February 2006 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.

a. In Georgia, Felony Murder is a criminal charge that results from the death of an individual, other than a co-defendant (if killed by law enforcement's pursuit or a victim's resulting self-defense), who's death results from the attempted or completed commission of an enumerated felony under the Felony Murder Statute. In Georgia, not only is a defendant liable for the deaths of victims or bystanders caused as a direct result of his own unlawful conduct but also a defendant will be liable from all other deaths that are the foreseeable result of his co-perpetrator's unlawful acts. Thus, while Georgia applies the Agency Theory of Felony Murder and limits conviction under the Felony Murder Statute to deaths resulting from defendant[s]' acts or instrumentalities, deaths resulting from other occurrences or as the result of another actor's conduct will not be included in the defendant's liability. Furthermore, those crimes that result from the defendant's flight or attempt to flee will also be included in the charge. For the defendant to escape liability under those circumstances, there will also need to occur a substantial break in the same transaction or occurrence, such as reaching a safe house, which will complete the original crime's chain of events.

In this situation, Robber conspired to commit robbery, and attempted robbery (with the underlying conspiracy merging). When the robbery became impossible due to Decoy's attempted (and unsuccessful) withdrawal from the conspiracy, Robber then burglarized Husband and Wife's residence. In this case, Robber successfully: 1) intentionally and unlawfully gained access to the victims' dwelling (the dwelling house of another) by breaking and entering (he forced open the door); 2) with the intent to commit a theft (or in Georgia, a crime or felony therein – as he stole an amount in access of $500 therein); 3) the facts do not indicate whether this burglary occurred during the nighttime or daylight hours, while at Common Law Burglary "nighttime" was an element of the crime, Georgia has done away with that requirement by statute. Therefore, Robber, has successfully, committed burglary – this will be enough to get to the charge of felony murder if that charge is appropriate. However, Burglar also entered into an agreement with others that was intentional and criminal in nature the aim of which was to commit the offense of Robbery (another enumerated and triggering felony for felony murder's use). In Georgia conspiracy requires the additional element of an "act" in furtherance, preparation, or toward the completion of the underlying crime or criminal agreement. The facts indicate that as planned, Decoy went to husband and wife's house, that act was enough for conspiracy's requirements to be met. However, conspiracy in Georgia merges with the completed or attempted crime. So as to Robber, who has now attempted robbery because he had the SPECIFIC INTENT to deprive Wife and Husband of their personal property by force or threat of imminent force with a

deadly weapon. Thus, conspiracy merged with the completed act. So to invoke the felony murder statute and charge Robber, Attempted Robbery and Burglary would be the underlying felony. With Burglary being the best underlying lying felony because he completed the crime.

However, as noted in the explanation of the Felony Murder Doctrine, the death must be the foreseeable result of the furtherance of continuance of a crime. In this scenario, Robber, as planned, got into Driver's care, and as planned, they made their getaway. At that point, Driver and Robber were acting as per plan and in furtherance of the completed crime – they were attempting their getaway from the preceding criminal event, as part of the same transaction or occurrence. There is no break in the chain. The men were leaving the scene of a planned and attempted robbery, which was also the scene of a completed burglary. Getting away, regardless of how careful, calmly, and smoothly it was executed was the ultimate aim. While making their escape, a child came into the road and obstructed the path of escape. In order to facilitate their escape, Driver swerved to miss the foreseeable obstruction in the road (as improvising an escape or flight route is a foreseeable result of either a robbery or burglary) and as a result, hit a group of people (all being foreseeable pedestrians on the side of road) and killed Husband. Therefore, Robber may be charged and tried for felony murder in Georgia and the state, having the burden of proof beyond a reasonable doubt, will have the opportunity to present evidence of the crime and all its necessary elements. In short, all the elements of Felony Murder have been met.

b. As noted above, Burglary is the act of: 1) intentionally and unlawfully gaining access to the victims' dwelling (the dwelling house of another) by breaking and entering (he forced open the door); 2) with the intent to commit a theft (or in Georgia, a crime or felony therein – as Robber stole an amount in access of $500 therein); 3) the facts do not indicate whether this burglary occurred during the nighttime or daylight hours, while at Common Law Burglary, "nighttime" was an element of the crime, Georgia has done away with that requirement by statute. Decoy is not guilty of Burglary. While Decoy did not have anything to do with the planning or carrying out of this crime, he did not adequately withdraw from the original conspiracy and this crime is the foreseeable result of the conspiracy to commit robbery and attempted robbery – while Decoy made it impossible for Robber to rob Husband and Wife, he also could have foreseen that the original crimes intent would be carried through to fruition – that being that Husband and Wife's property would be intentionally and/or physically and violently (or under threat of immediate violence) removed from their possession with the intent to deprive them of it. Here, there is no break in the chain of occurrences. The Burglary arose as a direct result of and in conclusion to the conspiracy and attempted robbery. Decoy's attempted and incomplete withdrawal will not shield him from the further, subsequent criminal acts of his co-conspirators.

c. In Georgia, conspiracy requires the agreement of two or more individuals to act in cooperation in the furtherance or commission of an unlawful act. Georgia, also requires that in order to be charged and found guilty of Conspiracy, an act in furtherance of the crime is required – although the threshold for this initial act is relatively low and may simply require the act of planning or preparation (getting the required tools, etc.). In this case, Decoy himself committed the extra necessary element, regardless of whether the acts of planning and preparation were sufficient prior to his act. In particular, Decoy went to the apartment as planned and initiated the conspiracy's last evolutionary steps. Whether Decoy made Robber understand that deadly force was not to be used – or that no one "should get hurt" – or that Decoy had planned to call the police is irrelevant. Decoy himself acted in

furtherance of the common plan or scheme and put its steps in motion. Decoy then attempted to give Robber notice of his withdrawal upon reaching Husband and Wifes, but he did not actually give Robber notice. Nor did he attempt or succeed in giving Driver notice of his withdrawal – one must give notice to all other parties in the conspiracy of one's desire and intent to withdraw. Likewise, Decoy never alerted the authorities as to the crime or attempted to avoid its commission by alerting the police to criminal activity – here again, his planned or intended call to the police is irrelevant. However, Decoy will be liable for the conspiracy to commit Robbery. If the District Attorney charges Robber with Attempted Robbery, Decoy will be liable for that, as in Georgia, Conspiracy merges with Attempt or the completed crime.

Question 1 - Sample Answer 2.

a. In Georgia, felony murder is the murder of a person committed in furtherance of the commission of a felony. The felonies that may underlie a felony murder conviction are burglary, arson, robbery, rape, or kidnaping. Here, the only two felonies present that may subject Robber to the felony murder rule are burglary or robbery. If one of these felonies is present, then Robber is liable for a murder committed, even during the escape from the scene of the crime – so, even though Robber was not driving, he would still be liable for Husband's death under the felony murder doctrine. Here, there is no robbery because there was no assault. Robbery is larceny plus assault – here, because Husband & Wife were out of the apartment, there was no fear of imminent injury on their part, so no assault, and thus no robbery. Burglary is the breaking and entering of a dwelling at nighttime with the intent to commit a felony therein. Assuming this was at night, Robber broke in and entered the dwelling, with the intent to commit robbery (the fact that this was impossible b/c Husband & Wife weren't there makes this factually impossible, rather than legally impossible, and therefore does not negate his intent). Therefore, Robber committed burglary, and thus can be convicted of felony murder. Robber & Driver were not yet at a safe-place, and thus were liable for any deaths caused while driving away.

   Robber could argue that the death of Husband was not a foreseeable consequence of the felony. If guilty of robbery, then the death of a victim with the gun would have been foreseeable, even with an intention of not hurting the victim or an agreement not to use the gun (as there was here). However, here there was no robbery, so the underlying felony, if there was one, would be burglary, and is the running over of a person while leaving the scene foreseeable? Probably yes, because the driving away was still in furtherance of the crime for felony-murder purposes. The girl running into the road and Driver swerving to avoid her was part of the escape, and it should not matter that Driver was going very slowly.

b. Burglary is the breaking and entering of a dwelling at nighttime with the intent to commit a felony therein. GA has eliminated the nighttime requirement. Here, Decoy was invited in, so the issue is whether this qualifies as breaking and entering. Although invited in, he was invited in under a fraud – he specifically visited them in order to set up their robbery, and fraudulent entry can negate an invitation in to someone's home and count as "breaking" and "entering." On the other hand, Decoy was their friend, he did not have to lie or misrepresent

in any way why he needed to come in, so he could argue he did not break & enter for burglary purposes.

The State could also argue that Decoy should be found guilty of burglary because of Robber's subsequent burglary under the doctrine that co-conspirators are liable for acts/crime committed by others in the conspiracy in furtherance of said conspiracy. My discussion of conspiracy is reserved for part (c).

[Back to my discussion of whether Decoy can be convicted of burglary.] The fact that Decoy changed his mind about robbing Husband & Wife is irrelevant. For burglary, the intent to commit a felony must be at the time of entry; therefore, if Decoy was found to have broken and entered when he was invited in, at that time he still had the intent to rob them, and so the intent element would be satisfied.

c. Conspiracy is the agreement between 2 or more persons to commit an unlawful act or to have an unlawful purpose, and the specific intent to agree to this unlawful act. In addition, Georgia requires an overt act in furtherance of the conspiracy. Here, Robber, Decoy, and Driver all agreed to rob Husband & Wife. They came up with the details, and each one intended at that time to go through with this plan. In addition, there was an overt act – Decoy went to the apartment and was invited in, Driver had the car ready, etc. Therefore, there was a conspiracy. The fact that Decoy later changed his mind does not relieve him of liability. There is no withdraw, just a limiting of liability for subsequent acts. Decoy must notify each conspirator to state his withdrawal. He notified Driver, but he did not reach Robber. Leaving a voicemail message may not be enough for the notification requirement. Here, Decoy also took Husband and Wife out of the apartment to foil the plans of his co-conspirators. This would probably limit his liability for their subsequent acts.

