February 2000 Bar Examination Sample Answers

DISCLAIMER
These are actual answers to essay questions that were written by applicants during this bar examination. These answers received a high score from the Examiner who wrote the question. The answers are provided to be helpful to applicants in preparing for a future exam, not to be used to appeal a score received on a prior exam. They may be printed and circulated.

Question 1. - Sample Answer 1.

1. The issue is whether a limited partner's signature on a security agreement makes him personally liable on the debt. The general rule is that a limited partner is not liable for the debts of a limited partnership in any amount above his capital contribution. Thus, if the security agreement were signed on behalf of the partnership, Smith would not be liable.

Here, moreover, Smith has affixed his signature with the caveat "as limited partner." We are told that creditor was not aware of the limited partnership, but knew that Smith was a silent partner. However, creditor did not know that Smith intended to be signing as a limited partner. A partnership may exist if the parties hold themselves as such. The question thus becomes one of whether an objective reasonable person, standing in creditor's position, would believe that Smith was a partner with personal liability on the debt. For this inquiry, it is important to note that creditor knew that Smith had personally guaranteed the debts of the partnership in the past in favor of certain other creditors. Additionally, although Smith signed "as limited partner," creditor was apparently oblivious to this fact since it would not have extended credit otherwise. The request for the personal financial statement of Smith should have alerted Smith that creditor believed that Smith would be personally liable. Therefore, the court may hold that Smith is now estopped from asserting that he is not personally liable. Smith held himself out as being personally liable by his past actions as guarantor and knowledge that creditor believed him to be a personally liable partner. In such case, the court may find that although Smith did not keep books or records of the partnership, nor supervised its accountant, nor wrote partnership checks, he nevertheless held himself out as a general partner.

2. The next issue is whether a limited partner may be held personally liable where he acts as an officer of the general partner. The general rule is that officers are not liable for the debts of a corporation. The only way that creditor can get to Smith's personal assets is if it can "pierce the corporate veil". One way this can be done is by showing that the corporate form was ignored. We are given no facts to suggest that this has happened. Another method is for creditor to show that GP was undercapitalized. This is a possibility considering its subsequent bankruptcy. However, creditor would also have to show that it was undercapitalized with the intent to avoid future obligation. Again, there is no such evidence here. Thus, Smith is not likely to be held personally liable as an officer of GP.

There is, however, a unique situation here where Smith, as an officer of GP, is in day-to-day control and management of the GP. As such, the court may hold that Smith's status as a limited partner is illusory and that he actually was very active in the control of the partnership, although

he is claiming personally immunity as a limited partner. The court may find that his duties as officer of GP and his role as limited partner are in conflict or so intermingled that they cannot be meaningfully separated. Thus, the court may hold that Smith has disregarded the form of a limited partnership and thus, creditor should be able to do the same

In further support of this position would be that, as an officer of GP, Smith owes a duty of care and duty of loyalty to the corporation. Creditor may claim that it has been harmed by a breach of Smith's duties to the corporation and that he should be held personally liable. If there was conflict between Smith's interests and the interests of the corporation, then Smith may have violated his duty to act, in good faith, in the best interests of the corporation and duty to use "business judgment" in favor of GP.

If the court holds that the limited partnership form was disregarded, then Smith can be personally liable for the debts of the partnership, The amount of the debt and reasonable attorney's fees thus would be recoverable, as parties may contract for attorney's fees to collect a debt.

Question 1. - Sample Answer 2.

1. Joe's Stereo, Ltd. is a limited partnership under Georgia law. A limited partnership must have at least one general partner who will be fully liable. Limited partners enjoy limited liability, to the extent of their contribution to the partnership, which can be money, services, or property. A limited partner may lose his limited liability, however, if he allows his name to be used in the partnership name, if he participates in the control and management of the partnership, or if he holds himself out as a general partner and allows someone to rely on such representation.

Tom Smith, the limited partner, has not allowed his name to be used in the partnership name nor has he participated in the control and management of the business. At issue is whether Tom Smith held himself out to be a general partner to the detriment of the Creditor. The security agreement was negotiated by the General Partner and the Creditor; Tom Smith did not participate. The Creditor was aware that Tom Smith was a "silent partner"; moreover, Tom Smith signed as a "limited partner". However, Tom Smith gave the Creditor a copy of his own personal financial statement, and the Creditor knew that Smith had in the past signed as guarantor of the Partnership's obligation in favor of other creditors.

The better answer seems to be that Smith did not lose his limited liability to be personally bound on his contract with the Creditor. He did not portray himself as a general partner of the Partnership and gave no reason for the Creditor to rely on its assumption that Smith was signing as guarantor in his agreement with the Creditor.

