Examinees should skim these MPT answers to understand how each should be formatted. The MPT Format Bible will enable you to quickly recognize the discrete sections of each MPT type and how to assemble those sections. Each MPT contained in this document consists of a heading that contain statistical information on the MPT type along with an NCBE summary of the MPT question and any relevant format tips. For each MPT, there is also box that contains the MPT Task Memo language where the task/format is discussed. Basically, this is the language contained in the MPT Task Memo (which is the first item in the MPT File) that tells the examinee what the task is. By familiarizing yourself with this language, you will be able to better understand what you are being asked to do on the MPT portion of the exam.

Each examinee MPT answer contains the original formatting (e.g. underlining, bolding and italicizing, indenting, centering, and spacing). Each examinee answer is a released above average examinee answer which can be regarded as a superior answer that likely scored in the top 5% of MPT scores. Word counts are also reported for each of the 100+ examinee answers contained in this MPT Format Bible. This will give you an idea of how much writing a top scoring answer in that format consists of. Examinees should also look at the online MPT Comparison to see how exactly passing MPT answers approach formatting, style, and writing length (this can be regarded as the bare minimum necessary for a passing MPT answer).

Examinees should spend a few hours going over these answers and looking at each MPT's layout, structure, and formatting so you can visually learn how to emulate the high scoring answers. A good deal of subjectiveness affects essay grading. However, by emulating the formats and styles of the below MPT types, you increase your odds of getting a better score because good answers look like other good answers.

Examinees should make sure that they review the most commonly tested formats.

To better understand how much to write for each MPT type, following is a breakdown of the average word counts of these released answers sorted by lowest to highest average word count. Please note that word counts are based on the top scoring answers and may not reflect what a typical examinee will write.



UBE Essays subscribers should examine the MPT Essay Comparison Banks to supplement their MPT studies. These Comparison Banks compare actual graded MPT answers to one another and to the model answers so you can better understand what a passing answer consists of. You can view poor MPT answers, exactly passing MPTs, or high scoring MPTs, and compare any MPT to another side by side. Examinees that only look at model/released answers frequently develop unrealistic expectations of what is required for a passing answer, whereas seeing that even better scoring MPTs contain mistakes will help you develop realistic expectations of the bare minimum required to pass an MPT. In order for essay grader to be relatively consistent with one another, the graders must convene to "calibrate." In this calibration process, the graders look at a sample of examinee MPTs and rank-order them until all the graders are in agreement as to which MPT can be regarded as a template of a superior answer and which MPTs are lowed-ranked templates. Thus, the more you look at MPTs that the bar graders themselves regarded as superior, the more likely you will emulate those MPTs and achieve superior scores yourself.

Following is a legend that explains the MPT heading statistics and how examinees should use these MPTs to learn the formats. The Table of Contents is Hyper-Linked – simply hold down the CTRL key and click on a heading and you will jump to that MPT. The advice highlighted in **yellow** should be followed by UBE Essays subscribers.

EXAMS:	This statistic reports how often this type of MPT (e.g. Opinion Letter) has been tested in the 44 MPT exams from Feb 1997 to present. For example, Opinion Letters have been tested on 6/101 MPTs since Feb 1997 meaning they have been tested in about 6% of the MPTs. Examinees should make sure that they review the most commonly tested formats, especially [REDACTED]
P/O:	This statistic reports whether the MPT style required is (P)ersuasive or (O)bjective. Since 1997, 46% of MPTs have been persuasive in tone while 54% have been objective in tone. Examinees should review the MPT answers to understand how a persuasive MPT answer is different from an objective MPT answer.
GUIDE:	This statistic reports whether the MPT question contained guidelines explaining how to format your MPT response. YES means the MPT File contained guidelines (meaning your MPT File contained a template of how your answer should be formatted); NO means the MPT File did not contain guidelines; and MINIMAL/PARTIAL means the MPT File contained minimal/partial guidelines (basically some advice on how to format your answer but no real template). Examinees should review the answers for the MPT types that DID NOT have guidelines or had minimal guidelines to ensure they understand the formats required for these types of MPTs. The main MPT types that DID NOT have guides [REDACTED]
SOC:	This statistic reports whether a Statement of the Case was required in the MPT answer. YES means the MPT required a Statement of the Case; NO means the MPT did not require a Statement of the Case; and MINIMAL means the MPT required a minimal Statement of the Case. [REDACTED]
SOF:	This statistic reports whether a Statement of Facts was required in the MPT answer. YES means the MPT required a Statement of Facts; NO means the MPT did not require a Statement of Facts; and MINIMAL means the MPT required a minimal Statement of Facts. [REDACTED]

Examinees should review the answers for the MPT types that did not have guidelines or had minimal guidelines to ensure they understand the formats required for these types of MPTs.

SOLUTION STATEMENT - APPEARANCE 1%	332
.....	332
NO – SOF: NO	333
	335
	337
#16 MPT FORMAT: LEAVE BEHIND (PERSUASIVE MEMORANDUM) - APPEARANCE 1%	339
F12 EXAM: FRANKLIN RESALE ROYALTIES LEGISLATION (MPT-1) – P/O: P – GUIDE: YES – SOC: NO – SOF: NO	339
NY Released Examinee Answer 1 (1,123 words)	340
NY Released Examinee Answer 2 (1,041 words)	342
#17 MPT FORMAT: MEMORANDUM OF CONTRACT REDRAFT - APPEARANCE 1%	344
J13 EXAM: PALINDROME RECORDING CONTRACT (MPT-2) – P/O: O – GUIDE: MINIMAL – SOC: NO – SOF: NO	344
NY Released Examinee Answer 1 (1,653 words)	345
NY Released Examinee Answer 2 (2,385 words)	348
#18 MPT FORMAT: MEMORANDUM/CAUSE OF ACTION - APPEARANCE 1%	354
J08 EXAM: WILLIAMS V. A-L AUTOMOTIVE CENTER (MPT-2) – P/O: O – GUIDE: YES (COA); NO (MEMO) – SOC: NO – SOF: NO	354
NY Released Examinee Answer 1 (2,314 words)	355
#19 MPT FORMAT: MEMORANDUM/LIABILITY WAIVER - APPEARANCE 1%	360
F08 EXAM: IN RE VELOCITY PARK (MPT-1) – P/O: O – GUIDE: NO – SOC: NO – SOF: NO	360
MD Released Examinee Answer 1 (1,110 words)	361
MD Released Examinee Answer 2 (1,595 w	364
#20 MPT FORMAT: PERSUASIVE LETTER BRIEF - APPEARANCE 1%	368
I05 EXAM: IN RE BRIGHAM (MPT-1) – P/O: P – GUIDE: NO – SOC: NO – SOF: NO	368
	369
	373
	376
	378
	380
#21 MPT FORMAT: PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW - APPEARANCE 1%	382
F17 EXAM: IN RE GUARDIANSHIP OF HENRY KING (MPT-2) – P/O: P – GUIDE: YES – SOC: NO – SOF: NO	382
NY Released Examinee Answer 1 (1,282 words)	383
NY Released Examinee Answer 2 (1,629 words)	387
AR Released Examinee Answer 1 (1,038 words)	391
MN Released Examinee Answer 1 (785 words)	395
NJ Released Examinee Answer 1 (1,393 words)	397
NJ Released Examinee Answer 2 (884 words)	401
#22 MPT FORMAT: RESPONSE TO A DEMAND LETTER - APPEARANCE 1%	404
J09 EXAM: IN RE CITY OF BLUEWATER (MPT-2) – P/O: P – GUIDE: NO – SOC: NO – SOF: NO	404
GA Released Examinee Answer 1 (1,023 words)	405
GA Released Examinee Answer 2 (1,010 words)	407
GA Released Examinee Answer 3 (994 words)	409

Examinees should review the MPT answers to understand how a Persuasive MPT answer is written versus an Objective MPT answer.