Question 1 - <u>Sample Answer 3.</u>

a. To be guilty of felony murder, Robber would need to have committed an inherently serious or dangerous felony that resulted in the killing of Husband. Because the policy behind felony murder is that committing such a crime in itself constitutes a conscious disregard for a potentially high risk to life, specific intent is not required for the killing, so long as he intended to commit the underlying felony and the felony in fact resulted in the death.

The threshold issue is whether Robber committed a felony of the type required for felony murder liability. Robbery is the taking of another's personal property by force or threat with intent to permanently deprive them of their property interest. If Robber had proceeded with the plan of holding up the couple at gunpoint, the elements of robbery would have been met, but as they had left the apartment no robbery occurred. Robber is likely guilty of burglary, the unauthorized entering (no breaking is necessary in Georgia, although Robber's forcing the door would qualify) of the dwelling (or similar structure) of another with intent to commit a felony or theft therein. Georgia has eliminated the common law requirement that a burglary occur at night. Robber entered another apartment, which the couple possessed as a dwelling, without consent and intended to commit robbery therein. The fact that he did not commit robbery is irrelevant, as long as he had the intent at the time he entered. If he had

not intended to commit robbery but instead intended to commit larceny, as he actually acted, the theft would still qualify under the elements of burglary. Robber is also likely guilty of larceny (theft by taking in Georgia). Larceny is the taking of the personal property of another by trespass with intent to permanently deprive the person of his property interest. Georgia may recognize this as an aggravated form of theft since the property value taken is over $500. If the larceny is not serious enough for felony murder, robbery would be the best underlying crime to choose.

It is next necessary to consider whether the death was the result of such felony. Georgia recognizes the agency theory of felony murder; Robbery will be guilty of the murder if anyone with whom he commits the felony causes the death of another, but he is probably not guilty of victims killed by other victims or police responding to the crime. Robber could argue that the killing of Husband did not occur during the underlying felony; the crime was committed and completed and the child's actions were an unforeseeable intervening proximate cause of Robber swerving into Husband.

However, if the act was committed in the process of the get-away from the crime, he will still be liable even if it was not foreseeable. Since he was not yet at a place of safety (he was still in the complex), one could argue that the act of getting away from the crime was still taking place.

b. Burglary is the unauthorized entering (no breaking is necessary in Georgia, although Robber's forcing the door open would qualify) of the dwelling of another with intent to commit a felony or theft therein. Decoy did not directly act to commit all of these elements as he had entered the house with permission and did not intend to commit the felony when he entered (he had changed his mind). However, Decoy will be liable for burglary if he is an accomplice of Robber, who is guilty of burglary. If an actor participates and lends support, encouragement and aid to another who directly acts to commit a crime, the actor will be liable for the crime himself. Although Decoy had originally intended to participate in the crime, he did change his mind and tried to get the others to stop the plan. He also removed the couple from the premises to prevent the intended robbery. However, if Decoy is guilty of conspiracy and has not properly withdrawn from the conspiracy, he will be guilty of the actions of the co-conspirators like Robber. Once an overt act has been made in furtherance of the conspiracy, Decoy would need to take necessary measure to withdraw. He could argue that his phone calls constituted such action. However, because he did not reach Robber, the primary actor, he needed to do more. Calling the police would have been one option. He did remove, eliminate the potential for robbery, but because the main aim of the conspiracy was to take the property of the couple and not to harm them (they even agreed not to use the gun), this act was not enough, especially as Decoy knew that Robber would be breaking into the house by force and not by consent. Although Decoy's actions to prevent harm to the couple may mitigate his eventual sentencing, his actions were not enough to stop the intended theft.

c. Conspiracy is an agreement between two or more people to commit a crime. There must be the intent to enter into the agreement and the intent to achieve the purpose of the conspiracy. Georgia also requires an overt act in furtherance of the conspiracy. Decoy entered into an express agreement with Driver and Robber to rob Husband and Wife. He intended to enter into the agreement and he intended the result, even if he had reservations about the risk of using a gun. An overt act was committed to finalize the conspiracy by Decoy going over the apartment as planned and the other actors taking the steps they were required to do. Once the conspiracy has been formed, the co-conspirators are guilty of the

crime of conspiracy, regardless of whether the crime that they intend ever is completed. Any actions by the actor to withdraw the conspiracy may limit their liability for further actions by the conspiracy, but not the crime of conspiracy itself. Therefore, Decoy's actions to extricate himself from the crime did not eliminate his liability for conspiracy.

Question 2 - Sample Answer 1.

(disclaimer)

1. (a) The Elm Street Residence will not be distributed by the terms of Horace's will. The will beneficiary of the residence is Winona. Under the Georgia law, when the will beneficiary intentionally murders the decedent from whom she would inherit, the beneficiary cannot take the property. Winona was actually found guilty of voluntary manslaughter by a court, and voluntary manslaughter is an intentional killing for purposes of this rule. Therefore, Winona is treated as having predeceased Horace and does not take. The property will then pass to the beneficiary's heirs at law by way of the anti-lapse statute. However, Lois will not take a share of the residence because she was not also a child of Horace. Only the children of both Winona and Horace will take. Van and Debbie will get the residence.

   (b) The 50-acre tract is no longer owned by Horace at his death. The problem here is ademption. When a specific devise is given away before death, the gift is extinct by ademption and Debbie would get nothing. However, when the testator sold or exchanged the property within 6 months before death, the beneficiary takes the proceeds. If not, it will become part of the residue and pass to Red Cross.

   (c) The 20,000 condemnation proceeds go to Debbie. Although the gift of property is extinct by ademption, the beneficiary gets any proceeds from condemnation that occurred within the 6 months prior to death of the testator.

   (d) Van will likely get the 2005 Jaguar. The rule of ademption also applies here. The bequest of the 1999 Jaguar is satisfied. If not the specific devise is exchanged for property of like and value, it can become substitute property and pass to the will beneficiary of the original property. That is unlikely here; the 2005 Jaguar will probably go to the Red Cross.

   (e) The IBM stock passes to Van by terms of the will. Horace still owned it at death.

   (f) The Major Bank Stock may pass to Van if he argues that it is substitute property.

2. (a) The property would pass according to the terms of the will. Because of the simultaneous death, Winona would be treated as if she predeceased Horace. Under the anti-lapse statute, the property would pass to Winona's heirs at law. Horace's heirs are Van, Debbie, and Lois. Therefore, the 3 children would take 1/3 equal shares. Because she did not kill Horace, Lois would still be able to take as an heir of Winona.

   (b) Winona's estate would pass under the laws of intestacy because she has no will. Horace would be treated as if he predeceased Winona under the simultaneous death rules. Therefore, Winona's heir per all take 1/3 share per stirpes.

3. (a) If the original will is lost or destroyed upon the death of testator, it is presumed that there is no will. However, this presumption may be rebutted. The copy of the will would be good evidence that there was a will and can be probated if it is shown that all formalities were complied with. Therefore, if the will had been signed by testator and there were two attesting witnesses, her estate must present evidence that the signatures are authentic. Winona's family could do this by presenting testimony of the witnesses themselves, explaining that the signatures are authentic and that they are present when Winona executed her will. Also, if the will contains an attestation clause it will be good evidence that the will was properly executed. [NOTE: Additional evidence to rebut presumption of revocation would be required.]

   (b) If Winona's will is probated, the distribution will alter from the distribution under 2(b) above. Horace will still be treated as if he predeceased Winona for purposes of Winona's estate. Under the anti-lapse statute, the deceased beneficiary's interest would pass to his heirs at law. The anti-lapse statute applies when (1) the beneficiary predeceases the testator (2) the beneficiary's heirs survive the testator (3) and there is no language indicating for an alternate take in case of the death of the beneficiary. Here, the rule would apply because all 3 elements are met. Therefore, by way of anti-lapse statute, Horace's heirs would take his share rather than the gift lapsing. His heirs at law are Van and Debbie. Each child would share in their father's ¼ interest of Winona's estate taking 1/8 each. Van and Debbie would also take ¼ from the will. Thus, Lois receives ¼ and Van and Lois each receive 3/8 of the estate. Had the anti-lapse statute not applied, gift would become part of the residue, meaning it would just be divided equally between Van, Debbie, and Lois.

Question 2 - Sample Answer 2.

(disclaimer)

1. (a) Although the residence was bequeathed to Winona, if it has been proved she feloniously or intentionally killed Horace then her gift will lapse. Her sentence is sufficient proof; and as voluntary manslaughter is likely a felonious and intentional killing, her gift will likely lapse. Although the anti-lapse statute generally provides that lapsed gifts usually are saved by going to the heirs of an intended beneficiary (Van, Debbie and Lois), the rule does not apply if the beneficiary killed the testator. As result, the gift would lapse and go to the residuary, the Red Cross. As the residence is a specific bequest and is still in Horace's ownership at his death, the property would pass accordingly. **[Note: Ultimate Conclusion incorrect]**

   (b) Horace had willed the property in a specific bequest to Debbie. If, however, the specific bequest is no longer owned by the testator at the time of his death, the gift is deemed to lapse by ademption by extinction. Unless he specifically provided for the proceeds (note and deed) to go to Debbie or if those proceeds were essentially identical to the original gift, Debbie would not take. Accordingly, the proceeds are part of the remainder of his estate and go to the Red Cross. However, Debbie could argue that because the Neighbors financed the sale by granting a deed to Horace, he still held title at his death. Unlike a mortgage, which Georgia treats as a lien rather than transfer of title (before foreclosure), financing by transferring a deed is treated differently. Debbie may be entitled to the deed and the note if

the court does not treat the transfer to the Neighbors as complete.