Tom Smith was acting as a mere agent of the Partnership and can bind the Partnership in ordinary business transactions. Tom Smith signed the security agreement as "limited partner" thereby disclosing his agency relationship. The contract was negotiated between the general Partner and the Creditor on behalf of the Partnership. Tom Smith was acting as an agent for a disclosed principal. An agent is not bound to a contract to a third party when the principal to the contract is disclosed. The principal is Partnership and is disclosed. Therefore, Tom Smith will not be personally bound on the contract with Creditor.

II. I believe that if Tom Smith was the CEO of the General Partner, he may be held liable personally on the contract with Creditor. As CEO of the General Partner, Tom Smith is participating in the contract and management of the Partnership. He would lose his limited liability and would be personally liable as general partners are. The problem, however, is that Tom owns no shares in the General Partner. He is not a shareholder. Courts are often inclined to pierce the corporate veil of a corporation to reach the assets of the shareholder. A shareholder in a corporation usually has limited liability. However, if the court pierces the corporate veil, the shareholders lose their limited liability. The courts will take such action when the shareholders are the alter-ego of the corporation such as when there is a failure to follow corporate formalities or there is a commingling of funds. Also, courts will pierce the corporate veil to prevent fraud and when the corporation was undercapitalized at its formation. The facts do not say whether there was a failure to follow corporate formalities or whether the corporation was undercapitalized at its formation. The only way the courts would pierce the corporation veil in this case would be if they found the corporation was formed to protect Tom Smith's liability while allowing him to participate in the control of a limited partnership fraud. The courts will probably not pierce the corporate veil in this case, however, because it is a contract case, and the parties could investigate who they do business with.

Courts more often pierce the corporate veil in tort cases. Moreover, even if the corporate veil was pierced, only the shareholders assets would be reached, not the officers. Tom is an officer, the CEO, not a shareholder so his assets will not be reached.

As stated above, it is Tom's participation in the control and management of the limited partnership through his role as CEO of the General Partner that will cause him to lose this limited liability. A limited partner can-not participate in the control of the limited partnership without losing his liability. It is unlikely that a court would allow a limited partner to participate in the control of the limited partnership through being a CEO of a general partner.

Question 1. - Sample Answer 3.

1. The issue is whether Smith as a limited partner can be held liable for the partnership debt based on his signing the security agreement. The general rule is that a limited partner is not personally liable for the obligations of the partnership; but can only be held liable to the extent of his investment in the partnership. An exception exists however when a limited partner either exercises control over partnership affairs or holds himself out as a general partner and a third party reasonably believers he is a general partner.

From the facts it does not appear that Smith exercised any control over the management of the partnership. He did not participate in the negotiation of the security agreement. Although he supplied a copy of his personal financial statement, this could not be considered a "management" activity. In addition, the limited partnership agreement did not give Smith any authority to manage the general partnership. As a result, he had no actual authority to bind the partnership. He also participated in none of the financial management aspects of the partnership. Therefore, because Smith did not participate in the day-to-day management and control of Joe's Stereo, he cannot be held personally liable for the security agreement. His signature on the security agreement is itself not enough to constitute control.

Smith may, however, be held personally liable if it was reasonable for Creditor to believe that Smith was a general partner. Based on Creditor's dealings with Joe's Stereo it seems reasonable for Creditor to believe Smith was a general partner. Creditor had no actual knowledge of the partnership agreement limiting Smith's authority. At Creditor"s request Smith furnished a copy of his personal financial report. At that point Smith should have been aware that Creditor might be relying on his financial status as a means of securing the loan. However, Creditor was never informed of Smith's status as a limited partner with limited liability. Creditor therefore reasonably assumed Smith was a general partner who would be personally liable for the debt. Creditor also knew that Smith had signed guaranties of partnership obligations in the past. This knowledge created a reasonable belief in the Creditor that Smith had the apparent authority to bind the partnership. Based on Smith's apparent authority to bind the partnership and the Creditor's reasonable belief that he was a general partner, Smith can be held personally liable for the partnership debt.

2. The issue is whether Smith's duties as CEO of the general partner raised his participation to the level of control necessary to hold him personally liable for the partnership obligation. A limited partner may be an officer of a general partner corporation without becoming personally liable for partnership obligations. The question turns on how much control the limited partner exercises as an officer of the corporation. In this case, Smith is the CEO of a closely held corporation. Because the corporation is closely held, there are few shareholders and the officers have a much greater hand in managing the corporation than they do in a large corporation. Therefore, a limited partner who is CEO of a closely held general partner exercises enough control over the general partner to be deemed to participate in the management and control of the partnership and expose himself to personal liability for partnership obligations. The fact that Smith is not a shareholder in the corporation is not determinative because of the close corporation status. Because the general partner is a close corporation, Smith necessarily has more control than would an officer in a large corporation.