Although only a few exams have required a Statement of Facts, examinees should still briefly look at these to understand how to compose one.

#21 MPT FORMAT: PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW - APPEARANCE 1%

F17 EXAM: IN RE GUARDIANSHIP OF HENRY KING (MPT-2) – P/O: P – GUIDE: YES – SOC: NO – SOF: NO

NCBE's MPT Summary:

Examinees are associates at a law firm representing Ruth King Maxwell, who is petitioning to be named guardian for her elderly father. Ruth's brother, Noah King, currently has their father's health-care and financial powers of attorney; he opposes the petition and has requested that the court appoint him as guardian instead of Ruth. Examinees' task is to draft proposed findings of fact and conclusions of law in the guardianship of Ruth's father, with the goal of preventing Ruth's brother from being named guardian. As part of completing the task, examinees must address two legal issues: whether and in what circumstances the trial court has the legal authority to override a prior nomination of a proposed guardian, and whether Noah King's conduct as health-care agent and holder of the financial power establishes "good cause" to override the nomination. The File contains the instructional memorandum, office guidelines on how to draft findings of fact and conclusions of law, and excerpts from the hearing transcript containing relevant testimony by Ruth and Noah. The Library contains excerpts from the Franklin Guardianship Code. It also contains two cases: Matter of Selena J., concerning the statutory priorities for appointment as guardian; and In re Guardianship of Martinez, concerning whether "good cause" exists to remove a guardian.

MPT Task Memo language that discusses the task/format:

Please draft our proposed Findings of Fact and Conclusions of Law to submit to the court.

This document is intended to be an efficient means of learning the different MPT formats and understanding what is required for each MPT format. Examinees should skim these MPT answers to better understand how to format them. Each MPT contained in this document consists of a heading that contain statistical information on the MPT, an NCBE summary of the MPT question, and then released above average answers for the MPT with their original formatting (e.g. underlining, bolding and italicizing, indenting, and spacing).

NY Released Examinee Answer 1 (1,282 words)

**In re Guardianship of Martinez
Findings of Fact and Conclusions of Law****FINDINGS OF FACT**

The headings tell you the state the examinee answer came from and its word count

Background

1. Henry King is 74 years old.
2. In 2013, a year after his wife died, Henry began to have trouble with his memory and lose his attention span. A neurologist and psychiatrist said that Henry was showing early signs of dementia. At that time, Noah lived in Dry Creek, where Henry lived, and Ruth lived in another city.
3. On May 20, 2013, after discussions, Ruth, Noah and Henry agreed it was practical to give Noah necessary authority and Henry subsequently signed an advance directive and power of attorney.
4. In both the advance directive and power of attorney, Noah was nominated as Henry's prospective guardian.
5. Noah's duties include the management of Henry's finances.
6. In about 2015, Henry's condition began to worsen. He did not leave the house and began to make less sense during any conversations with Ruth and Noah. He spends his days in his favorite chair, staring out the window, at a book or the TV. Henry's condition has remained that way until now and the doctors have said it is permanent.

Noah's care of Henry

7. Towards the end of 2015, Ruth returned to Dry Creek to visit her father.
8. During that visit, Henry told Ruth that he had fallen in the shower and the length of the back of his right arm was bruised.
9. On confronting Noah about the incident, he said that he was aware his father had fallen but he didn't think it was a problem because Henry had not complained.
10. Noah subsequently agreed to take Henry to the doctor, who confirmed there were no broken bones, but simply bad bruising.
11. A few days after that doctor's visit, Ruth and Noah argued about her concerns relating to her father's care and Ruth was told by Noah to stay out of it.

12. On June 22, 2016, Henry fell over in his bedroom, breaking his wrist. On that occasion, Noah had visited his father in the evening and Henry complained to being a little stiff, but did not appear to be in too much pain.

13. On June 23, 2016, a neighbor called Noah stating that Henry's wrist was swollen. Noah took his father to the emergency room where they put a cast on his wrist and discharged him the same day.

14. Noah did not tell Ruth about this incident.

15. In August 2016, Ruth transferred her work to an office close to her father. She spent two or three evenings a week with her father.

16. After moving back to Dry Creek and spending time with her father, Ruth noticed that Noah did not buy Henry food and the refrigerator was mostly empty.

17. Ruth began food shopping and cooking for her father, and ultimately hired someone to take over these duties.

Each of these 100+ top-scoring examinee answers are in their original format

Henry's finances

18. On one occasion after moving back to Dry Creek, Ruth noticed an overdue notice from the electric company. Ruth confronted Noah and he said he had missed a few months' payments.

19. The bills and bank statements kept at Henry's house.

20. Ruth looked through the bills and statements and discovered Noah had not been paying a lot of the bills.

21. Henry had received a number of threatening letters, some of which were from his doctor.

22. Ruth also discovered a number of online purchases made by her father from Amazon and other sites, which Henry had shipped directly to his friends as gifts to ensure their visits and to repay favors.

23. On that one occasion, Ruth reviewed 2 months' worth of bills and statements, which totaled \$2,200.

24. From the period between 2016 and 2017, Henry made purchases in the amount of \$9,000 on eBay and Amazon.

25. Henry receives \$2,515 each month from his pension and Social Security.

26. Ruth again confronted Noah. Noah said he knew about the online purchases but that it was difficult to stop his father from spending. He also said it was these online purchases that made it difficult to pay the bills.

27. Noah did not feel comfortable calling Henry's friends to ask them to return the gifts, and did not have the heart to tell his father to stop the purchases.

28. Noah did not think it was his place to stop his father from spending his money and took no further steps to stop the spending.

CONCLUSIONS OF LAW

1. A guardian is appointed by the court to manage the income and assets and provide for essential health, safety and personal need requirements for a person found in competent (s 400 Guardianship Code ("Code"))
2. The court appoints an individual as guardian who will best serve the interest of the adult, and the individuals are given preference according to list set out in s 401 of the Code (s 401(a)).
3. An adult may nominate a person to be future guardian providing certain formalities are met. Where an adult has given an advance nomination for an individual as guardian, they will be given preference. This is a presumption that can be overcome by a showing of good cause (s 401(b)(1); Matter of Selena J; In re Guardianship of Martinez).
4. Henry executed an advance nomination for Noah to be appointed Henry's guardian should that prove necessary and there is thus a presumption that Noah will therefore be appointed in that capacity.
5. A court may refuse to appoint a proposed or nominated guardian where that person's previous actions would have constituted a breach of a fiduciary duty had the person been serving as guardian at the time. Particular consideration is given to this factor where the person has in fact served as a fiduciary under an advance directive or power of attorney (Matter of Selena J).
6. Part of the nominated or appointed or named person's fiduciary duty is the duty to act in the principal's best interest (Matter of Selena J).
7. Noah has served as fiduciary in his preceding capacities. Thus, if the court finds Noah has breached his fiduciary duties, it has the power to refuse to appoint him and may appoint a person with lower preference (s 401(a)). Such a person includes another adult child of the adult (s 401(b)(3)).
8. A showing of good cause to remove a nominated or appointed guardian exists where the person breaches their fiduciary duty (Martinez).
9. Noah appears to have neglected the care of his father's financial affairs and neglected to properly provide the medical care necessary. Henry was not taken to the doctor after falling over and bruising his arm, nor was he taken within an appropriate time after falling and breaking his wrist. Further, Noah has failed to properly provide food for his father. Noah has also neglected to manage his father's affairs and has allowed debt to accumulate and bills to remain unpaid.
10. Where it appears to the court that there is good cause to revoke or suspend the guardian, the court can investigate the allegations and make such orders it deems appropriate (s 402 Code).