(c) There is an exception to the ademption by extinction rules for specific bequests if the property is destroyed and insurance proceeds are received or it is condemned and proceeds are received within 6 months of the testator's death. Since the condemnation proceeds were granted within such time, Debbie would take those proceeds in lieu of her specific bequest.

(d) Van was bequeathed the 1999 Jaguar, and as a specific bequest its sale would usually result in ademption by extinction with the new car going to the residuary (the Red Cross). However, since the 2005 Jaguar is substantially similar to the 1999 Jaguar and appears to have replaced it, Van would be entitled to it. However, Horace gave Van the 1999 Jaguar. If such gift was intended as a satisfaction of the bequest, Van would be entitled to nothing. It would need to be demonstrated that such an agreement was in writing and signed either by Horace within 30 days of the gift or by Van at any time.

(e) The IBM stock was still owned by Horace at death and as specific bequest it goes to Van.

(f) Van was intended to receive the Bank Two stock as a specific bequest. Another exception to the ademption by extinction result is if the original stock bequest is replaced by other stock as a result of an entity acquisition or merger. Cash proceeds of sale or a cash dividend, however, would not qualify as an acceptable replacement of the specific devise. Van would take the new stock.

2. (a) If Winona did not kill Horace, the gift of his residence to her would not have lapsed and she would be entitled to take. However, if she predeceased him, she would not take and her gift would lapse. Under the Simultaneous Death Act, if the spouses are in an accident whereby it is impossible to tell who predeceased the other, then they will be each treated as predeceasing the other for purposes of wills and intestate distribution. Accordingly, Horace's gift to Winona lapses. Because Winona did not kill Horace, the anti-lapse statute would apply and Winona's heirs would take the residence in equal amounts (Van, Debbie and Lois). Note that even though Lois is a child from a previous marriage, she would still take as an heir because the relevant parent is Winona, not Horace (so long as they are not divorced). Also, Winona, Van and Debbie can file for a year's support, which is an amount that they request from the probate court that will supercede all other claims to the estate, other than secure creditors. The amount requested will be granted unless disputed by other creditors or beneficiaries, in which case the probate court will determine a fair allocation. Such a grant may diminish the residuary estate going to the Red Cross.

   (b) If Winona dies intestate, her estate will be divided in equal amounts among her children. Horace, if he had survived her, would also take at least a 1/3 share as a spouse, but as he is treated as predeceasing her under the Simultaneous Death Act he takes nothing. Her three children, Van, Debbie and Lois, will each take three equal shares of her estate.

3. (a) If an original will is missing, a presumption results that the will was revoked by physical act of destruction. Winona's family would need to rebut this presumption by introducing some evidence to explain why the original could not be found.

   (b) If Horace had survived Winona, the existence of the will would have changed the result that would have occurred under intestate distribution. Under intestacy, Horace would have

received a 1/3 interest as a spouse and the three other children would have shared the remaining 2/3 interest equally, instead of the will's provision for all four people to share equally. However, since Horace will be treated as predeceasing Winona for the reasons discussed above, his gift would lapse. Under the anti-lapse statute, Horace's heirs can take in his place. His ¼ interest would go to Van and Debbie, but not Lois as she is not his child. Therefore, Lois would receive ¼ and each of Van and Debbie would receive 3/8 interests in Winona's estate.

Question 2 - **Sample Answer 3.**

(disclaimer)

1. a) Residence

   Because Winona killed Horace feloniously and intentionally she is treated as having predeceased Horace if such a killing can be shown by clear and convincing evidence. Here we are told that Winona pleaded guilty to voluntary manslaughter so presumably this is not a problem. Under the lapse statute, the heirs at law of a person who predeceases the testator take the gift if the heirs themselves survive the testator. This rule does not apply in the event that the person to whom the gift was to be given killed the testator unless the heirs at law of the killer are also the children of the testator. Winona's heirs at law are Debbie, Van and Lois. Two of those children are also the children of Horace. Therefore, Debbie and Van will take the home as the children of Horace and Winona.

   b) 40 of the 50 acres that Horace left to Debbie as a specific gift have been adeemed by extinction because Horace sold them prior to his death. Ademption occurs when a specific gift is not present in the estate of the testator when he or she dies. An exception to this rule is present if the specific gift was replaced with another item that is of the same kind and character as the original gift. In this case, the cash and security deed are not of the same kind and character as 40 acres of land. Therefore, the note and security deed are part of the residue of Horace's estate and will go to the Red Cross.

   c) The $20,000 condemnation proceeds will go to Debbie. Debbie was given 50 acres by specific gift. As discussed above, 40 acres were adeemed by existenction when Horace sold them. The remaining 10 acres were not present in the estate when Horace died but had been condemned only 3 months prior to his death. If a specific gift is condemned within 6 months of testator's death, the person to whom the specific gift was to be given receives the condemnation awards. The assumption is that the testator did not have an opportunity to replace the condemned property with something of like kind and character.

   d) Van will get to keep the 2005 Jaguar. As mentioned above, if a specific gift is not present in the estate when the testator dies because it has been replaced with another item of the same kind and character the person to whom such gift was to be given receives the replacement item. Even if Horace had not already given the car to Van as a graduation gift, Van would get the car.

   e) Van receives the IBM stock. The gift is present in the estate and is given to him as a

specific gift under the will.

f) Van will receive the Major Bank stock. The Bank Two stock which was a specific gift to Van was replaced by the Major Bank stock. The stock is of the same character and kind and, therefore, is not adeemed by extinction.

2. a) Under the simultaneous death act, Winona would be treated as having predeceased Horace for the purposes of Horace's will and Horace would be treated as having predeceased Winona for the purposes of her estate. For the purposes of Horace's will, this would mean that Louis, Debbie and Van would each share in the house left to Winona. Under the anti-lapse statute, Winona's heir at law would take her gift if they survived Horace. All three of Winona's children survived her and Horace, therefore all three would take. This is unlike the situation in question 1 where only the heirs at law of Winona who are also children of Horace could take. Lois was excluded under question 1 because Winona killed Horace feloniously and intentionally and Lois was not the child of Horace.

   b) Horace would be treated as having predeceased Winona. Since Winona died without a will and without a surviving spouse her children would share her estate per stirpes. Therefore, Van, Debbie and Lois would each receive 1/3 of Winona's estate.

3. a) If the original will is lost or destroyed prior to or immediately after the death of the testator, there is a rebuttable presumption that the will was revoked by physical act. Revocation by physical act requires the intent to revoke and an act that destroys or obliterates the will. If Winona's family is able to overcome the presumption or revocation by physical act, they can introduce evidence of the will. The family will have to prove the contents of the will which they can do with the copy and they will have to prove that the signatures of Winona and the 2 required witnesses are genuine. To do that, they will probably have to bring the witnesses to court or perhaps a handwriting expert.

   b) If the copy of the will is probated, the distribution of the estate will be slightly different than under 2b) . Van, Lois and Debbie will each receive ¼ of the estate. Van and Debbie will also each receive ½ of the ¼ that was left to Horace. Under the simultaneous death act, Horace will be treated as having predeceased Winona. Under the anti-lapse statute, the heirs at law of Horace will take his portion if such heirs survive the testator. Here, Van and Debbie are the heirs at law of Horace and have survived Winona. Therefore, they take ½ each of Horace's share.

Question 3 - Sample Answer 1.

(disclaimer)

a. No. In general, co-signor who pledges a collateral to secure a husband's debt is liable to the default. However, the contract is voidable if the party was incompetent or a minor. For a contract purpose, under GA, one has to be at least 18 years old to be able to enter into a contract (K). Since Bea was a minor, the K is voidable by the minor party before she reaches 18 or she ratifies after she becomes 18. Here, Bea was only 16 when she entered into the contract, legally a minor. Thus, K is voidable. When she became 18 in 2002, she

returned Al's car to Chuck instead of continuing to make a payment. This return is an effective way to revoke the avoidable K. A minor can ratify K by continuing the terms of K after she reaches 18. But, Bea did not do so. Bea may be liable for any damages to Al's car but she would not be liable for any balance of $7,500 or reasonable tear and wear. Chuck may argue that the car was a necessity for Al & Bea to make Bea to be liable because the court may find a minor liable if the items were necessities like a grocery, food, clothes, etc. But, here, the fact does not indicate that Bea was using the car for her living to make the car as a necessity. Therefore, Bea's mobile home is not subject to sale by Chuck who entered into the contract with a minor. Also, Chuck is not HDC, either since Bea did not sign the note and there is no definite terms to pay.

b. Al's estate and Bea may not be liable for the credit card debt incurred unbeknownst to Bea unless the credit card debt was for the necessities for their living. Under the Georgia family law, husband and wife should be liable for each other's debts if they were for the necessities during their marriage. Here, Al's credit card debt of $5000 was spent without Bea's consents. Also, the fact implies that those expenses occurred during Al's staying out late at night playing cards & drinking. Since they are not necessities and Bea did not authorize, Bea should not be liable personally. But, Al's estate may be liable since Al was personally liable.