Question 2. - Sample Answer 1.

(disclaimer)

A) In Georgia grandparents do not have visitation rights. The grandparents have no visitation rights, however, there is an exception to this.

The Court may give grandparents visitation rights if failure to do so would cause harm to the child mentally, or if the Court determines that it would be in the best interest of the child. The facts state that the child has not seen his grandparents since 1992. Assuming that today's date is February 22, 2000, then the child would be 15 years old, and would have not seen his grandparents in eight years. The child would have been 7 years old the last time he saw them. So it is unlikely that any mental harm would be caused now by not allowing visitation to the grandparents. From the Facts: can not see any reason where the court would find it in the best interest of the child to allow visitation.

B) No. The grandparents can not object to the adoption of their grandson because, they are not legal guardians of the child. In Georgia an Adoption requires notice be given to the child's natural parents and that the parents be represented at the Adoption proceeding. The Adoption requires relinquishment of parental rights. From the Facts it states that John Smith, Sr., the child's father, relinquished his parental rights to John, Jr.

By relinquishing his rights John, Sr. is no longer involved in the adoption process. Mary Smith, John, Jr.'s mother, will still be his mother so her rights are not at issue. However, the grandparents have no parental rights, therefore, they can not object to the adoption.

C) No. John, Jr. cannot elect to live with his grandparents. Yes. John, Jr. can object to the adoption.

Assuming that today's date applies, John, Jr. would be 15 years old.

Georgia law in a divorce case allows the court to decide child custody. Many things will be considered in determining child custody. Who is the primary care giver. Who feeds and clothes, and cares for the child. In most cases this will be the mother, however, fathers are given custody also. Custody is between the parents unless the court has taken their parental rights away. The facts here show that the father relinquished his rights. No reason why is given but because of the John, Jr. would live with his mother.

The facts do not give any rights to the grandparents. Georgia will also allow a child over the age of 14 to chose with which parent he wants to live, provided the choice would not result in harm and was in the best interest of the child. Here, John, Jr. is 15 but again this mother is the only one who has rights to his custody.

In an Adoption proceeding in Georgia children who are 14 years old or older must consent to the adoption. Because John, Jr. is 15 years old he may object to the adoption.

Question 2. - Sample Answer 2.

A) In the present case, John's natural father is divorced from his mother. This situation permits the grandparents to seek visitation rights. Further, John, Sr. has relinquished his parental rights. Thus, there would likely be no interference with the requested visitation from the grandparents. Although the mother objects to visitation, it may be in the child's best interest to grant visitation. John, Jr. has expressed a desire to maintain contacts with his paternal grandparents and is of sufficient age (15 years old) to express his own interest. His preference should be given substantial weight, and visitation rights granted for the grandparents.

B) No. The grandparents cannot object to the adoption sought by Henry. While the natural father of a child may intervene and block an adoption proceeding, no such right is given to grandparents under Georgia law. The mother may seek to remarry, and her new spouse is permitted to seek adoption of her natural children, absent objection by either the father or the child (as discussed below, in C). Again, such adoptive rights are measured by the child's best interests.

In the present matter, Henry has married the natural mother of John, Jr. and seeks adoptive rights. The natural father, who has divorced Mary, relinquished his rights. Instead, the grandparents seek to intervene. However, they do not have standing to challenge the adoption. No showing has been made that Henry is parentally unfit, and John, Sr. does not seek to block adoption. The grandparents may not object.

C) Yes. John, Jr. may object to the adoption by Henry. However, he may not elect to live with the

grandparents, absent unfitness or if not in his best interests.

In Georgia, a child who is 14 years old (or older) may object to adoption, and such objection is presumed valid. John, Jr. is 15 years old (born on January 1, 1985) and has expressed that he prefers living with his paternal grandparents. Due to his age, his selection is presumed valid, and he can object to Henry adopting him.

While John, Jr. may object to the adoption, he may not elect to live with his grandparents absent a showing that such arrangement is in his best interests and that his mother or Henry is unfit. No showing of parental unfitness has been made, and Mary has not relinquished her rights as a parent. While a child's preference is entitled to substantial weight as between natural parents, especially with a 15 year old, the court must also weigh parental preference and determine the "best interests" of John, Jr.

On these facts, John, Jr. may object to Henry's adoption but may not elect to live with his grandparents.

Question 2. - Sample Answer 3.