11. In this case, the court should find that good cause has been shown that Noah has breached his fiduciary duties owed to his father. He has neglected to provide the necessary care for his father, in both health and financial matters and has demonstrated that he is not capable and fit to be his father's guardian. Good cause is shown by his failure to meet his obligations and by breach of his fiduciary duties. Thus, the court should appoint Ruth as guardian of Henry as permitted by s 401 of the Code.

NY Released Examinee Answer 2 (1,629 words)

Findings of Fact and Conclusions of Law Regarding Guardianship of Henry King

FINDINGS OF FACT

1. Henry King is 74 years old.
2. In 2013, a year after his wife died, Henry started to have trouble with his memory and began to lose his attention span.
3. Around this time a neurologist and a psychiatrist diagnosed him with dementia.
4. Upon receiving this diagnosis, and while still generally doing well, Henry set up arrangements for his health care and finances in the event that he should become incompetent.
5. Henry and his two children, Ruth and Noah, agreed that Noah would become Henry's health-care agent and holder of durable financial power.
6. Henry, Ruth and Noah further agreed that Henry would nominate Noah as his prospective guardian in the event he should become incompetent.
7. Noah was chosen for these fiduciary duties because he lived closer to Henry than Ruth.
8. On May 20, 2013, Henry signed an advance directive and power of attorney and in both documents nominated Noah as his prospective guardian.
9. Ruth has stipulated to the validity of these documents.
10. About two years ago Henry became noticeably worse to the extent that he cannot take care of himself.
11. Henry's doctor has informed Ruth and Noah that his condition is permanent.
12. In the summer of 2015, while acting as Henry's health-care agent and holder of durable financial power, Noah failed to take Henry to the doctor until prodded by Ruth, even though Noah knew that Henry sustained bruises up and down the back of his arm due to a fall in the shower.
13. On June 22, 2016, while acting as Henry's health-care agent and holder of durable financial power, Noah failed to take Henry to the hospital until prodded by a neighbor, even though Noah knew that Henry was in pain, which the doctor determined was due to Henry breaking his wrist tripping over a rug.
14. Noah did not inform Ruth about Henry's broken wrist.

15. Ruth confronted Noah about his neglect of Henry's bruising and his failure to inform her of the broken wrist.

16. In August 2016, when Ruth moved back to Dry Creek, she spent two or three evenings a week with Henry and noticed that Noah wasn't buying any food for him, that the refrigerator was always nearly empty with just skim milk and a little bread, and there was only canned soup in the cupboards.

17. Ruth started buying food and cooking for Henry and also hired someone to shop and cook for him.

18. Ruth went through Henry's bank statements and his bills and discovered that lots of different bills had not been paid, or were months delinquent, including the electricity bill and the doctor bill (which was about to go to collections).

19. Ruth also noticed that Henry had made purchases online, up to \$1200 a month of his \$2515 monthly stipend (totaling \$9000 over the past 12 months), to buy gifts for friends so they would visit him.

20. Noah has stated that he didn't have the heart to tell Henry to stop his online purchases and therefore he just let it go.

21. After Henry spent \$1200 online in one month Noah asked him to stop, but Henry didn't seem to understand; Noah took no further action.

22. Noah has stated that he doesn't think it is his place to keep Henry from his online spending because he has enough money.

23. Ruth confronted Noah about the unpaid bills and the online spending and Noah responded by telling her to let it go, even though Noah admitted that the online purchases made it hard to pay the bills.

CONCLUSIONS OF LAW

1. The court shall appoint as guardian that individual who will best serve the interest of the adult in need of guardianship (hereinafter, "adult" or "ward"), considering the order of preferences set forth in the Franklin Guardianship Code ("Code") Section 401(b). Code 401(a).

2. Individuals who are eligible have preference in the following order: (1) The individual last nominated by the adult, according to certain formalities, while the adult was competent, to serve as the adult's guardian should the adult be judicially determined to be in need of a guardian (401 (b) (1)); (2) The spouse of the adult (401(b)(2)); (3) An adult child of the adult (401(b)(3)). Code 401(b), 401(c).

3. However, the court may disregard an individual who has preference pursuant to Code 401(b) and appoint an individual who has a lower preference or no preference, provided that the court may disregard the preference for a guardian nominated by the adult only upon good cause shown. Code 401(a).

3.5. The court has great discretion over guardians since even once a guardian has been appointed, the court may, upon petition of an interested party and after its investigation of allegations and the guardian's accounting, revoke or suspend the guardian for good cause Code 402.

4. A court may refuse to appoint a proposed guardian when that person's previous actions would have constituted a breach of a fiduciary duty had the person been serving as guardian. Matter of Selena J. Franklin Court of Appeal (2011).
5. A proposed guardian's previous actions are of special concern when the proposed guardian has actually served as a fiduciary for the proposed ward under an advance directive or power of attorney. Selena J.
6. An advance directive in this context includes a person serving as a health-care agent. Selena J.
7. A health-care agent owes his or her principal a fiduciary duty, which is a legal obligation, to act in the principal's best interest and to avoid self-dealing. Selena J.
8. A holder of a durable power of attorney to make financial decisions for the principal owes his or her principal a fiduciary duty, which is a legal obligation, to act in the principal's best interest and to avoid self-dealing. Selena J.
9. Good cause not to appoint as guardian a person who has been acting as the adult's a health-care agent or holder of durable financial power includes (a) neglect of the adult's financial affairs, and (2) neglect to arrange for needed medical care for the adult. Selena J.
10. Although no Franklin case has yet ruled on the "good cause" standard as it relates to overturning a proposed ward's previously stated preference for a guardian, the Franklin Court of Appeal has stated that the "good cause" standard under such circumstances would be the same as that applied in *In re Guardianship of Martinez* (2009).
11. In *Martinez* the Court of Appeal affirmed the trial court's removal and replacement of guardian Evelyn pursuant to the Code, because Evelyn almost completely disregarded her fiduciary duty to preserve and manage the estate to provide for her ward's needs. *Martinez*.
12. In *Martinez* the court noted that a guardian's fiduciary duty includes the responsibility to apply the income and principal of the ward's estate "so far as necessary for the comfort and suitable support of the ward." *Martinez*, quoting *Nonnio v. George* (Fr. Sup. Ct. 1932).
13. The *Martinez* court stated that a guardian can breach his or her fiduciary duty by action or neglect, if the action or neglect harms the ward. *Martinez*.
14. The *Martinez* court stated that a fiduciary can harm the ward through mismanagement of finances, neglect or the ward's physical well-being, or similar actions. *Martinez*.
15. As Henry's health-care agent and holder of durable financial power, Noah had a fiduciary duty to use Henry's funds for Henry's comfort and suitable support, not to harm Henry by action or neglect such as by mismanaging Henry's finances, neglecting Henry's physical well-being, or similar actions. *Martinez*.

16. Noah's failure to take Henry to the doctor when he sustained bruises up and down the back of his arm and when he broke his wrist breached Noah's fiduciary duty to Henry by neglecting Henry's physical well-being. Martinez.

17. Noah's failure to buy food for Henry, leaving the refrigerator always nearly empty, with just skim milk and a little bread, and only canned soup in the cupboards, breached Noah's fiduciary duty to Henry by neglecting to use Henry's funds for Henry's comfort and suitable support. Martinez.

