February 2021
MEE Question 1
Agency & Partnership

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FEBRUARY 2021 MEE
QUESTION 1 – AGENCY & PARTNERSHIP

A woman owns and operates a food-truck business. Business has been good. The woman asked a man she knew to work with her. "It would be great if you'd help with my food-truck business. There is just not enough time in the day. I need someone to do the early morning produce shopping for me at the farmers' market. Are you interested?"

The man has a job as a night watchman and had been looking for a way to make extra money. He answered, "Sure, I'm interested. Text me at night what type of produce you want me to buy in the morning when I get off work. The market opens just as I get off my night shift. I could stop by the market with my car and then drop off the purchases at your truck." He then asked, "And how much would I be paid?"

The woman responded, "Texting works for me. I'll go to the market with you the first few times to give you a general idea of what I'm looking for. But then you'd be on your own, making the choices of which vendors to use and which produce to buy. Please use your own credit card to make the purchases, and I'll reimburse you."

Then the woman paused and continued, "As for pay, I can afford to pay you only $20 per daily delivery. I know that's a bit low, but the business doesn't have the cash flow yet. So, my offer to you is that, in addition to $20 per day, I will give you 10% of the food truck's profits."

The man thought for a bit and said, "Okay. It's a deal." They shook hands.

For the first few months, the arrangement worked well. The woman sent texts to the man each night indicating the type of produce to buy, and the man selected and purchased the requested produce in the morning from vendors he selected. He then dropped the produce off at the woman's food truck. The man paid the vendors with his own credit card and later was reimbursed by the woman. Except for the man's purchase and delivery of the produce, the woman did all the work related to the food-truck business.

One morning, while parking at the market, the man negligently ran his car into a farmer's stall, causing extensive damage. The man truthfully told the farmer that, although the accident was the man's fault, he had no money to pay for the farmer's damage and his automobile insurance had lapsed.

The farmer wrote the woman a letter demanding that she pay him for the losses caused by the man's negligence. The woman has asked her attorney what legal relationship she has with the man and what the liability implications would be in each case.

1. (a) Are the woman and the man partners in the food-truck business? Explain.

   (b) Assuming that the woman and the man are partners in the food-truck business, would the woman be liable to the farmer for the damage proximately caused by the man's negligence? Explain.

2. (a) Is the man an employee of the woman? Explain.

(b) Assuming that the man is an employee of the woman, would the woman be vicariously liable to the farmer for the damage proximately caused by the man's negligence? Explain.

3. (a) Is the man an independent contractor for the woman? Explain.

(b) Assuming that the man is an independent contractor for the woman, would the woman be vicariously liable to the farmer for the damage proximately caused by the man's negligence? Explain.

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ANALYSIS 1 – AGENCY & PARTNERSHIP

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

OBJECTIVE

The objective of this question is to test whether the examinee can differentiate between a partner, an employee, and a non-employee agent and determine what the woman's liability would be depending on the characterization of the man's relationship to the woman.

Legal Problems:

(1)(a) Are the woman and the man partners in the food-truck business?

(1)(b) Assuming that the woman and the man are partners in the food-truck business, would the woman be liable to the farmer for damages proximately caused by the man's negligence?

(2)(a) Is the man an employee of the woman?

(2)(b) Assuming that the man is an employee of the woman, would the woman be vicariously liable to the farmer for damages proximately caused by the man's negligence?

(3)(a) Is the man the woman's non-employee agent?

(3)(b) Assuming that the man is the woman's non-employee agent, would the woman be vicariously liable to the farmer for damages proximately caused by the man's negligence?

DISCUSSION

Summary

The liability of the woman to the farmer for the man's negligence depends on the nature of the legal relationship between the woman and the man. There are three possible relationships that could result in liability, each carrying different liability implications for the woman. These relationships are partnership, employment, and agency.

It is unlikely that the woman and the man are partners. Beyond buying and delivering produce as requested, the man does not participate in the control and management of the food-truck business, Thus, it is unlikely that he is a co-owner of the business. Furthermore, the woman's agreement to share some of her business profits with the man would likely be seen merely as partial compensation for his services. However, if they are partners, then the woman would be jointly and severally liable with the man for the obligations of the partnership. The man's

negligence, if it occurred while the man was carrying on ordinary partnership business as appears to be the case here, would create a partnership obligation and expose the woman to potential liability to the farmer.