A) In Georgia, grandparents have limited visitation rights with their grandchildren. To grant grandparent visitation rights, the court must have a specific finding the child will be harmed in disallowing visitation rights. The court, in deciding this issue, will look to the best interests of the child. The court will look to such factors as the wishes of the parents, the wishes of the child, whether the child has had significant contacts with his grandparents, and what type of relationship the grandparents and grandchild have. Here, John, Jr. has not been allowed to visit with his grandparents for six years. Mary Smith, John's mother, still refuses to allow the grandparents visitation with John, Jr. However, John, Jr. expresses an interest to live with his grandparents. This strongly indicates that John, Jr. will be harmed if he is not allowed to visit with his paternal grandparents. Further, because John, Jr.'s father relinquished his parental rights to the child, the court may find it important for John, Jr. to have at least some contact with his paternal grandparents, in order for the child to be able to identify with his father's side of the family. Additionally, because John, Jr. is now fifteen years old, his wishes are weighed more heavily than if he were a small child. Based upon the above, a Georgia court would be able to make a specific finding that John, Jr. will be harmed if he is not allowed to visit with his paternal grandparents, and therefore allow visitation rights.

B) The grandparents can not object to the adoption of their grandson by his stepfather. Grandparents in Georgia do not have parental rights in connection with their grandchildren. Only someone with parental rights, i.e. Mary Smith, can object to the adoption of John, Jr. by his stepfather. Further, it is important to note that John Smith, Sr. can not object to the adoption. When the child's natural father relinquished his parental rights, he relinquished his ability to object to a later adoption of his son.

C) (a) In Georgia, a child over the age of fourteen can elect to live with either his mother or father after a divorce. Here, John, Jr. is indicating he would like to live with his paternal grandparents instead of his mother and stepfather. Because Georgia courts do not grant grandparents parental rights with respect to their grandchildren, it would be unlikely a court

would grant John, Jr. the choice to live with his grandparents.

C) (b) John, Jr. can object to the adoption by his stepfather. In Georgia, a child over the age of fourteen can object to his adoption. John, Jr. was born in 1985 and is now fifteen years old. Based upon Georgia law, John, Jr. is able to object to his adoption by his stepfather. Here again, because of John, Jr.'s age, the courts weigh more heavily his wishes against the wishes of his parents in regards to custody. Because the adoption of John, Jr. by his stepfather would give legal custody of John, Jr. in stepfather Henry Jones, the court will allow John, Jr. to object to the adoption.

Question 3. - Sample Answer 1.

(disclaimer)

1. The issue is whether a federal court would have appropriate subject matter jurisdiction over an action filed by Buyer, Inc. against Product, Inc. Federal subject matter jurisdiction can be based on either Federal Question jurisdiction or diversity jurisdiction. Federal Question jurisdiction requires that the claim be based on a right asserted under federal law . That is not the case here, so if federal jurisdiction is appropriate, it must be under diversity jurisdiction.

Diversity jurisdiction has two rules. First, there must be complete diversity of the parties, and second, there must be more than $75,000 in controversy. Complete diversity of the parties means that no plaintiff may be a citizen of any state of which a defendant is a citizen. Corporations are considered to be citizens of both their state of incorporation and their principal place of business. Principal place of business is determined by either the "nerve center" or the "muscle center" test.

In our case, Buyer, Inc. is incorporated in Georgia and has its principal place of business in Georgia because its only place of business is in Georgia. Buyer, Inc. is therefore only a citizen of Georgia. Parent, Inc is incorporated in California. The facts do not tell us where its principle place of business is, but we do know that it has no office or employees in Georgia and they only traveled to Georgia to observe and validate Seller, Inc. From these facts, it appears that Parent, Inc's principal place of business is somewhere other than Georgia. Therefore, Parent is a citizen of California and perhaps some other state, but not Georgia. Therefore, there is complete diversity of citizenship.

Because the contract in question is for $800,000, the amount is controversy exceeds $75,000. Therefore, both tests for diversity jurisdiction have been meet and Buyer can file an action against Parent in US District Ct.

2. This question raises the same issue of Federal subject matter jurisdiction. As discussed above, Federal Question jurisdiction is not appropriate here. Furthermore, the tests for Diversity jurisdiction are complete diversity of the parties and amount in controversy in excess of $75,000. As discussed above, Buyer, Inc. is a citizen of Georgia. Seller, Inc. is incorporated in Delaware and has its only place of business in Georgia. Therefore, Seller is a citizen of Delaware and Georgia. Because both Buyer and Seller are citizens of Georgia, there is not complete diversity and Buyer may not file an action against seller in US District Court.