18. Noah's failure to pay a lot of different bills on time and even missing several months' payments, including to the electric and doctor bills which were about to go to collections, breached Noah's fiduciary duty to Henry by mismanaging Henry's finances. Martinez.

19. Noah's failure to prevent Henry from spending up to \$1200 a month online of his \$2515 monthly pension and Social Security on gifts for friends breached Noah's fiduciary duty to Henry by mismanaging Henry's finances. Martinez.

20. Ruth prodding Noah to take Henry to the doctor when Henry's arm was bruised demonstrated Ruth's willingness and ability to assume the fiduciary duty of caring for Henry's physical well-being.

21. Ruth spending two or three evenings a week with Henry upon her relocation to Dry Creek, and her purchase of food and cooking for him, and her hiring someone to shop and cook for him, demonstrate Ruth's willingness and ability to assume the fiduciary duty of caring for Henry's comfort and suitable support.

22. Ruth going through Henry's bank statements and his bills and discovering his arrears on bills and online charges and confronting Noah about these matters demonstrate Ruth's willingness and ability to assume the fiduciary duty of properly managing Henry's finances.

23. Noah's fiduciary breaches constitute good cause pursuant to Code 401(a) for the court to disregard Noah as Henry's guardian.

24. Ruth's demonstrated willingness and ability to care for Henry's physical well-being, and his comfort and support, and to properly manage his finances give the court good cause to appoint her as guardian. Martinez; Selena J.

AR Released Examinee Answer 1 (1,038 words)

In re Guardianship of Henry King

Proposed Findings of Fact & Conclusions of Law

(1) Proposed Findings of Fact:

- 1) Ruth King Maxwell is the daughter of Henry King.
- 2) Noah King is the son of Henry King.
- 3) In 2013, Henry began to have trouble with his memory and lose attention span.
- 4) A doctor informed Henry he had early signs of dementia.
- 5) It was agreed by all parties that Henry make Noah his guardian.
- 6) On May 20, 2013 Henry signed an advance directive and power of attorney, which made Noah his prospective guardian.
- 7) Henry was mentally and physically "doing well."
- 8) Over the past two years, Henry's condition began to worsen.
- 9) A year and a half ago, Henry fell in the shower and bruised his arm.
- 10) Noah knew about the fall, but didn't think it was an issue.
- 11) Both sibilings took Henry to the doctor and discovered his arm was only bruised badly.
- 12) A few days later, Noah got angry and told Ruth not to worry and he knew how to take care of Henry.
- 13) In June 2016, Henry broke his wrist when he tripped over a rug in his bedroom, which Ruth was not notified.
- 14) After the accident, Noah claims that Henry did not seem in much pain.
- 15) The next day, a neighbor discovered Henry's wrist was swollen and Noah took him to the ER.
- 16) A cast was placed and Henry was discharged that night.
- 17) In August 2016, Ruth transfered to a nearby office with her company.

- 18) Ruth is now able to spend two or three evenings a week with her father.
- 19) Around August 2016, Ruth discovered that Henry broke his wrist.
- 20) Ruth also discovered that Noah was not buying Henry food.
- 21) The refrigerator only had skim milk and a little bread, and there was only can soup in the cupboards.
- 22) Ruth hired someone to shop and cook for Henry.
- 23) Ruth discovered an overdue notice from electric company.
- 24) Ruth looked through Henry's bills and statements and discovered many of the bills were late.
- 25) Ruth discovered statements and charges from Amazon and other online retailers, but could not find new items around Henry's house.
- 26) Henry stated the online gifts were for his friends, because he wanted them to come visit him.
- 27) Besides explaining that it was hurting Henry's fiances, Noah took no other steps from preventing his father from buying gifts online.
- 28) In a two month period, \$2,200 was spent online.
- 29) In the past 12 months, he spent about \$9,000.
- 30) Henry only receives \$2,515 a month from his pension and Social Security (this is \$30,180 a year).
- 31) Noah admitted he knew of the online purchases. He stated it was hard to keep Henry from purchasing items, and it made it hard to keep up with the bills, but he was able to keep the bills under control.

(2) Proposed Conclusions of Law:

- 1) A guardian is an "individual appointed by a court to manage the income and assets and provide the essential requirements for health and safety and personal needs of someone found incompetent." Franklin Guardianship Code § 400.
- 2) The court shall appoint a guardian whose interest will best serve the interest of the adult. Franklin Guardianship Code § 401(a).
- 4) An adult may nominate in writing an individual to serve as the adult's guardian should the adult be judicially determined to need a guardian. Franklin Guardianship Code § 401(c)

- 4) This must be expressed, signed, and acknowledged by the adult in the presence of two witnesses who sign in the adult's presence. Id.
- 5) The individual last nominated by the adult has preference over an adult child of the adult. Franklin Guardianship Code § 401(b).
- 6) The law recognizes and protects an individual's right to make decisions about her medical and financial affairs, this includes advance directive permits to specify the medical care the ward would prefer to receive and handle financial matters, and to name an agent to make the decisions when she/he lacks capacity. Matter of Selena J. (Fr. Ct. of App. 2011)
- 7) The court *may disregard* an individual who has preference and appoint an individual who has a lower preference if good cause is shown. Franklin Guardianship Code § 401(a).
- 8) A court may refuse to appoint a proposed guardian when that person's previous actions would have constituted a breach of a fiduciary duty had the person been serving as a guardian; and such conduct is of special concern when that person has actually served as a fiduciary for the proposed ward under an advance directive or power of attorney. Matter of Selena J. (Fr. Ct. of App. 2011)
- 9) The guardian should act in the best interest of the ward. In re Guardianship of Martinez (Fr. Ct. of App. 2009).
- 10) Henry King signed a valid advance directive and power of attorney on May 20, 2013, which made Noah his prospective guardian. Henry was mentally and physically "doing well."
- 11) A guardian has the responsibility to apply the income and principal of the ward's estate "so far as necessary for the comfort and suitable support of the ward." In re Guardianship of Martinez (Fr. Ct. of App. 2009) citing *Nommio v. George* (Fr. Sup. Ct. 1932).
- 12) Around August 2016, it was discovered that Noah was buying Henry very little food and what food present was not diverse, nor not suitable for the comfort of Henry.
- 13) Besides a discussion, Noah has done nothing to prevent his father from continuing to purchase online gifts for his friends and breached his fiduciary duty of financial affairs.
- 14) These online orders have cost Henry about \$9,000 during the year, this is compared to the \$30,180 he gets per year from social security and pension.
- 15) Due to the online orders, Henry's bills have not been paid on time and he has received an overdue notice from electric company.
- 16) A neighbor, not Noah, discovered that Henry's wrist was broken and he needed medical care and has shown that Noah has breached his fiduciary duty over Henry's medical affairs.
- 17) As an adult daughter, Ruth is eligible to have preference as a guardian of Henry.



18) Ruth has Henry's best interest and has hired a cook/shopper, reviewed finances, and concerned herself with his medical interest.

19) These breaches constitute good cause for disregarding Henry's preference to appoint Noah and instead appoint Ruth as Henry's legal guardian.