   Bea may argue that $10,000 additional charge was incurred while Al did not have mental competency. But, since he used it before Bea was appointed as his guardian, he may still be liable. Bea may be found liable personally to Credit Card company for the loan made to Al because she promised in writing of the surety, promised to pay for the third party's debt. According to the stature of fraud (SOF), the writing is required for surety. Also, not suing Al's estate is sufficient consideration since Company . . . to make the contract effective. K has 3 elements: offer, acceptance, and consideration, a bargained-value given for

c. Since the credit card debt was for the necessities for their living, Al's estate and/or Bea may be liable. Under the Georgia family law, husband and wife should be liable to each other's debts if they were for the necessities during their marriage. Here $2,500 was spent for the gas and grocery. Bea may argue that the gas was not necessary since they could live without driving the sports car which could be considered as a luxury item if they could go to work using the public transportation or other means. But, if Al used the car to go to work instead of going to a card game or other leisure/entertainments, the gas may be considered as a necessity. Since the facts only mention that Al's sports car was used to a card game without mentioning its usage for essential transportations to work or school, the court may find the payment for Al's gas as non- necessary item. But, since Bea ratified the credit card spending by continuing to buy groceries and gas on credit from Dee, Bea may be liable for the gas and grocery account up to $2,500.

d. While Bea may be liable to Credit Card company for the loan made to Al because she promised in writing of the surety, promised to pay for the third party's debt. According to the statute of fraud (SOF), the writing is required for the surety. But, Bea is not liable to Ed's debt since she promised orally. SOF required a writing for the surety. And her oral promise to Ed is not enforceable. The contract is manifestation of mutual assent to offer and to accept with consideration. At issue is whether the mental state of one party is a defense to avoid a contractual obligation. In general, the insanity may be a defense to K since one cannot satisfy a mutual agreement where one can understand the duty and obligations of the terms that one bargains for. When one party does not have a mental incapacity to enter into the contract, a promissory note, the contract may be voidable by the incompetent party. Here, Al signed a promissory note without his guardian's consent. Thus, the

promissory note may not be effective. Ed might argue that he is a Holder in Due Course (HDC) who has a writing, signed by the promisor, for the definite amount. But, since there is no definite time mentioned for the promissory note, the negotiability does not exist. Also, Al had no mental capacity to bargain for. Thus, the court may find the note non-negotiable.

Question 3 - Sample Answer 2.

(disclaimer)

a. At issue is whether the pledge by Bea of her mobile home as collateral for the loan to Al is enforceable. At the time Bea made a pledge, she was only 16.5 years old. Individuals under the age of 18 are minors and contracts made with minors are voidable. There are several potentially relevant exceptions to this rule. The first is that Bea may be an emancipated minor by virtue of the fact that she is married and her parents consented to the marriage. [The minimum age to marry in GA is 16 and parental consent is not required.] Second, contracts with minors are enforceable under equity as quasi-contract if they are for necessities - food, clothing, shelter, medical expenses. A car will generally not be a necessary and a sports car even less so. Third, a contract with a minor is only voidable – in that it will become a valid contract that cannot be voided if after the minor reaches an age of majority the minor affirms the contract by keeping the subject matter without complaint. Given the dates in question, Bea was already 18 when she returned the car to Chuck. Therefore, Bea's age will not allow her to disaffirm the contract with Chuck.

   Another issue that Bea could raise would be the statute of frauds. The statute of frauds applies to guaranties to pay the debts of others. The statute of frauds can be satisfied by performance or by writing. In this case, we have the pledge of Bea's mobile home. It is not clear from the facts what was executed in the pledge. We do know she did not sign the note. For a writing to be sufficient under the Statute of Frauds, it has to be signed by the party to be charged and have the material terms. Therefore, it is not clear if the statute of frauds is satisfied. Whether Chuck will be able to recover the deficiency on the note for the car will therefore depend on whether Bea can assert the Statute of Frauds as an affirmative defense.

b. Al's estate is liable for the $5,000 of credit card debt incurred prior to the injury and is also probably fully liable for the $15,000 charged after the injury. Individuals who are mentally incompetent lack capacity to enter contracts. They are only liable for the fair market value of necessities – i.e what the item is worth to them. We do not know what Al purchased on the credit card. If none of it was necessities, he would not be liable if he lacked mental capacity. However, the guardian was appointed for him shortly after the purchases were made. To be considered mentally incompetent for contract purposes, usually a guardian has to have already been appointed for you. Unless the credit card company knew or had reason to know that Al lacked mental capacity at the time the purchases were made, Al's estate is liable for the charges made before the guardian was appointed.

   Bea is liable for the full $15,000. After she turned 18, Bea sent a written letter to the credit card company promising to pay the debts of the estate if they did not sue the estate. Promises by an executor to pay the debts of the estate, are subject to the statute of frauds.

Here, the statute of frauds is satisfied because we have a writing signed by Bea promising to pay the debts to the credit card company. Past consideration is not a problem because Bea asked the credit card company not to sue the estate. This legal detriment resulted in present consideration.

c. Bea and Al's estate are individually liable for the gas and groceries purchased from Dee. First, a spouse has apparent authority under principles of agency to buy necessities - food, clothing, shelter, medical expenses. Therefore, Al and Bea will be liable for each other's purchases of gas and groceries (which are probably both necessaries – it is less clearly the case for gas). Al was 19 when he purchased the first $2,500 of groceries and was therefore not a minor. However, the facts imply, that Bea was not yet 18 when she purchased $10,000 worth of groceries. Therefore, as a minor she is only liable for necessities under equity. In quasi- contract, the price that a minor will have to pay for necessaries is the value of such to the minor – i.e the fair market value. Therefore, Bea and Al's estates are liable for the $2500 that Al bought and the value of the groceries and gas bought by Bea to Bea under quasi-contract.

d. Ed loaned money to Al after a guardian was appointed for him. Therefore, the contract is not enforceable by Ed unless it was for necessities and then only to the fair market value. However, Bea said she would pay Ed's debt in full. This is not enforceable because it lacks consideration and it violates the statute of fraud. The statute of fraud says that a promise by a executor to pay the debts of an estate from the executor's personal funds must be in writing. Here, there is not a writing between Bea and Ed. For a contract to be enforceable, there must be consideration. Here we only have past consideration, in that Ed gave Al money. There is nothing in the facts that indicates that Ed could try to use promissory estoppel. Therefore, Bea is not liable.

Question 3 - Sample Answer 3.

(disclaimer)

a. No. Bea's mobile home is not subject to sale by Chuck. A contract signed by a minor less than 18 years old is voidable by the minor with certain exceptions (entertainment industry, necessities, etc.) The mobile home belonged exclusively to Bea. It was a gift to her from her father. It was her separate property not marital property. When Bea signed the mobile home as collateral she did so on a "new sports car" desired by Al. A new sports car is not a necessity. Because Bea was only 6 months into her 16th birthday she was legally an "infant" and could not be compelled by Chuck to adhere to the "mobile home as collateral" contract. At most, Chuck could recover the car and possibly sue Al's estate for the balance owed. He cannot touch the mobile home. There is no evidence that Bea took any action after her 18th birthday to ratify the contract. Had she done so, the result may have been different.

b. Al's estate could be liable for his credit card debt at least for the first $5,000. The issue is questionable regarding the next $15,000 since Al was no longer competent to manage his own affairs, he lacked the capacity to enter into contractual agreements or to continue in a prior contractual agreement. If the credit card company knew or should have known of Al's

lack of capacity, a court might discharge the $15,000 debt. If, however, a court were to find in the interest of equity to hold Al's estate liable for the $15,000, there is a question of just how much was the estate worth? Bea was the beneficiary of the $100,000 life insurance policy. The mobile home was her separate property, the car was Al's and not paid off. It would appear from the fact scenario that Al's estate consisted of $2,500.00. Bea would not normally have been liable for Al's credit card debt. The card was his, the debt was his. However, since Bea agreed to assume the debt of another (Al) in exchange for the credit card company's foregoing a legal fight to sue Al's estate, (consideration) and since she agreed in writing thereby satisfying the statute of frauds requirement that anyone agreeing to pay the debt of another do so in writing, Bea (and Al's estate) can be held liable for Al's credit card debt.

c. The debt run up at Dee's convenience store was a marital debt for food and gas. Both Al and Bea charged on the account. Since the credit was extended for necessities (food and gas) Bea has no out even if she was less than 18. Therefore, Al's estate and Bea are liable to Dee for the $15,000 credit charged at the store.

d. Bea is not liable individually for the loan Ed made to Al. Ed, as a friend of Al's, knew or should have known, of Ed's head injuries and resultant lack of capacity. Al lacked the mental capacity to sign a promissory note as evidenced by the fact that Bea had previously been appointed Al's guardian. A person adjudicated by the courts to be incompetent cannot enter into a valid contract. Therefore, the loss is Al's. Bea told Ed she wants to pay Al's debt. However, the statute of frauds requires that an agreement to pay the debt of another be contained in writing. There is nothing in the scenario to support Bea did so. Therefore, Bea's oral agreement is unenforceable in accordance with the statute of frauds. Moreover, to have a valid contract there must be consideration. There is nothing in the fact scenario to suggest that Bea would receive anything from Ed in return for her agreement to pay Al's debt to Ed. Therefore, no contract was formed between them and Bea is not liable to Ed for the loan he made to Al.

Question 4 - **Sample Answer 1.**

(disclaimer)

I. Enforceability of the Premarital Contract

Parties may enter into two types of premarital contracts. One type is that which is contingent upon getting married. The other type, which is at issue here, is what explains what happens to property after divorce or separation. In Georgia, a premarital contract must be voluntarily entered into, it must be based on full disclosure of relevant facts, and it must be fair at the time it is sought to be enforced.