Note. The amount in controversy is still $800,000 which is in excess of $75,000, but that is irrelevant because diversity has been destroyed.

3. The issue is whether a District Court in Georgia would have personal jurisdiction over Parent, Inc. As established above, Parent is not a citizen of Georgia. There are two standards which must be met in order for a court in Georgia to have personal jurisdiction over Parent, the statutory standard and the constitutional standard.

There are various statutes which can give a Georgia court personal jurisdiction over a party. The one applicable here is the Long Arm Statute which gives a Georgia court jurisdiction over a person for a matter arising out of actions in Georgia. This only gives the court specific jurisdiction over matters arising out of such actions, but that is enough here. Parent came to Georgia to sign the Asset Purchase Agreement here. That is sufficient to subject Parent to jurisdiction under the Long Arm Statute.

The constitutional standard requires minimum contacts. The party must have enough contacts with the state such that the state's jurisdiction does not offend standards of Fair Play and substantial justice. Parent's contacts include the fact that they came to Georgia to sign a contract whereby one of its subsidiaries sold assets located in Georgia. That is minimum contacts.

Therefore, a US District Court is Georgia does have personal jurisdiction over Parent.

4. Buyer could pursue remedies against Parent for Parent's breach of contract. Specifically, Parent has breached the non-compete provision of the Asset Purchase Agreement. Buyer should request damages since Parent has already entered into a contract in violation of the non- compete. As special damages, Buyer could ask for the amount of profit Buyer would have received from the contracts which Parent entered into. The standard for damages in a contract matter is "benefit of the bargain." Buyer should be entitled to the amount it would have benefitted from those contracts.

Buyer should also pursue an injunction to prohibit Parent from further entering into any additional contracts in contravention of The Asset Purchase Agreement.

Question 3. - Sample Answer 2.

1) Yes. Buyer could file an action against Parent, Inc. in a United States District Court. In order to file such a claim, subject matter jurisdiction must exist. Subject matter jurisdiction exists if one of the two following conditions are met: 1) the claim substantially arises out of federal law (federal question) or 2) the amount in controversy exceeds $75,000 exclusive of interests and costs and the plaintiff is a citizen of a different state from defendant. (Diversity). Here, there is a breach of contract claim. Therefore, federal law would not be involved. However, diversity jurisdiction exists.

We will assume that Buyer will allege damages in excess of $75,000 exclusive of costs and interest.

A corporation is a citizen of the states in which it is incorporated and the state in which its principal place of business is located. Buyer is incorporated in Georgia and has its principal place of business there. Thus, it is a citizen of Georgia. Parent is incorporated in California and seems to have its principal place of there. Thus, Parent is a California citizen. Because Buyer is a citizen of a different state than Parent and the amount in controversy should exceed $75,000, diversity

jurisdiction will exist in a Federal District Court.

2) Buyer can not file an action against Seller in United States District Court. As stated earlier, diversity jurisdiction must exist for such a claim. Although the amount in controversy would exceed $75,000, both corporations are Georgia citizens. Thus, there would not be diversity jurisdiction. A corporation is a citizen of the state in which it is incorporated and the state where its principal place of business is located. Although Seller is incorporated in Delaware, its principal place of business appears to be in Georgia. That is where its office and operations are located. Thus, Seller is a Georgia citizen. Buyer can sue Seller in a state Court in Georgia

3) Yes. A federal district court in Georgia would have personal jurisdiction over Parent. In order to assert personal jurisdiction over a non-resident of the forum there must be a statutory and a constitutional basis.

Here, the statutory basis is provided by the Georgia Long Arm statute. The statute provides that a non-resident of Georgia is subject to personal jurisdiction in Georgia if the claim arises out of a contract that the non-resident entered into in Georgia or was to perform in Georgia. Here, Parent entered the contract in Atlanta, Georgia. Also, because Buyer is a Georgia company, it can argue that contract was to be performed in Georgia. Thus, there is a statutory basis.

There is also a constitutional basis. The International Shoe minimum contacts analysis provides a constitutional basis if there was purposeful availment of forum, forseeability of a claim in forum, conduct related to forum, the forum is convenient and the state has an interest in adjudication.

Here, the contract was entered in Georgia, the defendant's subsidiary is in Georgia, and it has traveled to Georgia numerous times for business. This would provide the minimum contacts necessary for a constitutional basis.

4) Because this is a breach of contract action, the plaintiff could pursue money damages or an injunction to prevent the sale of parts in Georgia. The money damages would be the Buyer's lost expectancy or his lost profits due to Parent's action. Instead, Buyer could show that sale in Georgia contra the contract would cause him irreparable harm. As a result, a court would enjoin or issue an injunction to prevent Parent from selling parts in Georgia.