MN Released Examinee Answer 1 (785 words)

FINDINGS OF FACT

1. In 2013, Henry King ("Henry") was diagnosed with early signs of dementia.
2. On May 20, 2013, Henry executed an advance health-care directive naming his son, Noah King ("Noah"), as his health-care agent because he lived closer and could respond more quickly than his daughter, Ruth King Maxwell ("Ruth").
3. In the health-care directive, Henry executed a durable power of attorney giving Noah the power to make financial decisions for him.
4. In the health-care directive, Henry nominated Noah to become Henry's guardian if that later proved necessary.
5. In 2015, Henry's condition started to get worse.
6. In 2015, Henry confided in Ruth that he had fallen in the shower and badly bruised his arm.
7. Ruth confronted Noah about the bruised arm and Noah stated that he did not take Henry to the doctor for it because "he didn't think it was much of a problem."
8. Noah agreed to take Henry to the doctor at her urging.
9. In August 2016, Ruth moved closer to her father.
10. Around the same time, Henry told Ruth that he had broken his wrist in June 2016.
11. Noah did not seek medical attention for Henry's broken wrist until the second day, after receiving a concerned phone call from Henry's neighbor. Noah had visited Henry the prior evening, learned the wrist was stiff, but did not believe it to be very painful for Henry.
12. Noah did not disclose the broken wrist to Ruth until after Ruth confronted him about it.
13. Upon discovery that Henry's fridge was always nearly empty, Ruth began buying food and cooking for him when she could.
14. Eventually, Ruth hired someone to shop and cook for Henry.
15. Ruth found an overdue notice from the electric company at Henry's home.
16. Noah stated that he had missed a few months' payments of the electric bill.
17. Henry had received multiple threatening letters regarding unpaid bills and had an overdue doctor's bill that was nearly sent to collections.
18. Henry has made numerous online gift purchases for his friends, spending roughly \$2,200.00 over the course of two months and about \$9,000 over the prior year.
19. Noah was aware of Henry's online shopping habits and failed to prevent it. Noah testified, "I didn't think it was my place to keep him from spending his money the way he wanted."
20. Henry receives \$2,515.00 per month between his Social Security and pension. Based upon the foregoing Findings of Facts, the Court makes the following:

CONCLUSIONS OF LAW

1. A guardian is an individual appointed by a court to "manage the income and assets and provide for the essential requirements for health and safety and personal needs of someone found incompetent." Fran. Guard. Code § 400.
2. The court shall appoint an individual who will best serve the interest of the adult, considering the order of preferences set forth in Fran. Guard. Code § 401(b). Id. § 401(a).
3. The court may appoint a person with lower or no preference to the adult as guardian by disregarding the adult's preference only upon good cause shown. Id. § 401(a).

4. "A court may refuse to appoint a proposed guardian when that person's previous actions would have constituted a breach of fiduciary duty had the person been serving as a guardian." *Matter of Selena J.*, 1 (Fran. Ct. App. 2011).
5. A guardian can breach his or her fiduciary duty through mismanagement of finances or neglect of the ward's physical well-being. *In re Guardianship of Martinez*, (Fran. Ct. App. 2009).
6. In his health-care directive, Henry expressly identified Noah as the individual to become his guardian. Fran. Guard. Code. § 401(c)(1).
7. Noah has first preference as an eligible individual to serve as Henry's guardian as he is the individual last nominated by Henry. *Id.* § 401(b)(1).
8. Ruth has second preference as an eligible individual to serve as Henry's guardian as she is an adult child of the adult. *Id.* § 401(b)(2).
9. Proposed guardian Noah's conduct as a fiduciary for Henry under the health-care directive and/or power of attorney is of special concern. *Matter of Selena J.*, at 3.
10. Had Noah been serving as a guardian, Noah's conduct of mismanaging Henry's bills, not seeking medical attention for Henry, and not buying Henry food would have constituted a breach of fiduciary duty. *In re Guardianship of Martinez*, at 4.
11. Noah's breach of his fiduciary duty constitutes good cause to disregard Henry's preference to have Noah serve as Henry's guardian. *Id.*
12. If Henry's preference is disregarded, the Court has authority to appoint Ruth as Henry's guardian because she is second preference. Fran. Guard. Code § 401(a).
13. Ruth has not breached any fiduciary duties that would constitute good cause to refuse her appointment. *Matter of Selena J.*, at 1.
14. Ruth should be appointed as guardian of her father, Henry King.



NJ Released Examinee Answer 1 (1,393 words)

To: Eleanor Wallace
From: Applicant
Date: February 21, 2017
Re: Guardianship of Henry King.

As requested here are the findings of fact and Conclusions of law that convinces the court that it has the authority to override Henry's nomination of Noah as prospective guardian in 2013 and convincing them that Ruth should be appointed guardian to be submitted to the court in the matter of Guardianship of Henry King.

Finding of Fact

1. Henry King is 74 years old and has two children, Ruth and Noah.
2. Henry started having trouble with his memory a year after the death of his wife in 2012.
3. In 2013, Henry learned that he had a condition that might leave him incompetent (Dementia).
4. Ruth, the daughter of Henry, lived in a different state when all of these arrangements were made.
5. Upon learning of the condition, Noah, Ruth, and Henry himself discussed how arrangements should be made in case his health began to deteriorate.
6. This discussion concluded with the decision to execute an advanced health care directive naming his son, Noah as his health-care agent and a durable power of attorney giving Noah the power to make financial decisions.
7. The document discussed in 3 also nominated Noah to become Henry's guardian if and when necessary.
8. The decision to appoint Noah was predominately made because he lived closer and could respond more quickly.
9. The court ruled that these documents and the nomination was valid at the time it was made during an evidentiary hearing.
10. Noah King has served as guardian of his father, Henry King, since
11. Noah handles Henry's finances through his Durable Power of Attorney.
12. Henry is on a fixed income and receives \$2,515 per month.

13. Henry's bank statements reflect purchases made amounting to over \$9,000 over the past 12 months.

14. Noah, aware of these charges and in control of Henry's finances, did not feel comfortable trying to get the gifts purchased with these funds back or tell Henry to stop purchasing.

15. After Henry made a monthly purchase of over \$1,200, Noah attempted to tell him to stop and explain the consequences of these purchases but Henry did not understand.

16. Noah, again, made no efforts to stop the spending because he "did not think it was his place to keep him from spending his money the way he wanted because he has enough money."

17. On one occasion on or around August 2016, Ruth noticed a over due notice from the electric company.

18. When confronting Noah with this notice he stated that he "had missed a few payments but not to worry about it."

19. Ruth thereafter made an investigation and noticed that many of Henry's bills were overdue and unpaid.

20. Noah also acts as Henry's Health Care Agent.

21. When shown Henry's medical records for the past year, Noah indicated that he was unaware of the records but states that he is familiar with his Henry's medical conditions.

22. On June 22, 2016, Henry broke a bone in his wrist by tripping on a rug in his home.

23. He initially learned of the injury when visiting Henry and Henry complained of stiffness in his wrist. Noah did not think it was a big deal and stated that he did not seem to be "in all that much pain."

24. The next day Noah was alerted by a neighbor that he should check on Henry because the wrist was swollen.

25. Noah then took Henry to the hospital to get a cast. The wrist is now completely healed.

26. Ruth was not informed of the incident.

27. In August of 2016, Ruth transferred to a nearby office for work and began spending 2-3 evenings per week with Henry.

28. After this date, Ruth noted that Noah was not buying Henry enough food and the refrigerator was constantly empty.

29. Ruth took it upon herself to buy Henry food and cook for him throughout the week when she could.

30. Eventually Ruth hired someone to shop and cook for Henry.

Finding of Law

1. At any time prior to the appointment of a guardian, an adult may nominate in writing an individual to serve as that adult's guardian should the adult be judicially determined to be in need of a guardian, and that nomination shall be given preference if expressly identified and signed and acknowledged by the adult and two witnesses. §400

2. The statute above does not make the nomination of a preferred Guardian binding in a later guardianship matter. *Matter of Selena*.