The first issue that Mary might raise in combating the enforceability of the premarital contract is that she did not enter into it voluntarily. She might argue that John's threat of not marrying her if she did not enter into the agreement overcame her free will. However, this argument is not likely to be successful. To hold that every time one party in an engaged couple decides to ask for a premarital contract the other party does not voluntarily

agree would render most premarital contracts void. Mary knew the nature of the document and signed it. The agreement was voluntarily entered into by both parties.

The second argument Mary might make is that John did not fully disclose the extent of his property. This is likely to be a more persuasive argument since a premarital contract in Georgia must be based on full disclosure. In this situation, Mary was not fully informed of the extent of John's property. If she had known of the additional $45,000 worth of stock she might have bargained to receive something in the event of divorce.

The third issue Mary might raise is that it must be fair at the time it is sought to be enforced. In this case, Mary has only her automobile ($15,000), furniture ($2,000) and a $20,000 IRA. John on the other hand has a $150,000 CD, a home worth $300,000 (we'll discuss later that not all of this $300,000 is his), $10,000 worth of furniture, and an automobile worth $15,000. The worths of the parties are clearly imbalanced and it would be unfair to enforce the agreement against Mary. The length of the marriage is taken into account in determining to whom property should go to in a divorce. The longer the marriage the longer the parties have had to become accustomed to their way of living. It would be unfair to Mary to leave her with such little funds while John took so much.

The premarital contract between Mary and John would be unenforceable because it would be unfair to enforce the contract at this point and it was not based on full disclosure.

II. Premarital Contract Is Not Enforceable

a.) character of the property

In Georgia, property of the spouses in a marriage is divided on marriage in what is called equitable division. Separate property is that acquired before marriage or after marriage by gift or devise. Marital property is property acquired during marriage. Finally, mixed property is that property which is partially marital property and separate property. A court will give each party their separate property and then divide the marital property equitably.

Mary's automobile would likely be marital property unless it was acquired with Mary's separate funds. Mary's furniture would be separate property since she acquired it prior to and brought it into the marriage. Mary's IRA would be marital property since it was acquired during marriage. John's car, for the same reasons as Mary's car, would likely be marital property. John's CD would be separate property even though it appreciated in value. Any appreciation in value of separate property will remain separate property. Likewise, the Coca-Cola Stock would be John's separate property. In addition, John's $10,000 furniture would be separate property. Although it was separate property at the beginning of the marriage, the home would be mixed property because the mortgage was paid off during the marriage. Mary would be entitled to proceeds from the house to the extent that the mortgage was paid off during the marriage.

b.) Increase in Value to the Home During Marriage

The increase in the value of the home would be mixed property. Generally increase in value to separate property will not change the character of the property. However, there was an existing debt on the home at the time of the marriage. Despite the fact that John's funds were used to pay the mortgage, it was done during marriage. Items acquired and debts paid during marriage will be deemed to be marital property. Maybe with the mortgage paid

Mary was able to concentrate her income in another area. Therefore, the increase in value of the home should be allocated in proportion to how much debt was paid off during marriage.

III. Can the 401(k) and IRA be a part of the equitable division of the property?

In Georgia, a 401(k) or an IRA can be included in the equitable division of property. It will be deemed to be marital property to the extent it was earned during the marriage. Furthermore, it can be obtained without tax effect if a qualified domestic relation order (QDRO) is issued by the court. A QDRO will require the holder of the investment account to hold the court determined portion for the benefit of the spouse holding the QDRO. Since the property will not be passed at that time, taxes will not have to be paid on the transfer.

IV. Does Mary's adultery bar her claim for alimony or her claim for equitable division of property?

Georgia is in the minority of states that allows evidence of fault in the distribution of marital property. First of all, in Georgia adultery will bar a spouse from obtaining alimony. However, adultery will not bar the equitable division of property. It will, however, be a factor in the analysis. Thus, Mary's alleged adultery will bar her recovery of alimony, but will not bar the equitable division of property.

Question 4 - Sample Answer 2.

(disclaimer)

1. It is highly possible that the premarital K entered into between John and Mary will not be enforceable. This type of marital contract is one which contemplates divorce. In order to have a valid premarital contract, it must be entered into voluntarily, with all the material facts and values of all the assets of both parties, and at the time of enforcement, it must be reasonable.

   Voluntary- Both parties agreed to the contract. Mary will argue that she didn't have a choice if she was to marry John in signing the contract. John will argue that not only did she have the choice, but she even took it to her attorney to approve. The law will look to see whether John really meant that if she didn't sign the contract he wouldn't marry her. Mary would have had a better argument here if she hadn't taken it to her lawyer, because John's attorney prepared it and John told her to sign or hit the road.

   Did John disclose all the material facts? No. John didn't disclose the stock valued at $45,000 in the contract. The law is skeptical of premarital contracts and when one party doesn't disclose everything it will make the K fail. This coupled with the lack of . . . will surely make the K fail.

   Arguendo, was it fair and reasonable when being enforced? Probably not. His stock he failed to disclose is worth $100,000 and his house is worth $300,000. Therefore, the prenuptial contract probably will fail.

2. Georgia law divides property into separate, marital and/or part separate, part marital. Separate property is property the spouse had prior to entering the marriage or gifts or inheritance during marriage. Marital property is property which has accumulated over the course of a marriage. However, some property may be part marital and part separate if one has separate property but through his/her labors during marriage the asset grows.

   a. The Coca-Cola stock valued at $70,000 is John's separate property. The 401(k) is marital property because it was acquired during marriage. The IRA account is marital property because it was accumulated during marriage. The new automobiles, furniture and furnishings are marital property because they accumulated during marriage. What is tricky is the home. When John and Mary married, John had $100,000 equity in his $150,000 home. The payments have been paid through funds John had earned. However, we would need to know of the contributions Mary made to the marital estate. Just because the funds came from John's paycheck doesn't necessarily indicate that Mary didn't help pay. If he paid the house payment and she paid all other bills, it would be unequitable not to give her a part of the house. So, if she contributed as well, the court is likely to divide up the equity as follows: ½ of 1/3 to Mary because she would get half of the 1/3 interest her and John paid together. He would get the remaining 5/6 totaling his $100,000 equity and half the $50,000. Thus, John would get $250,000 and Mary would get $50,000 of the home.

3. Yes, Under ERISA, half of the proceeds from both the 401(k) and the IRA can be divided among the two persons. However, if the court issues a Qualified Divorce Order, the IRA and the 401(k) can be divided up as a part of the equitable division of property.

4. Mary's claim for alimony and equitable division of property may not . . . by adultery. Normally in Georgia, adultery bars one from receiving alimony. However, in order to claim this, the divorce grounds have to be adultery. Here, John didn't discover that Mary was having an affair until after 6 months of being separated. John probably filed for a "no-fault" divorce because this is the most common in GA. Because this isn't the reason John divorces Mary, it is likely the court wouldn't bar alimony. Adultery is taken into consideration for the equitable separation of property just as it is taken into account for alimony. The court is going to ask a few questions when it comes to equitable separation of property. First, who are the parties? How long have they been married, what is there education levels? Next, the court will ask what do the parties have? What kind of home? Separate property? Next, the court will ask <u>where</u> the property came from? Income? Gifts? Inheritance? Then the court will ask where is should go? Georgia is one of the few states which takes conduct of the parties into consideration. Here, Mary's adultery will come back to bite her. The court won't be as willing to give her stuff due to the adultery.

   Similarly, in alimony the court looks to how long they have been married? Education levels? What kind of home? What does each person have? What is the ability to pay alimony? The court looks to who has custody of the children. Then, once again, Georgia (being in the minority) looks to the conduct of the parties. Here to, the adultery will place a serious dent in what kind of alimony she could have received. However, if the court awards alimony, it may as: 1.) permanent periodic payouts, 2.) lump sum, 3.) rehabilitative alimony or 4.) reimbursement alimony.

Question 4 - Sample Answer 3.
(disclaimer)

1. The premarital contract is possibly not enforceable.

   The ante nuptial agreement must be entered into voluntarily without coercion, the other party should have independent legal counsel, and the agreement must fully and fairly disclose the party's assets at the time of the agreement.

   It can be argued that Mary was coerced into signing the agreement since it was presented to her "several days" prior to the marriage. Arguably, this did not give her ample time to contemplate the agreement due to her desire to marry John. Additionally, it conditioned the marriage happening on her signing the agreement.

   Mary did have an opportunity to consult an independent attorney, but due to the short period of time coercion can still be argued.

   The third and perhaps the most important factor is the fact that the agreement did not provide full disclosure. John did not include Coca Cola stock worth at the time $45,000. This is probably enough to make the agreement non-enforceable as now the stock is worth $70K.

2. a. **John's Property**

   1. The marital home $100K
   2. The CD valued at $150K/increased in value due to no effort or additional money invested
   3. Coca-Cola stock valued at $70K/same as above
   4. Furniture valued at $10K/pre-marital property

   *Auto is probably gone/sold/traded since it has been 10 years

   Mary's Property
   1. Furniture valued at $2K

   *Auto probably sold/traded since it has been 10 years

   Marital Property
   1. Mary's IRA valued at $20K/obtained with marital funds during the marriage
   2. John's 401(k) valued at $100,000/ same as above
   3. 2 automobiles valued at $30K/acquired during the marriage
   4. Furniture valued at $20K/same as above
   5. Increase in value of home valued at $200K ($50K loan paid with marital funds so only $100K is solely John's)

   b. The increase in value of the home occurred 2 ways. The first being the $50K loan was paid during the marriage so there is no lien. Secondly, though increases in property value occurred due to market activity as well as maintenance, upkeep, and good husbandry. Therefore, Mary is entitled to the increase in value as well. The items characterized as marital property were all gains or obtained during the marriage.