Question 3. - Sample Answer 3.

1. Buyer may file an action against Parent in Federal Court in Georgia. The issue is diversity jurisdiction.

A federal district court has jurisdiction of "cases or controversies" (U.S. Court Act II) arising under federal Law (not present here), or of cases in which all plaintiffs are of diverse state citizenship from all defendants, and the amount in controversy exceeds $75,000, exclusive of interest and costs. The citizenship of a corporation, for purpose of the jurisdiction, is the state of its incorporation and the state of its principal place of business.

The amount in controversy here is well over the jurisdictional amount of $75,000. It is $800,000. Buyer is a citizen of Georgia. Parent is a California corporation. We do not know where its principal place of business is, but it cannot be Georgia because it has no offices or employees

here. The requirements of diversity jurisdiction are satisfied, and Buyer may sue Parent in a Georgia federal court.

2. Buyer may not sue Seller in federal court in Georgia. Seller's principal place of business is in Georgia; so it is a citizen of Georgia; so there is no diversity of citizenship between Buyer and seller, which is a Georgia corporation. Further, it appears there is no dispute worth more than $75,000, if any dispute exists, between Buyer and Seller .

Finally, Buyer could not sue both Parent and Seller in a Georgia federal court. The lack of diversity between buyer and seller would prevent federal court jurisdiction of the matter.

3. Whether a U.S. District Court in Georgia would have personal jurisdiction of Parent is a closer question. The issue is whether Parent has had such contracts with Georgia as to make it being hauled into court in Georgia fair and reasonable.

Parent has no offices or business here, except for its subsidiary Seller, so it has no regular contacts with the state, no systematic contacts which would allow it to benefit from Georgia law and anticipate that it could be hauled into a Georgia court, so no "general jurisdiction."

However, the dispute here arises directly from Parent's contacts with Georgia, so there might be "specific jurisdiction."

Parent's officers visited and over-saw Seller's functions in Georgia and the contract of issue was executed in Georgia by Buyer, Seller and Parent. We are not advised whether Parent officers came to Georgia to negotiate the contract. If so, that would increase Parent's contacts here.

On balance, it appears that it would not "offend traditional notions of fair play and substantial justice" for a U.S. District Court in Georgia to have personal jurisdiction of Parent.

Further, to the extent a federal court is <u>in persona</u> jurisdiction is governed by the states long -arm statute (a great extent). The facts recited would satisfy the requirement of Georgia's long arm statute.

In addition to the above, another subsidiary of Parent is now shipping products into Georgia, in violation of a non-compete agreement, and is doing harm to a Georgia company.

4. Buyer may pursue both legal and equitable damages. Parent covenanted not to compete with Buyer for two years. Through an agent, for whom it is responsible, Parent is competing with Buyer before the two years is over.

Buyer, and Seller before it, sold parts to a Georgia company. Parent is now selling to that company. If Buyer can adequately pursue the amount of lost revenues, that might support an award of damages at law.

That still would not protect Buyer from Parent to actions. Parent injures Buyer every time it makes a sale in Georgia, and damages cannot make Buyer whole. Buyer can seek equitable remedies – i.e., injunctive relief.

Buyer should apply for a temporary restraining order, a preliminary injunction and a personal injunction in U.S. district court in Georgia to prevent Parent's selling or delivering products in violation of the agreement. A TRO might be had without a hearing, but Buyer must attempt to

notify Parent of the TRO application. If a TRO is obtained, it will stay in place for 10 days, perhaps extended for a good reason, as a hearing on the preliminary and/or permanent injunction must be held promptly. The hearing on the preliminary injunction could be joined with the trial on the personal injunction. If this was, Buyer could quickly get equitable relief regarding the actions of Parent.

Question 4. - Sample Answer 1.
(disclaimer)

1. Probably not. A lawyer should not undertake to represent a client if to do so would create a conflict of interest. A lawyer cannot do anything that would prejudice or jeopardize the rights of his or her client. In a case such as this, if I were to represent both Helen and Hector, a potential conflict could arise if Hector & Helen point the finger at each other. I, as a lawyer, would have to make full disclosure to the clients & tell them the adverse consequences. As a prudent lawyer I would not represent both Helen & Hector.