3. ". . .A court may disregard an individual who has preference and appoint an individual who has a lower preference or no preference. §401(a).

4. The court may disregard the preference of the individual last nominated by the adult only upon good cause shown." §401(a).

5. Upon petition of an interested party a court may investigate allegations made to revoke or suspend the guardian or impose sanctions when good cause exists. §402

6. Good cause exists to remove a guardian when a guardian breaches her fiduciary duty by using the ward's funds to benefit the guardian. *In re Guardianship of Martinez*.

7. Although no Franklin court has ruled on a "good cause" standard a court may refuse to appoint a proposed guardian when that person's previous actions would have constituted a breach of fiduciary duty had the person been serving as guardian. *matter of Selena J*.

8. Both a health-care agent and the holder of a durable financial power have a legal obligation to act in the principle's best interest. *Matter of Selena*.

9. An appellate court will affirm the trial court's exercise of discretion unless its decision is clearly erroneous. *In re Guardianship of Martinez*.

10. An Appellate court can and will remand a decision back to the trial court if the trial court failed to discuss the available evidence as it relates to good cause. *Matter of Selena J*.

11. Henry nominated Noah as his guardian and health-care agent, assigning him as Power of Attorney by all proper formalities as found by the trial court in the evidentiary hearing.

12. *The court is not bound by this decision in a later guardianship matter such as the one at hand where a sibling is claiming a breach of fiduciary duty by another. The court may analyze the facts presented at the hearing and decide whether the agreement should be upheld or a new guardian should be appointed.*



13. Noah owes a fiduciary duty to Henry. This duty was breached once he missed multiple payments on the bills.

14. Noah's fiduciary duty was breached when there was no food in the refrigerator and Henry had missed meals because at that point Noah was not acting in the best interest of Henry.

15. The expenditures of over \$9,000 over a period of 12 months did not breach the fiduciary duty because they were not made for the benefit of Noah. However Noah failed to take affirmative steps to restrict or otherwise prevent these actions allowing the court to further analyze these actions to determine if a better guardian is available. *in re martinez*.

16. Ruth's hiring of someone to clean for and cook for Henry shows that the task was not impossible or improbable making this fact an important determination in assigning if a new guardian should be appointed.

17. The trial court, similar to the court in *Matter of Selena J*, failed to make the good cause analysis and simply gave deference to the documents previously signed by Henry.

18. Similar to *Matter of Selena J*. "the trial court failed to consider [] evidence that good cause existed not to appoint his sister as guardian. [The] affidavits indicate evidence that [Noah] had neglected his [father's] financial affairs and that [he] also neglected to arrange for needed medical care." Because of the failure to make this analysis, the appellate court remanded the case to the trial level to make this determination. *matter of selena j*.

19. The trial court has the power and the authority to override Henry's decision of nomination for guardian. §401(a)

20. Ruth is now in the vicinity, is willing and is able to care for Henry, because of these changes in circumstances her petition to be appointed guardian over Henry's previous nomination should be considered.



NJ Released Examinee Answer 2 (884 words)

To: Eleanor Wallace
From: Applicant
Date: February 21, 2017
Re: Guardianship of Henry King

FINDINGS OF FACT

1. Henry King is the father of Ruth King Maxwell and Noah King.
2. Henry King is 74 and has early signs of dementia.
3. When diagnosed in 2012, Mr. King made arrangements for his future affairs.
4. Mr. King signed an advanced directed and power of attorney in which both documents nominated Noah as his prospective guardian, and have been stipulated as valid.
5. At the time, Ms. Maxwell lived in a different state than Noah and Henry.
6. In 2015, Henry King began to deteriorate to the point of being unable to make sense or participate in the outside world.
7. In 2016, Ms. Maxwell visited Mr. King and noticed that his arm was severely bruised, to which he claimed he fell in the shower.
8. Ms. Maxwell subsequently persuaded her brother to take their father to the doctor where it was determined no bones were broken.
9. Ms. Maxwell transferred to the area in August, 2016 and began to spend 2-3 evenings a week with her father.
10. Ms. Maxwell discovered in August 2016 that her father had broken his wrist on June 22, 2016 after tripping on a rug.
11. Noah King checked on his father after the accident, but did not take him to the doctor until the next day after a neighbor showed the wrist had become swollen.
12. Henry King was put in a cast and discharged the same day.
13. Noah King had not advised his sister about the broken wrist, stating he didn't think she needed to know and would become upset with him.
14. Ms. Maxwell also determined that Noah was not buying food for their father.

15. Ms. Maxwell began to feed her father, eventually hiring help to do the shopping and cooking.

16. Ms. Maxwell also discovered her brother had missed a few months payments on the electric bill when she found an overdue notice.

17. Ms. Maxwell reviewed her father's finances and learned her brother had not been paying multiple bills, including a medical bill that was about to go to collection.

18. Ms. Maxwell also learned her father had been making multiple purchases online to give as gifts, totalling \$2,200 over a two month period.

19. Mr. King stated he was buying the gifts for friends to persuade them to visit.

20. Noah King advised Ms. Maxwell that he was aware of the purchases but couldn't stop his father, and didn't feel comfortable calling the friends to retrieve the purchases.

21. Henry King had spent about \$9,000 over past 12 months, charging as much as \$1,200 in a month.

22. Noah attempted to discuss the matter with his father to no avail, and didn't take any other steps to stop the spending.

23. Mr. King receives \$2,515 a month from his pension and Social Security.

CONCLUSIONS OF LAW

1. A durable financial power of attorney and advance health care directive create a fiduciary duty in the agent and holder a legal obligation to act in the principal's best interest and avoid self dealing. *MATTER OF SELENA J.* (Fr. Ct. of Appeal 2011)

2. A guardian is a court-appointed individual that manages the income and assets and provides for the essential requirements for health and safety and personal needs of someone found incompetent
FRANKLIN GUARDIANSHIP CODE Sec. 400

3. Prior to the appointment of a guardian by a court, an adult may nominate in writing an individual to serve as guardian, as Henry King did in his nomination of Noah, and that nomination shall be given preference as described in Code. FGC Sec. 401(c)

4. The court shall appoint the individual that will best serve the interest of the adult, considering the order of preference. FGC Sec. 401(a)

5. The court may disregard an individual who has preference and appoint another individual who has a lower preference or no preference only upon good cause shown. FGC Sec. 401(a)

6. The court may refuse to appoint a proposed guardian when that person's previous actions would have constituted a breach of a fiduciary duty had the person been serving as a guardian. *MATTER OF SELENA J.*

7. A guardian is obligated to act in the best interest of the ward and...can breach this duty by action or neglect, if the action or neglect harms the ward. *In re Guardianship of Martinez* (Fr. Ct. of Appeal 2009)

8. The fiduciary breach includes mismanagement of finances, neglect of the ward's physical well being, or siminal actions. *Id.*

9. The court should apply a good cause standard when assessing Noah King in determining his failure to adequately monitor Henry King's health care constituted a breach of a fiduciary duty. *MATTER OF SELENA J.*

10. The court will also find that good cause exists to refuse to appoint Noah guardian due to his breach of a fiduciary duty to properly manage Henry King's finances. FGC Sec. 402., *MATTER OF SELENA J.*

11. A later guardianship in favor of Ruth King Maxwell will override the earlier grant of authority given through the advanced directive or power of attorney to Noah King. The authority granted to the guardian supersedes any conflicting authority granted to the agent under either document. *MATTER OF COLLINS* (Fr. Sup. Ct. 2002)

#22 MPT FORMAT: RESPONSE TO A DEMAND LETTER - APPEARANCE 1%

J09 EXAM: IN RE CITY OF BLUEWATER (MPT-2) – P/O: P – GUIDE: NO – SOC: NO –
SOF: NO

NCBE's MPT Summary:

Examinees are employed by the Bluewater City Attorney's Office. The City plans to provide water and sewer services to a proposed 500-acre subdivision and to collect the corresponding revenue for such services. However, the City has just received a demand letter from Turquoise Water Supply Corporation (TWS), threatening to sue the City if it proceeds with its plan to provide water and sewer services to the subdivision site, which has not yet been annexed by the City. TWS claims to have the exclusive right under federal and state law to provide such services to the site. This presents an issue of first impression in Franklin. Examinees' task is to draft a response to TWS's demand letter, addressing TWS's contentions and persuasively setting forth the City's right to provide the services in question. The File contains the instructional memorandum, a preliminary research memorandum, the TWS demand letter, a newspaper article about the proposed subdivision, and a copy of the City's draft service plan. The Library includes the relevant provisions of the federal statute and the Franklin Code regarding water utilities, and two Columbia cases.