   The part separate/part marital property include property that was possibly separate but through the benefit of marriage they increase in value. The home is in this category.

The property that remained separate property may have increased in value, but it was not through any affirmative act of the parties. The stock and the CD increased based on time and the original agreement entered into prior to the marriage.

The 401(k) and IRA plan can be divided, without tax effect, as a part of the equitable division of the property. Because the "withdrawals" are during a divorce preceding they are not considered necessarily voluntary.

Pursuant to a valid qualified domestic relations order the court can decree that the funds be transferred or rolled over into another account without penalty. This is what the court would do in this case.

Mary's adultery does not bar her claim for equitable division of property. Adultery is a bar to equitable division if the divorce was granted on those grounds.

In this case, based on the facts, John did not even know Mary had committed adultery prior to their separation and decision to get a divorce. Based on the facts the divorce was granted on irreconcilable differences grounds.

MPT 1 - Sample Answer 1.
(disclaimer)

MEMORANDUM

To: Jean Perwin

From: Applicant

Date: February 21, 2006

Re: Harris v. CBL

1. Does Harris own the Blinky copyright, or does CBL own it either as a "work for hire" or as a result of transfer of ownership?

Harris is probably the owner of the Blinky copyright. It is unlikely that CBL could successfully argue that it owned the copyright by either the "work for hire" doctrine or by transfer of the copyright.

A. Work for Hire Doctrine

Ownership of copyright is determined by Title 17 of the United States Code on copyrights. As provided in section 201 of the statute, initial ownership of a copyrighted work vests in the author of the work. There is no doubt in this case that Harris is the author of the work as he has all the digital records of the evolution of Blinky. Ownership of a copyright can also be created through the work for hire doctrine. A work made for hire is one that is either

prepared by an employee within the scope of his employment or a work specially ordered or commissioned for use as a contribution to a collective work … "if the parties expressly agree in a written instrument signed by them that the work shall be considered a work for hire."

In the present case, Harris was not an employee of CBL, however he might fit under the other definition of the statute. This work will be considered one created for a compilation as it was created for the larger marketing scheme of CBL's i-chip. The more difficult issue is whether the parties expressly agreed in a written instrument that Blinky would be considered a work for hire. Generally, the writing must be executed prior to the creation of the work. Wilkes. In this case, the writing, the Marketing Services Agreement, was not executed until December 2, 2005, but the contract provides that the effective date is November 15, 2005. If a court were to find that the November 15 date controls, then Blinky may be considered a work for hire because the design for Blinky was not submitted until November 18, 2005. The court would probably find that the date of execution controls, however, and this post-creation writing will not function to convert Blinky into a work for hire. Wilkes also provides that a post-creation writing can create a work for hire when the writing is confirming a prior express understanding by the parties. Such is not the case here as there had never been discussion of CBL owning Blinky as a work for hire before the Marketing Services Agreement. Moreover, the case against CBL's ownership is stronger as Harris demonstrated his intent to own the rights to Blinky by notifying CBL that he owned the copyright rights to Blinky when he submitted his design. The Wilkes Court provided that such notice is evidence of an intent regarding ownership of the work.

B. Transfer of Ownership

It is also unlikely that CBL will successfully argue that Harris transferred the copyright of Blinky. While the original owner can transfer his rights in a copyright, Section 204 of the Copyright statute provides that an effective transfer must be evidenced by an instrument of conveyance or a note or memorandum of transfer in writing signed by the owner of the rights. There is no writing in this case wherein Harris transferred his rights in Blinky to CBL. It is highly unlikely that the Marketing Agreement between the parties would be construed to complete such a transfer as it never expressly mentions a transfer of rights. Moreover, as discussed above, the "work for hire" provision will probably not be effective to convert Blinky into a work for hire. And none of the emails exchanged between Harris and Cabot discuss the transfer of copyright rights. Finally, Harris specifically mentioned in an email the issue of a transfer, indicating that it had not taken place and Cabot never responded. Thus, it does not appear that there was a transfer of ownership rights and Blinky and a court will likely find Harris to be the owner.

2. Did Harris grant CBL permission, via implied nonexclusive license, to use Blinky?

In contrast, a court most likely will find that CBL has a nonexclusive license to use Blinky in its own business. A nonexclusive license permits a licensee to use the copyrighted material, but does not transfer ownership. Atkins. Such a license can be expressly or impliedly created when; (1) a person requests the creation of a work; (2) the creator makes the particular work and delivers it to licensee; and (3) the licensor-creator intends that the licensee copy and distribute his work. Id. It appears that a nonexclusive license was created here as CBL requested Harris to create a character, Harris did so and delivered his drawings of Blinky, and it was understood by both parties that CBL would use Blinky in its marketing campaign.

3. Did CBL exceed the scope of the nonexclusive license?

A licensee can exceed the scope of a nonexclusive license which permits the licensor to sue to enforce his rights. Harris might have an argument that CBL has exceeded the scope of the license. First, it seems clear from the correspondence that both Parties operated with the understanding that Harris would be involved in the marketing campaign and design of future images. Moreover, he again notified CBL of his belief that he owned the rights to Blinky and wanted to discuss transfer of ownership and royalty payments. Therefore, CBL's continued use of Blinky without Harris' involvement at all may be viewed as excessive. But, it appears that CBL has paid Harris a reasonable amount and that the price was not discounted as in Atkins. Nonetheless, Harris says that separate payments for marketing and design are customary in the field. This is a fact specific inquiry that must be weighed. However, at the very least, Harris will likely be able to obtain continued royalty payments for CBL's use of Blinky.

MPT 1 - Sample Answer 2.

(disclaimer)

MEMO

To: Jean Perwin

From: Applicant

Date: Feb. 21, 2006

Re: Harris v. CBL

Issues:

1. Does Harris own the Blinky copyright, or does CBL own it as either a "work for hire" or as the result of a transfer of ownership?

   There is a strong argument that our client has retained ownership of the Blinky copyright. Sec. 204 states that a transfer of ownership, other than by operation of law, is not valid unless an instrument of conveyance or a note or memo of the transfer is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent. Pursuant to Sec. 201, initial copyright ownership vests in the author (here, Harris) of the work. Since Harris has the initial copyright ownership and had not expressly conveyed copyright ownership of Blinky to CBL, there has been no transfer of ownership.

   This is not a "work made for hire." A "work made for hire" is "a work prepared by an employee within the scope of his/her employment OR a work specially ordered or commissioned. . .if the parties specifically agree in a written instrument that the work shall be considered a work for hire." Wilkes. Here, when Harris designed Blinky, he was not an employee of CBL; he was an independent graphic artist who entered a competition. Wilkes supports his contention.

Although Sec. 1.03 of the written agreement between Harris and CBL states that Blinky is to be considered a work for hire, this agreement was executed after the creation of Blinky. The Wilkes court held that a written work for hire agreement signed after the creation of the material ordinarily does not meet the statutory mandate. In a Footnote, the court noted that the inclusion of a copyright notice (such as the one Harris included in his email sending Blinky to CBL) is evidence of the author's intent to retain ownership of the material and not to create a work for hire.

The Wilkes court noted that "the writing requirement may be met by a document . . . executed after the work is created only if the writing confirms a prior agreement . . . made before creation of the work protected by copyright." Contrary to the situation in Wilkes, CBL did not tell artists entering its competition that the work chosen would be a "work for hire" nor did CBL send a written memo stating that the work would be a "work for hire" prior to selecting a competition winner. Thus, there was no "prior agreement."

In summary, because Harris did not transfer copyright ownership to CBL, Harris was an independent contractor (not an employee), there was not a signed written agreement that Blinky was a "work for hire", and Harris expressed his intention to retain copyright ownership (by including "(c) 2005 Steve Harris"), Harris has retained copyright ownership in Blinky.

2. Assuming Harris owns the copyright,

a. a. Did Harris grant permission to CBL to use Blinky?

As stated in Atkins v. Fischer, an implied nonexclusive license will arise where :

1. a person (the licensee) requests the creation of a work – CBL did request creation of the work (which resulted in Blinky);
2. the creator (the licensor) makes the particular work and delivers it to the licensee who requested it – the creator (Harris) made Blinky and delivered it to CBL; and
3. the licensor-creator intends that the licensee-requestor copy and distribute his work – the licensor-creator (Harris) intended that the licensee-requestor (CBL) copy and distribute his work (as evidenced by Harris entering the contest, the emails from Harris to Cabot and the Agreement itself). Thus, an implied nonexclusive license arose.

   A nonexclusive license permits a licensee to use the copyrighted material, but does not transfer ownership. A licensor can file suit if the licensee's use goes beyond the cope of the license. Thus, the main issue is whether CBL's use of Blinky violated the scope of the license.

b. Is CBL's use of Blinky within the scope of any such implied nonexclusive license?

The courts use of 5 relevant factors in determining whether a licensee has exceeded the scope of the license include:

1. the amount of consideration exchanged:

   Harris was paid $7,000 each month. In Atkins, the author was paid $2,000 per month and the court held that this was a low amount which indicated that a limited license was granted. However, the total of $42,000 that Harris was to receive is quite a bit

less that the $78,000 which the court in Effects Associates, Inc. v. Cohen found to grant a broad license. Courts take a holistic approach to these factors, so the other factors may lessen the impact of the consideration paid.

2. the expectations expressed during negotiations and the parties' subsequent conduct, esp. if the licensor knew of and acquiesced to uses that are later claimed to be infringing:

   Harris' expectations were that he would continue to work on developing Blinky into an ongoing marketing plan. This was based on the industry norm, emails from Cabot and the terms of the agreement.