2. The case against Hector would be premised on the fact that he gave a government agent money in return for favorable treatment. Hector gave a check for $3000.00 to the agent himself, when in fact it was owed to the Georgia Department of Revenue. This would constitute bribery. However, Hector may have a valid defense based on entrapment, although this defense is hard to prove. Hector would have to show that he was enticed and encouraged to commit the crime and that he was not predisposed to commit the crime. However, the fact that Hector had time to reflect after meeting with the agent and even spoke to his secretary & wife may invalidate any defense based on entrapment. Hector could argue that his rights were violated under the Fourth Amendment to the U.S. Constitution which prohibits unreasonable searches and seizures. Hector could argue the taping by agent O'Leary was unreasonable search and seizure. The question is whether his fourth amendment rights were violated. There must be government action, as here, and defendant must have a reasonable expectation of privacy. The argument is that the taping of Hector's conversation at the Waffle House was in violation of the 4th amendment. This argument, however, will likely fail since Hector did not have a reasonable expectation of privacy while in the Waffle House. Moreover, it has been held that a person must assume the risk that the person he is speaking to may be taping the conversation. Therefore, no warrant (search warrant) was necessary to tape the conversation. Any argument that Hector's 5th amendment right and rights under Miranda would also fail since Hector was not "in custody." He was free to leave.

3. Helen has a good defense to bribery. She did not commit any act which is necessary for criminal liability. Mere words alone are not sufficient. Also, she could not be held liable as an accomplice, since accomplice liability requires some form of active aiding and abetting, which is absent here. Also, I do not see any liability for conspiracy. Under Georgia law, a conspiracy merges with the substantive offense which, here, is bribery. In Georgia, a conspiracy requires (1) an agreement between 2 or more persons (2) an intent to enter an agreement for the purpose of committing an unlawful objective or crime & (3) an overt act. Here, none of these elements are present under the facts as given. Clearly, Helen's words "pay him" are insufficient to hold Helen liable.

4. (A) No. In Georgia, a witness generally may be impeached by introducing evidence of prior convictions for crimes of moral turpitude (i.e., a felony or other very serious crime). (Note that in

federal court a witness may be impeached by prior convictions if the prior crime was a felony or a crime involving deceit or false statement). However, a defendant in a criminal case cannot be impeached by introducing evidence of prior convictions. Generally, evidence of defendant's bad character or prior bad acts is inadmissible against a defendant in a criminal case for purposes of providing criminal disposition or impeachment unless the defendant first opens the door by showing good character. Georgia goes even further, and says that when a criminal defendant takes the stand, he may not be impeached with evidence of prior convictions, prior bad acts or bad reputation.

4. (B) Defendants are entitled to have open and give closing argument. So is the prosecution. Defendants clearly have such a right in a criminal case.

Question 4. - Sample Answer 2.

1. An attorney owes each client a duty of loyalty. This means, in part, that the attorney must take precautions against putting himself in a conflict of interest situation. It is not recommended to represent two clients in the same suit and it is never wise to represent potential accomplices in a criminal proceeding. The likelihood that the accomplices' interests will conflict is great, and the lawyer may easily find himself in a position of maintaining two conflicting confidences. If the lawyer does not believe he can represent both fairly and adequately, he should not represent either.

Therefore, I would inform my clients of the conflict and urge them both to seek other counsel. In the event one of them continued to be represented by me may be fair so long as I have not engaged in confidential communications with the other, I have learned no "secrets", and the other gives informed consent.

2. Hector is being charged with bribery of a public official. Hector intentionally gave agent Arkwright cash so that Arkwright would quietly settle the tax claim.

Hector will be able to assert the defense of entrapment. A person is not criminally liable for engaging in a criminal act if the criminal act was instigated by a public official for the purpose of holding the defendant liable for the crime. This is a valid defense so long as the defendant was not predisposed to commit the crime. As it does not appear from the facts that Hector was so predisposed (this is shown by his actions of seeking out two trusted advisors to assist him with the decision). The crime certainly originated with Agent Arkwright. "But for" Agent's actions, the crime would not have been committed. What is not clear, however, is whether Agent O'Leary was "planted" in the nearby booth to collect the incriminating evidence from Hector. It is also not clear whether Agent Arkwright was entrapping Hector or whether he was actually eliciting a bribe. In the event that Agent Arkwright is a culpable wrong-doer and Agent O'Leary truly just happened to "tape all conversations" at the Waffle House, then Hector's claim of entrapment would fail because there was no intent to entrap. However, due to the fact that Agent Arkwright was not jointly indicted with Hector and Helen, it is likely that Hector was set up and, therefore, entrapment will be a valid defense.