It is unlikely that the man is an employee of the woman because she does not have control over the "manner and means" by which he makes purchases on her behalf at the farmers' market. Merely following the woman's text instructions to buy specific types of produce does not make him an employee. However, if the woman is the man's employer, then the woman would be vicariously liable for negligent actions by the man if, as appears to be the case here, he was acting within the scope of his employment.

It is likely that the legal relationship between the woman and the man is that of principal-agent, with the man acting as a non-employee agent (independent contractor) of the woman. Thus, the woman would not be liable for the man's negligence because principals generally are not liable for the negligence of their non-employee agents in the absence of an authorization by the principal for the agent to act negligently.

Point One(a) (20%)

<u>It is unlikely that the woman and the man are partners because the man does not participate in the control and management of the food-truck business, even though they have an agreement to share profits.</u>

A partnership is defined as "an association of two or more persons to carry on as co-owners a business for profit . . . whether or not the persons intend to form a partnership." Revised Uniform Partnership Act (RUPA, as amended 2013) § 202(a); *see also* Uniform Partnership Act (UPA, 1914) § 6(1). In addition, "[a] person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment . . . for services as an independent contractor or of wages or other compensation of an employee." RUPA § 202(c)(3); *see also* UPA § 7(4) (receipt of share of profits is "prima facie evidence" of partnership, unless profits were received in payment of employee wages). Thus, the sharing of profits in a business creates a rebuttable presumption of a partnership that switches the burden of persuasion to the person who denies partnership status. *See* Comment, RUPA § 202(c).

Here, the woman should be able to rebut the presumption that her sharing of 10% of the food truck's profits with the man created a partnership. There is no indication that the man is a "co-owner" of the business, given that there is no indication that he has any control over running the food-truck business. *See* Comment, RUPA § 202(a) (stating that "co-ownership is a key concept" that requires both the "power of ultimate control" of the business and the "right to share in the [business] profits"). The man's only role in the business is to purchase produce in the morning and drop it off at the food truck. According to the facts, the woman has continued to run the business as a sole proprietor, doing all the work related to the business except for the purchase of the produce.

Furthermore, although the man is entitled to 10% of the food truck's profits and $20 per delivery, the facts strongly suggest that this is compensation for his services as the woman's independent-

contractor agent, not as a partner. *See* Point Three(a) below. That amount was proposed to him in response to the question, "And how much would I be paid?" not "How will we share profits?"

Thus, even though the man's negligence occurred in the ordinary course of the woman's business, it is unlikely she would be liable as his partner.

Point One(b) (13%)

Assuming that the woman is the man's partner, she would be liable to the farmer for damages caused by the man's negligence while acting in the ordinary course of the partnership business.

Generally, a partnership is liable for loss or injury caused to a third party because of the wrongful act of a partner acting in the ordinary course of partnership business. RUPA § 305(a); UPA § 15. Further, all partners are personally liable for all liabilities of the partnership. RUPA § 306(a) (joint and several liability for all partnership debts, obligations, and liabilities, unless the partnership liability arose before the person became a partner or the partnership is a limited liability partnership); *see also* UPA § 15(a) (joint and several liability for partnership liability arising from partner's wrongful acts). Thus, if the woman and the man are partners in a partnership, the woman would be liable for the negligence of the man in running into the farmer's stall, as it appears that the man, assuming he is the woman's partner, was acting in the ordinary course of partnership business.

Point Two(a) (20%)

The man is not an employee of the woman because she does not have the right to control the "manner and means" of how he performs his work.

An employee is a type of agent. Generally, an "agent" is a person who consents to act on behalf of and subject to the control of another person (the "principal"). Restatement (Third) of Agency § 1.01. "[A]n employee is an agent whose principal controls or has the right to control *the manner and means* of the agent's performance of work." *Id*. § 7.07(3)(a) (emphasis added).