MPT Task Memo language that discusses the task/format:

Please draft a letter responding to TWS's attorneys' demand letter. We need to address each of TWS's contentions, and persuasively set forth our position that the City has the exclusive right to provide water and sewer services to the Acadia Estates subdivision.



GA Released Examinee Answer 1 (1,023 words)

To: Henry Bowman, Bowman & Bowman
From: City Attorney's Office

Dear Mr. Bowman

I am writing in response to your July 24, 2009 letter regarding TWS and Acadia Estates(AE). While TWS does have the exclusive right to service the residents of El Dorado county, it does not have the exclusive right to provide water and sewer services to the proposed AE or in Bluewater County. While TWS holds CCN, the area of the CCN does not include AE, only El Dorado County.

While TWS may have applied for a modification of its existing CCN, the Franklin Public Service Commission (Commission) will evaluate in light of the City's right to annex, right to serve outside city limits (Section 675) as there is no current holder, and whether TWS possesses the capability to provide continuous and adequate service (Section 457).

The City has the right to annex the property and bring water/sewer service under Section 675. Bluewater has a water supply system and there is no current holder of a CCN for the area of AE. In Klein Water Co v. City of Stewart the Columbia Court of Appeals allowed a similar city service were a city annexed areas in which it had begun providing water service into its city limits and customer outside of city limits. While the water association raised federal law (Section 1926), the court found that the same protection allocated to the association was also found in municipalities, including the city. While we do not dispute that Section 1926(b) was enacted to encourage rural water development by protecting associations' customer bases and thereby safeguarding the financial viability of rural association and the repayment of federal loans, Bluewater not only has federal loans as well, but has more money invested within them.

For TWS to bring a lawsuit, you would have to (1) be an association within meaning of the Act (which you and the City both are) (2) have qualifying federal loan (which we both do) and (3) have provided service or made service available in disputed area. This is something TWS has not done. While you have provided "water supply to serve and meet the needs of rural residents" by serving approximately 250 homes and some commercial businesses, your facilities are located approximately 5 miles away from the AE site in El Dorado County. Further, though your water line is about 3 miles from AE (to serve 100 homes), our lines are less than a quarter mile away and would be completed (with the necessary 12 inch pipe to your inadequate 6 inch one) within approximately 3 months, as opposed to your 2 years.

In order to have "made services available" under Klein (which distinguished Glenpool and is binding on our fed. courts) an association needs water lines adjacent to or within the area at issue before municipal service begins. In Klein, the associations' facilities were 1.2 to 1.4 miles (not 5) and would take 12 months (not 2 years) to be operational. Even with these facts, the court acknowledged that the availability of service necessary was merely speculative, leaving the association without Section 1926(b) protection. Like Klein, you do not have the needed written authorization via the Franklin Code (FC) (450) because your CCN does not cover the area or even county. Further, FC requires that all CCN holders provide



continuous and adequate service to every customer in the area, yet TWS has zero customers in Bluewater county and would be hard pressed to now serve more.

Unlike TWS, in Glenpool v. Creek County the rural water association had been incorporated to provide water service within specific territorial limits and had a water line that ran within 50 feet of the area, customers only had to apply for service, and the association would be obliged to provide service. While the case prohibited the City from using annexation as a "spring board" for providing water service to the area and thereby curtailing or limiting the service made available by the association, the facts are very distinguishable from our situation and the 10th Circuit is not binding authority. The test is do facilities exist in, or in proximity to, the location to be served. Do you have existing water lines within or adjacent to the property claimed to be protected prior to the time an allegedly encroaching competitor begins providing service? No, your lines and facilities are miles away while ours are under a mile from AE. If not, are you able to provide such service within a reasonable time? No, you stated that your services would be completed by January 2011, while ours would be finished in 3 mere months.

A Columbia trial court in Fountain Water Supply v. City of Orangevale, outlined "making service" as 2 components: (1) legal right under state law to serve an area; and (2) the physical ability to serve an area, which is also known as the "pipes-in-the-ground" test. While Klein debated the legality of "pipes-in-the-ground", your inability to meet those requirements is more legal merit to City's exclusive right to serve AE.

Further, the US Code states 1926(a) as "serving farmers, ranchers, farm tenants, farm laborers, and rural businesses, and other rural residents," not a residence of over 500 single family homes, condos, and/or apartment complexes. Therefore, your association does not have exclusive rights to serve AE, and even if your extension is granted after AE is annexed you have no legitimate state or federal claim under the US or Franklin Codes and no right to service where the City has met all service requirements. The City has the right to extend its system into any territory adjacent to the city provided it shall not enter into territory served by a CCN holder unless the holder requests. As shown in our draft service plan, there is no CCN for the AE area. As TWS does not currently hold a CCN, and given your capabilities, should not be granted an extension, the City has proper and exclusive rights to AE.

I hope this addressed your concerns as we feel confident of City's legal position should it come to legal action.

Sincerely, City Attorney's Office

GA Released Examinee Answer 2 (1,010 words)

Dear Mr. Bowman,

The City of Bluewater writes in response to your letter dated July 24, 2009. Bluewater has the exclusive right to provide water and sewer services to the Acadia Estates subdivision. The weight of precedent demonstrates that any legal action taken by TWS to enjoin Bluewater's provision of services will fail because TWS does not qualify for protection under the applicable federal or state laws.

Federal Law Supports Bluewater's Right to Provide Water Service and Indicates That TWS Would Lose a Court Challenge.

7 U.S.C. § 1926(b) states that "service provided or made available" by a covered rural association "shall not be curtailed" by a city's annexation of an area "served" by the association. The controlling federal case, *Klein Water Co. v. City of Stewart*, as well as a relevant district court case, *Fountain Water Supply, Inc. v. City of Orangevale*, indicate that there are three elements for an association to win a claim that a municipality has violated § 1926(b). The plaintiff must be an association as defined in the statute, it must have a qualifying outstanding federal loan, and it must have "provided service or made service available in the disputed area." *Klein; Fountain*.

While TWS may claim to be an association, and its loan of \$1.4 million qualifies, all indications are that the statutory language "served by such association" suggests that municipalities are only precluded from including in their territory and then serving areas that are already served by the association. *See* 7 U.S.C. § 1926(b). There are two prongs in the 15th Circuit to determine whether an association "has provided" service to a particular area. First, the association must have legal authority to provide the service. Second, it must have the physical capacity to serve the area. *Fountain*.