3. whether the agreement was task-specific or if future involvement by the licensor was assumed:

   Sec. 1.02 of the Agreement specifically states that Harris will be very involved in future development of Blinky.

4. any adverts indicating that the licensor intended to retain control of the work:
5. evidence of custom or practice that may clarify the terms of the implied license:

   The custom and practice in this type of business is that the author of the work retain copyright ownership until there is a transfer and that the author will be engaged in developing more extensive uses of his/her material. It is also customary to be separately paid for marketing and copyrighted transfer. Harris has not been compensated for copyright transfer, only for marketing.

   Taken as a whole, it appears that there is a strong case that CBL exceeded the scope of its implied license and Harris has a good chance of winning on the merits of this case.

MPT 1 - Sample Answer 3.
(disclaimer)

MEMORANDUM

To: Jean Perwin

From: Applicant

Date: February 21, 2006

Re: Harris v. CBL

Steven Harris has a potential copyright infringement claim against Columbia Biotech Laboratories, Inc. (hereinafter CBL). This memorandum will address the different aspects of Mr. Harris's

potential claim and evaluate the likelihood of prevailing in such a claim.

1. Did Harris own Blinky or does CBL own it either as a work for hire of as the result of a transfer?

   Ownership

   Blinky will be considered within the scope of a copyright. The character is an "audiovisual work" within the definition provided in 17 U.S.C. 101.

   Under 17 U.S.C. 201(a), ownership of a copyrighted work will initially go to the author of the work. However, this is not the case in 17 U.S.C. 201(b), with a work for hire. A work for hire will vest ownership in the employer or person requesting the work.

   Work for Hire

   A work for hire may be one of two things. It may be a work prepared by an employee within the scope of their employment. Second, it may be a work specially ordered or commissioned. 17 U.S.C. 101 Harris is not employed by CBL The character was created without any supervision of CBL .

   It is more likely that Blinky would be considered a work for hire as a commissioned work. Harris and other artists were commissioned by CBL to create an "animated cartoon character." This should be sufficient to qualify as a commissioned work. There is a second requirement: the parties must expressly agree that the work will be a work for hire.

   CBL and Harris did make a written agreement about the use of Blinky. It includes a Work for Hire clause, that all work performed by Harris in the scope of his services to CBL will be considered a work for hire. It is notable that in the Scope of Services clause, the creation of Blinky is not mentioned. Instead, Harris's services are stated to include the creation of a campaign "using" Blinky. The ads created by Harris after the agreement may be considered the property of CBL, but the contract is silent as to the ownership of Blinky himself.

   Also, Blinky being a work for hire is that the contract was created on December 2, 2005. Blinky was created and submitted by Harris on or before November 18, 2005. Thus, the writing was created after Blinky had already been created. This fact situation was addressed by the 15th Circuit Court of Appeals in Wilkes v. Monterey Festival, Inc. (1997). In Wilkes, an artist was commissioned to create a character for a marketing campaign. The agreement on copyright ownership was made after the character had already been created and accepted by the requestor. The court found that a written agreement could be created after the creation of the copyrighted material "only if the writing confirms a prior agreement, either explicit or implicit." In Wilkes, the character was a work for hire because the parties had previously agreed that the work would be made for hire.

   No agreement was signed between Harris and CBL before Blinky's creation. It also does not appear that there was any implied agreement. Initially, CBL only stated that the winner would "most likely" be hired. Harris requested specific rules or conditions of the contest and was informed by CBL that none existed. CBL never made any reference to a work for hire or ownership. Further, Harris intended that Blinky remain his property. He registered a copyright for Blinky with the U.S. Copyright Office and included a "copyright Steve Harris" notation on the submitted file. The Wilkes court found that this is evidence of intent as to

ownership.

Thus, Blinky is not a work for hire and ownership still belongs to Harris.

Transfer

If Harris transferred ownership of Blinky at any time, this would give CBL a valid right to use Blinky in ad campaigns after Harris's services were terminated. Under 17 U.S.C. 204 (a), a transfer of copyright ownership must be in writing and signed by the owner. Harris was the valid owner of Blinky and no express agreement was ever made to transfer the copyright. Thus, Blinky is still within Harris's ownership.

2. Did Harris grant permission for use via an implied nonexclusive license and, if so, is CBL within the scope of that license?

   Implied Nonexclusive License

   Even if one retains ownership in a copyright, it may be used by another if there is an express or implied nonexclusive license. An implied license occurs when the work is requested, delivered, and where both parties intend that the work be distributed by the requestor. There is clearly an implied nonexclusive license between Harris and CBL. CBL requested, Harris created and delivered Blinky, and both parties intended that CBL use Blinky in its ad campaigns.

   Scope of License

   A copyright owner may still bring suit for infringement when a licensee goes outside the scope of the license. The scope is determined by the intentions of the licensor. The 15th Circuit Court of Appeals found in Atkins v. Fischer (2003) that relevant factors include the amount of consideration, the parties' expectations, whether future involvement was assumed, advisements that the licensor retained control, and custom.

   Harris was paid a total of $42,000 for his services. This is a large sum. However, this is payment not for creation of the character, but for the later campaign work he took part in. Future involvement was not contemplated by the contract as it was limited to six months. It is arguably not within Harris's intent for use of the character to go beyond advertisements within that period unless another agreement was signed. CBL's creation of plush toys is probably outside the scope of the license. CBL's promise that Harris would "make a lot of money" is also relevant evidence. On the basis of all these facts, Harris appears to have a legitimate claim of copyright infringement.

MPT 2 - Sample Answer 1.
(disclaimer)

State of Franklin
v.

John Butler

BRIEF IN OPPOSITION TO MOTION TO QUASH STATEMENT OF THE FACTS

Due to a disagreement regarding the value of Lynn Long's partnership interest in D&L Disposal, Lynn Long and John Butler, the defendant, conducted a mediation session with Flora Hernandez on August 15, 2005. Prior to the mediation, Ms. Long, the Defendant, and Ms. Hernandez entered into a written Agreement to Mediate expressly stating that Ms. Hernandez would be impartial and the parties would treat the mediation as confidential. Ms. Long, Ms. Hernandez and the Defendant were the only parties present at the mediation and no written or audio records of the proceedings were made.

Prior to her death in January 2006, Ms. Long made a statement to Elkhart Police Department that during the August 2005 mediation session the Defendant admitted to dumping hundreds of gallons of waste into the Green River in July of 2005. A review of the test samples of water on the Green River show elevated levels of several toxic chemicals and an unusually high number of dead fish have been reported. Additionally, the books of D&L Disposal indicate discrepancies between the amount of toxic waste produced and the amount disposed of by permit.

In December of 2005, before Ms. Long passed away, the Defendant was charged under Section 330 of the Franklin Criminal Code for the felony of unlawful disposal of hazardous waste. After Ms. Long died, the State of Franklin subpoenaed Ms. Hernandez to testify in the criminal case against the Defendant as to the statement made at the August mediation. Ms. Hernandez has filed a motion to quash citing privileges as a mediator under the Franklin Uniform Mediation Act (FUMA).

II. MS. HERNANDEZ'S TESTIMONY IS NOT WITHIN THE SCOPE OF THE MEDIATION PRIVILEGE OF FUMA BECAUSE THE EVIDENCE MS. HERNANDEZ TESTIMONY GIVES IS NOT OTHERWISE AVAILABLE AND IS SOUGHT IN A COURT PROCEEDING INVOLVING A FELONY.

Section 6(b) of the FUMA creates an exception to the general rule of privilege for mediation communications if a court finds after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting the confidentiality, and that the mediations communication is sought or offered in a court proceeding involving a felony.

This is an issue of first impression for the courts of Franklin. However, we have persuasive authority in the form of a 2004 opinion from the Columbia State Court of Appeals in Rinaker. The Rinaker court held that to make a determination under the CUMA (which is identical to FUMA) a court should hold an in camera hearing to determine whether (1) the mediator is competent to testify, (2) the probative value of the mediator's testimony, and (3) that the mediator's testimony is not otherwise available.

1. The Rinaker court notes that the testimony of the mediator will not be competent if the mediator does not recall or denies the inconsistent statement in question. This court will not be able to determine Ms. Hernandez's competency unless and until the court allows her to be questioned at an in camera hearing.
2. The court must assess the statement's probative value. Probative value is present if the statement has any tendency to make consequential facts more or less probable. Here, the issue in question is whether the Defendant feloniously dumped toxic chemicals into the

Green River. Ms. Hernandez's statement regarding the Defendant's admission would go to the probability of such a fact being true.

3. If the evidence provided by the mediator's testimony is cumulative, the Rinaker court instructs that such testimony should not be allowed in. Given the death of Ms. Long and the lack of records during the mediation session, Ms. Hernandez's testimony is not cumulative. It is in fact the only evidence that definitively ties the Defendant to the elevated levels of toxic chemicals in the Green River at and around the time of the alleged dumping.

III. THE STATE'S NEED FOR MS. HERNANDEZ'S TESTIMONY SUBSTANTIALLY OUTWEIGHS THE INTEREST IN PROTECTING THE CONFIDENTIALITY OF MEDIATION COMMUNICATIONS

The Rinaker Court instructs that if a mediator's evidence is competent, probative and not cumulative, the court must then balance competing policies. The Rinaker Court found that the public policy of encouraging productive mediation by keeping communications during mediation confidential was not outweighed by the important public policy of allowing a criminal defend his due process rights of being able to challenge a witness with an inconsistent statement.