3. In order to be liable, Helen would have to be found as an accomplice to the crime of bribery. In order to be an accomplice, the actor must be "concerned in the commission of the crime." In the event that Hector can assert a valid entrapment defense, then Helen should be able to raise

impossibility as a defense, as it would be impossible for her to have encouraged the action which was not a crime due to the valid defense. However, when Helen encouraged Hector, she had the specific interest to further the crime. The crime occurred, so she should be held liable, even if Hector can assert a valid defense. Helen's best argument would be entrapment based upon the same factors discussed above with Hector.

4. (A) No. The DA may not sue evidence of Hector's prior record to impeach. First, Hector did not necessarily bring his character into issue merely because he took the stand. Although character evidence relating to truthfulness may be relevant, it is not clear whether any other character evidence may be available. Second, the DA may not bring in extrinsic evidence of bad acts to impeach Hector. This is a policy followed by most courts, Georgia included, because of the likelihood of the jury convicting on the prior bad acts and not the act at hand. As the crimes were not crimes of dishonesty and seem to be remote, there is even less justification for allowing them. DA may bring in witness testimony (reputation only) concerning the character of Hector (if raised by Hector) or, at a minimum, Hector's truthful or untruthful nature.

(B) Both defendants must be given the opportunity to address the court in opening and closing arguments. Although a party may waive this right, it is not waivable by the prosecuting attorney on behalf of criminal defendants. That would be plain silly.

Question 4. - Sample Answer 3.

1. This question poses a conflict of interest which ethically prohibits an attorney from simultaneously representing co-defendants in a criminal trial. A conflict of interest is anything that would drive a wedge between the lawyer and his client. An attorney may represent clients in spite of a conflict if the clients insist, only after full disclosure and explanation to the clients, giving them an opportunity to think it over, recommending they talk with another lawyer. And after this, the attorney may handle the case only if a reasonably prudent attorney under the same or similar circumstances would handle the case.

Here, no reasonably prudent attorney would represent both of these clients at one time. This is a criminal prosecution and representing both clients may deprive one or both of them of their constitution only guaranteed right for a fair trial. Even if they insisted, I would refuse to represent both of them.

2. Hector, you are charged with bribery. Bribery is a felony punishable by time in prison exceeding seven years. Bribery is a crime involving an offer to pay money or other consideration to an official in return for the official's promise to refrain from carrying out his or her official responsibilities. Here, Hector the District Attorney has indicted you for offering to pay an official of the Georgia Department of Revenue a substantial sum of money to withdraw a pending action for back taxes against you.

As an accused, you have the right to a trial by a jury of your peers and the right to have your guilt proved by the State beyond a reasonable doubt. You have absolutely no burden to prove your innocense or anything else. You have some viable defenses. The first is the affirmative defense of entrapment. Entrapment is when (1) the idea to commit the crime originated with the government and (2) the defendant was not predisposed to commit the crime. Here, Arkwright solicited you to meet him. He offered you a way to put the tax action behind you by settling for a

lesser amount. Based on the facts, it is unlikely the government can show any predisposition on your part to commit the crime of bribery. The state will have to prove that you were not entrapped beyond a reasonable doubt.

Second, bribery is a specific intent crime requiring the government to prove that you intended to offer Arkwright money in order to abate the action against you. Given the facts, it is unlikely that they can do this.

Third, since bribery is a specific intent crime, any mistake of fact will serve as a defense. Whether or not your belief that Arkwright was acting legitimately was reasonable or unreasonable is of no consequence as long as it was a mistaken belief.

3. Even though I would not represent Helen and Hector, Helen is not likely guilty of any crime. The facts indicate that she was indicted jointly with Hector for bribery. In Georgia, she would have to be prosecuted as a party to the crime. In order to be a party to the crime, one must encourage, assist, or participate directly or indirectly in the commission of the crime.

Helen was merely an employee in charge of Hector's books. From the facts, her knowledge of the Arkwright encounter at the Waffle House was limited to an offer to settle and Hector's asking what he should do. Under the circumstances, Helen had absolutely no criminal intent. Moreover, her money was not used and she stood in no position to directly benefit from the transaction. Helen's only involvement where the words, "Pay him!". She could not be guilty as a party to the crime of bribery by stating an opinion that neither amounts to encouragement, assistance or participation.

4.(A) Evidence of character is not admissible to show propensity. Evidence of a criminal defendant's character is admissible only if the defendant first places his character in issue. A criminal defendant does not place his character in issue by taking the stand and testifying. Since Hector's character was not in issue the probative value of his prior criminal record was outweighed by unfair prejudice and thus the State could not use it to impeach.

4.(B) When a criminal defendant presents any evidence, he may not open and conclude. The question is whether Hector's testimony is evidence. A criminal defendant's testimony without more, such as the introduction of physical or documentary evidence will not bar his right to open and conclude. Hector opens and closes.