Here, the man is acting as an agent of the woman, purchasing produce for her at the farmers' market. Whether the woman is his employer depends on whether she has the right to control the "manner and means" of the man's purchasing and delivery of produce for her food-truck business. Each night, the woman directs what type of produce the man is to purchase the next morning, and she briefly accompanied the man to the farmers' market during the first days he worked for her. But the more significant purchasing tasks are lodged in the man. He alone chooses the vendors from whom he purchases the produce, and he alone chooses the produce before dropping it off at the woman's food truck in the morning. In fact, the woman does not have the right to control which farmers the man purchases from or the specific produce that he purchases. *See also* Restatement (Second) Of Agency § 220(1) (servant is subject to control of master with respect to "physical conduct in the performance of the services").

In addition, many of the factors that might suggest the existence of an employer-employee relationship are absent from the relationship between the woman and the man. The woman and the man did not agree that she would exercise control over "the details" of his work; the man's purchasing of produce is done without the woman's supervision; the man (not the woman)

supplies the car for driving to, picking up, and delivering the produce; the man is not paid for time worked, but instead by the job (daily purchase of produce); and the man pays for the produce with his own credit card rather than with the woman's credit card. *See* Official Comment to Restatement (Third) Of Agency § 7.07(2) (listing factors used by courts to identify existence of employer-employee relationship); *see also* Kleinberger, Agency, Partnerships and LLCs: Examples & Explanations § 3.2.4 (5th ed. 2017).

Point Two(b) (14%)

Assuming that the man is the woman's employee, she would be vicariously liable for the damage to the farmer's stall proximately caused by the man's negligence because he was acting within the scope of his employment.

Generally, an employer is subject to vicarious liability for torts committed by an employee "acting within the scope of employment." Restatement (Third) of Agency §§ 2.04, 7.07(1). Thus, if the man is an employee of the woman, the woman would likely be liable for the man's negligence in driving into the farmer's stall, as it appears here that driving to and from the farmers' market is within the scope of the man's employment.

[NOTE: An examinee might point out that participants in a business can become directly liable for the negligent hiring or supervision of an employee or agent. *See id*. § 7.05. The answer, however, should not receive credit for making this point. The question asks only for an analysis of the woman's *vicarious* liability to the farmer given her relationship with the man. Further, there is nothing to indicate that the woman was negligent in hiring or supervising the man.]

Point Three(a) (20%)

The man is a non-employee agent (independent contractor) of the woman because he agreed to act on her behalf but not subject to her control regarding the manner and means by which he performs his work.

As described above, an "agent" is a person who consents to act on behalf of and subject to the control of another person (the "principal"). Restatement (Third) of Agency § 1.01. An independent contractor is an agent who is not subject to the principal's control of the "manner and means" by which the agent conducts his work for the principal. Here, the man agreed to perform acts on behalf of the woman, but his acts are not subject to her control. Thus, he is a non-employee agent for the woman.

Point Three(b) (13%)

Even assuming that the man is acting as a non-employee agent (independent contractor) on the woman's behalf, the woman is not vicariously liable to the farmer for the man's negligence on This basis.

The general rule is that a principal is not liable for the negligence of a non-employee agent acting on behalf of the principal unless the principal actually authorized the agent to act in a negligent manner. Restatement (Third) of Agency § 7.04. Here, the man is a non-employee agent

(independent contractor) of the woman for purchasing produce at the farmers' market. The woman did not authorize him to act negligently. Thus, she is not vicariously liable to the farmer.

[NOTE: Vicarious liability of a principal for the torts of an independent-contractor agent may also arise in certain special circumstances: when the independent contractor injures an invitee to the principal's property (Restatement (Second) of Torts § 415); when the independent contractor is involved in an ultra-hazardous activity, such as blasting with explosives (*id.* §§ 423, 427A); or when the principal has held out the independent contractor to the injured party as an employee (*Wabash Indep. Oil Co. v. King & Wills Ins. Agency*, 618 N.E.2d 1214, 1218 (Ill. App. 1993)). An examinee should not receive credit for discussing these exceptions because there is nothing in the facts to suggest that any of them apply here.

Similarly, credit should not be given for the observation that a principal can become directly liable for the negligent hiring or supervision of an employee or agent because the question asked only for an analysis of the woman's *vicarious* liability to the farmer given her relationship with the man.]