TWS cannot meet the first prong, as it lacks the requisite Certificate of Convenience and Necessity ("CCN") to serve Acadia Estates. Even if it obtains such certificate in the future, a federal court might apply the "pipes in the ground" rule to see if the association has the physical capacity to serve the area. *Fountain*. Even if it applies the slightly broader *Glenpool* test from the 10th Circuit, which the 15th Circuit referenced without expressly adopting in *Klein*, TWS would lose. *Glenpool* states that an association has "made service available" to an area if the association's facilities are located in or are "in proximity to" the area to be served. Much like the municipality in *Glenpool*, Bluewater stands at the ready to provide water and sewer services from its plant and lines that are less than one fourth of a mile from Acadia Estates. Acadia Estates is projected to need water pipes that are 12 inches in diameter. The city will be able to provide service within three months of the date of annexation. Draft Service Plan. As you know, TWS would not be able to serve Acadia Estates until 2011 at the earliest, and at present has no pipes wider than 6 inches and has no facility closer than three miles. While you may reply that the subdivision may not be complete until December 2010, some residents may have moved in once the earlier homes are completed. They should not have to wait for TWS when Bluewater could provide service in plenty of time for them to move in.

An additional factor indicates that TWS lacks the physical capacity to serve Acadia Estates. Adding Acadia would triple the number of customers served by TWS. Even if it is able to extend the pipes and build new facilities in proximity to the area in time, serious questions remain about TWS's capacity.

In addition to the clear meaning of the text of the statute, Bluewater's position is supported by the dual purpose of 1926(b). The two purposes of the federal statute are to encourage rural water development and to provide the federal government with greater security for its loans. *Fountain*. Bluewater has a greater amount of outstanding federal water development loans than TWS does. Why should the federal government enforce a claim that will jeopardize its revenue? Bluewater will foster rural water development by including the new subdivision to a strong and proven water service network.

Further, Bluewater would not only win a case in defense against TWS, but it could itself preclude TWS from serving the area. Bluewater also qualifies as a public agency with a qualifying outstanding federal water loan. *See Klein* (noting that "Congress intended that municipalities be viewed as 'associations' for purposes of the ... Act"). Therefore, Bluewater could invoke 1926(b)'s purpose to prevent its exclusive right from being infringed.

If TWS claims that *Klein* and *Fountain* indicate that federal courts in the 15th Circuit will look to underlying state law and that state law supports TWS because it has obtained a Certificate, it is erroneous reading of the case law. The cases only look to state law to determine how to determine whether or not the association has received the legal authority to provide services in the area in question, which is only one prong of a two-prong test. TWS still must satisfy the second prong, of having pipes in the ground or at least having facilities in the proximity of the area. TWS has neither.

State Law Further Supports Bluewater's Right.

Section 450(b) does not help your client. The law only prevents provision of services that interfere with an area for which a corporation "already holds" a CCN. Even if TWS obtains a CCN and then sues, § 450(b) would be preempted by the federal law. The Supremacy Clause notes that state laws conflicting with federal laws are preempted. The state may not enjoin the provision of water services that is lawfully authorized by the controlling federal statute.

Further, § 675 only applies to areas that are "served" by the holder of a Certificate. Acadia Estates will not be served by TWS until 2011 at the earliest. The city in fact receives express authorization from § 675 to extend its system to the annexed area that is "adjacent to the city."



GA Released Examinee Answer 3 (994 words)

Henry Bowman, Esq.
Bowman & Bowman
3200 Allen Parkway
Cypress FR

re: Turquoise Water Supply - Arcadia Estates

Dear Mr. Bowman,

The city received your demand letter regarding TWS's belief that it has rights precluding the city from annexing Arcadia Estates and that state law bars the city from acting. We disagree with your contentions and feel that your claims are not meritorious.

7 U.S.C. §1926(B) was enacted to encourage rural water development by protecting associations' customer bases and safeguarding the financial viability of rural associations and the repayment of federal loans. We do not argue that TWS is an association covered by §1926(B) but we do contend that the city is as well and can rely on statutory protection as well. The 15th circuit in Klein vs. City of Stewart found that Congress did intend for municipalities to be viewed as "associations" and as such can also rely on its protections. To have protection under the Act, one must show it is an "association" within the meaning of the Act, it has a qualifying outstanding federal loan, and it has provided service or made service available in the disputed area. Again, as we are both "associations" under the Act and we both have qualifying federal loans, the question of service is important as to which one of us is entitled to the protections in the Act. The court in Fountain Water Supply (FWS) vs. City of Orangevale interpreted the statute to mean that making service available had 2 components (1) the legal right under state law to serve an area (2) the physical ability to serve, AKA pipes in the ground. Here, the legal right to serve is written authorization from the Franklin Public Service Commission by obtaining a Certificate of Convenience and necessity. Your client DOES NOT have a CCN to serve the proposed area. §675 of the Franklin Code however does give the city legal authority to serve the area as there is no holder of a CCN for that area. In addition, you will not be able to show that you have the physical ability to serve or meet the "pipes in the ground" prong of the test. TWS's nearest facilities are 3 miles from the proposed subdivision and the pipes closest to it are 6 inch diameter lines. TWS own best estimates for their ability to provide service would be in 2011. To meet the 2nd prong, the court in Klein set forth that if an association was not actually providing service, they could show that they would be able to in a reasonable period of time. The Arcadia subdivision needs to have water & sewer capacity served by water lines 12 inches in diameter. The city already has existing sewer & water lines less than 1/4 of a mile from the location and can have them up and running in several months. Given our readiness capacity and our closer proximity, we clearly meet the second prong of the test and as such the city and not TWS can use the §1926 protection to justify its service to the subdivision. I am sure you will wish to argue that Glen Pool v. Creek County gives you better footing to claim ability to serve. It should be noted that TWS stands in a different factual position than Glenpool as they were already providing service there and the additional users were only 50 feet from Glenpools' lines. Again, TWS current infrastructure is several miles away and TWS will be unable to provide service in 2011 at the earliest. TWS situation is more like the plaintiff in Klein where the



nearest facilities were a mile away and it would take at least 12 months to make service available. Although unlike the plaintiff in Klein, TWS has applied for authorization to provide service and for funding, the service plans of TWS remain speculative.

With respect to your claims that the city is banned by state law from serving the tract, you point to §450 & 675 of the Franklin Code. §675 provides that a city may furnish water and sewer services to a territory adjacent to the city provided they do not enter the territory served by a hold of a CCN. §450 states that a water supply corp. must obtain a CCN to provide service and again provides protection to such a holder. Here it must be stressed that TWS is NOT A HOLDER of a CCN for this subdivision. As previously discussed, without being a holder, the legal authority to provide services currently rests with the city. TWS has applied for expansion to include the subdivision pursuant to §457 of the Franklin Code, which allows for the holder of a CCN to expand/modify the service area. The standard given in §457 is that the applicant must possess the capability to provide continuous & adequate service. It is our belief TWS will not be granted the extension because you will not be able to meet the standard.

All indications are that the subdivision will begin construction and have people in need of service in 2010. The best case scenario provided by TWS on their timeline to provide service is it may be in 2011. Homeowners in the subdivision could find themselves without service if the amendment is allowed. However, we, the city will argue that we are capable of providing service in months so prior to the homeowners need. The city could be providing service on the 1st day of any homeowner's need and are already provided legal authority to do so. We will oppose your application for amendment and as we are a much more viable alternative, we expect to be successful.

We understand TWS's claims, we however feel that TWS's claims have no merit and cannot be sustained. We therefore ask that you reconsider your amendment application for a CCN and cease & desist any activities in competition with our annexing the subdivision and providing water to service it.

Sincerely,