In Retail Store Employees 2004, two parties in a labor union disagreed as to the result of a mediation. The testimony of the mediator was wanted to break the tie between the two opposing parties. In Retail, the Court held that the need for evidence was not outweighed by the need for impartiality of mediators. However, Retail expressly limited its holding to the facts before the court, the long history of mediation in the labor union context, and the absence of compelling public health or safety issues. The Retail court expressly noted that it could envision a situation where public policy would lead to a different result.

Retail's holding can easily be distinguished from the present case because this court is confronted with a criminal versus civil matter and this case involves compelling issues of public health and safety. In this case, the public policy of punishing and prohibiting the dumping of toxic materials and endangering public health and safety is outweighed by the need for cheap mediation and confidentiality.

In conclusion, the FUMA privilege for mediation does not apply in this case because the testimony is not otherwise available and the public policy issues of a criminal investigation regarding public health and safety substantially outweigh the policy considerations of encouraging mediation.

MPT 2 - Sample Answer 2.

(disclaimer)

STATEMENT OF FACTS

At issues in this case is whether a mediator should be prevented from testifying concerning matters discussed during mediation. On or about August 15, 2005, Hernandez, Long, and Butler all met in order to mediate a business dispute between Butler and Long concerning the value of the waste disposal business which Butler and Long had started. During such mediation while Long and Butler were discussing the value of the business, Butler lost his temper and blurted out that he saved the business a bunch of money by illegally dumping waste in the Green River rather

than disposing of such waste according to the law and acquiring expensive permits. This information became known to police on September 2, 2005, when Long reported Butler to the police for such illegal activities. However, Long has since passed away and the only available source of such admission is Hernandez, the mediator. While the case concerns the privilege a mediator has concerning matters during mediation, the case is larger than that privilege.

The Green River where the dumping occurred is located on the outskirts of Elkhart. The river is popular for kayaking, fishing, and swimming. The river was recently restocked with the native blue fish. To say the least, the river is enjoyed by lots of citizens of the state of Franklin and those citizens could be placed in danger by the action of the Defendant in this case. This fact is more than supported by the fact that during the same period when this case was mediating, the Department of Natural Resources was testing the river and found that the levels of contaminants in the river where the substance was admittedly dumped was high and fish were killed in great number.

The Defendant should not be allowed to hide behind a privilege of the mediator to protect criminal behavior when the statements during mediation are substantiated by outside sources. For this reason and for reasons that follow, the State of Franklin respectfully requests that this motion to quash be denied.

1. The FUMA privilege protecting the mediator from testifying is not absolute and does not prevent the admission of Hernandez's testimony which is not otherwise available and the needs substantially outweigh the interest of confidentiality of Butler.

   While there is no case which addressed this issue before, there is authority for the proposition that Hernandez's testimony is admissible. The FUMA is identical to Uniform Mediation Act of the State of Columbia and Columbia Court of Appeal addressed this very issue just last year in the case Rinaker v. Superior Court of San Joaquin County. In Rinaker, the court was faced with the issue of when to allow the testing of mediator to be called into a criminal trial. In conclusion, that mediators privilege was not absolute, the court determined that mediators testing could be called in several requirements are not. Rinaker at 2. The first determination to be made was whether a party was calling testimony could be privileged. Id. Second, the court needed to have an in camera review or hearing to determine, according to (b) of FUMA, if the mediator (1) was competent to testify, (2) whether the evidence was helpful to the trier of fact and (3) that the evidence was not otherwise available. Id. Then if the mediator passes these elements or is competent, her testimony is not cumulative and it is not available otherwise, the court was to determine if the interest in mediation confidentiality outweighs the interest opposing the privilege.

   In this case, the test handed down by the Columbia Court is not the mediator heard the statements and presumably remembers them. The mediator is also the only evidence linking Butler to the crime. Thus, the information is helpful and not otherwise available. The second determination must then be made, that the interest in confidentiality is outweighed by the interest of truth in criminal proceeding and protecting the public.

   Here the proposed information is not available otherwise and concerns a crime that could kill people if allowed to occur again. Accordingly, as in Rinaker, the court should hold an in camera hearing and deny mediator Hernandez's notion.

   While Hernandez, in his motion, relies on Retail Store Employees Union Local No. 79 v. Nation Labor Relations Board, such reliance is misplaced. In Local 79, the issue was

enforcement of settlement supposedly reached at mediation, not a criminal matter. It stands to reason that a case was not settled at mediation if the parties won't stand by the settlement. Second the case is a federal case based on federal law and not a criminal matter. Rinaker is more point and should be followed by this court.

2. There are no interests in the confidentiality at mediations that outweigh the public interest in preventing crimes and incurring clean water. Hernandez states that party honesty and promise of settlement outweighs any interest in revealing matters during mediation. This is simply wrong. Confidentiality during mediation is necessary. However, no such interest can outweigh society's interest in preventing crime which could injure potentially hundreds of people.

   Here, Butler potentially poisoned any person coming in contact with the river. Such atrocious criminal conduct cannot be allowed to hide behind a privilege when no other means is available to link the wrong done to the crime. Moreover, mediation is between parties and the State should not be bound by the parties' mediation agreement.

MPT 2 - Sample Answer 3.
(disclaimer)

To: State of Franklin District Court of Western County

From: State's Attorney Office, County of Western

Re: State of Franklin v. John Butler

OPPOSITION TO HERNANDEZ'S MOTION TO QUASH

1. STATEMENT OF FACTS

John Butler and Lynn Long were business partners in B&L Disposal. While in mediation, with Flora Hernandez as mediator, Butler admitted to illegally dumping hazardous waste into Green River at the south footbridge on the outskirts of Elkhart. Subsequent testing showed increased levels of toxic chemicals down river from the alleged dumping site. Long contacted the police concerning practices of John Butler in connection with their business. Long decided to sever business relations with Butler and had to enter into an agreement to mediate because neither party could agree to the value of the business and Long's share. The agreement was entered into by all parties on August 15, 2005. During the mediation session, Butler stated that he had dumped chemicals into the river. After investigation established discrepancies for waste collection by B&L Disposal, Butler was charged with felony unlawful disposal of hazardous waste. Long died prior to trial set date. Flora Hernandez was subpoenaed to testify concerning specific statements made in the August 2005 meditation.

2. AN IN CAMERA HEARING IS REQUIRED TO DETERMINE FACTORS CONCERNING EVIDENCE OF FELONY CHARGED AGAINST BUTLER AND REQUIREMENT FOR HERNANDEZ TO TESTIFY

Under the Uniform Mediation Act, mediation communication is privileged and not subject to discovery or admissible in evidence in a proceeding unless waived (4 (a)). The Uniform Mediation Act provides exceptions to privilege. 6.a. (1-7). The Franklin Uniform Mediation Act (FUMA) created privileges but the privilege is not absolute. The Columbia Court of Appeals in its decision in Rinaker v. Superior Court of San Joaquin County determined that exceptions under the similar worded Columbia Uniform Mediation Act (CUMA) has exceptions to prevent parties from misusing the confidentiality protection but the exceptions do not relate to past acts. Here, the issues in question concerning Long, Butler, and their company are concerning past acts as discussed in the mediation. As such, when the mediator testimony is relevant to a criminal matter, 6(b) provides that the court is to hold an in camera hearing where the court will decide whether the evidence is not otherwise available and whether the need for the evidence substantially outweighs the interest in protecting mediation confidentiality. Here, Long set forth allegations concerning statements made by Butler in the presence of the mediator Hernandez. Long is no longer available to testify to such matters. Further, such evidence is an essential component to felony charges brought against Butler by the State. Based on the facts set forth, Ms. Hernandez is not able to assert privilege against disclosure under FUMA 4(b)(2). The in camera hearing will maintain mediation confidentiality while the court considers factors bearing upon the constitutional rights implicated. (id). The court will be able to determine whether Hernandez is competent to testify regarding the statements. If Hernandez is unable to recall statements or if she denies statements, the court would be able to eliminate the need for Hernandez to testify in open court (id).

The court held in Retail Store Employees Union v. National Labor Relations Board. United States Court of Appeals (15th Cir. 2004) that there are two factors to balance when considering allowing mediator to testify over matters discussed in a mediation session. First, the court looks at the long-standing public policy of refusing to call mediators to testify. The policy is to allow mediators to maintain the appearance of neutrality essential to successful performance of their tasks. Second is the Long Fundamental Principle of American Law that the trier of facts is entitled to every person's evidence. Id. What sets this case apart from our particular facts is that the Retail Store Employees mediation concerned labor and management issues where the mediator was dealing with a bargaining session. As with the August 2005 mediation, Long and Butler were settling their business and Butler made statements outside of the winding up process. The issues that Butler brought up during the mediation in the presence of former business partner Long and mediator Hernandez were of public policy concerning water quality in Elkhart. Due to the nature of the comments and the charges of unlawful disposal of Hazardous waste would in fact allow Hernandez to speak on those comments that Long had alleged were made during the mediation. Therefore, the court should allow for an in camera hearing to weigh the statements against the interest of keeping the mediation private.

As the mediation communication is not privileged under FUMA 6(a) or (b), only the portions concerning statements made by Butler in the presence of Long and Hernandez may be admitted. Because the statute is, in essence, protecting the rights of the parties to settle their own issues, the statute cannot also protect crimes that have already been committed or could be concealed in the future. FUMA 6(a)(4).

In conclusion, based on the aforementioned cases and law in support of the facts presented, mediator Hernandez's Motion to Quash Subpoena should be denied. Ms. Hernandez should be compelled to testify about the limited issues concerning the dumping of toxic waste via statements made by John Butler in the August 2005 mediation. As the communications requested cannot be obtained by any party, we request that the court grant brief opposition to Hernandez's Motion to Quash Subpoena.

Respectfully,

State Attorney’s Office