February 2011 Bar Examination Sample Answers

DISCLAIMER
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Question 1 - Sample Answer # 1

1. The employment agreement between Bob and Climax Inc. appears to be enforceable unless public policy preclude such restrictions upon physicians.

For a restrictive covenant in an employment agreement to be upheld, it must be limited in duration, scope, and geographic limitation. If the agreement is limited and not unduly burdensome, it will be upheld by the Georgia Courts. In the event the covenant tends to be a little too restrictive, GA courts may blue-pencil the covenant so that it can be complied with.

The covenant contained in the employment agreement is limited in duration because the time restricted is 2 years. Georgia has held that 2 years is a reasonable restriction. The agreement also limits Bob's ability to work during this time which is not excessive. However, there is an issue with the geographic scope of the covenant. The language of the Exhibit is not limited to particular addresses, so it gives the effect of precluding him from working in the town or any address within 25 miles of the town as opposed to the office. Therefore, Georgia courts may blue-pencil the restrictive covenant so that Bob is precluded from working within 25 miles of the office. (Unclear, but if public policy prohibits doctors from entering into restrictive covenant similar to the prohibition against lawyers to do so, the covenant will be enforceable).

For the reasons set forth above, the restrictive covenant in the employment agreement may need to be blue penciled by the court, but absent public policy, it is enforceable.

2. Shareholder agreements are agreements by and among the shareholder, the corporation, and the other shareholders. Such agreements list the duties and obligations of the shareholder to the other parties. Shareholder agreements may contain restrictive covenants.

The problem with the restrictive covenant in the shareholder agreement is that the term "Territory" is too broad. Territory is not defined as specific addresses, nor does it refer to facilities already owned and operated by Climax. Conceivably, Bob could comply with the terms of the restrictive covenant by providing professional services outside of the 50 mile radius, but if Climax later purchases a facility within

the 50 miles radius, then Bob will be in breach of the covenant. Therefore, unless the GA courts blue pencil the geographic location to make it more specific the covenant is not enforceable.

3. Based upon the requirements set forth in Question 1, it is unlikely that a court will enforce the restrictive covenant against Chuck.

The restrictive covenant in this argument precludes Chuck, forces him to obtain the permission of his previous employer before he is able to accept new employment. Such a covenant is over burdensome in terms of the duration (5 years), geographic location (50 miles) and the requirement that he seek permission. The covenant essentially restricts Chuck's ability to obtain a living. Furthermore, Chuck is restricted from obtaining employment in areas outside of Iron City where he worked.

Even though Chuck is educated and not a lay person, there is significant unequal bargaining power that will likely preclude enforcement.

For these reasons, it is highly unlikely that a court will enforce the restrictive covenant against Chuck.

Question 1 - Sample Answer # 2

1. As Abe is now the sole shareholder of Climax Clinics Inc., he is attempting to enforce the contract provisions against Bob. At issue is whether the restrictive covenant in the employment agreement is enforceable against Bob. Note that Georgia recently passed a constitutional amendment allowing for greater use of non-compete agreements. Restrictions on employment are valid if they contain a limited duration, geographic scope, and type of employment prohibited. Non-compete agreements can be obtained from an employee in Georgia without additional consideration other than continued employment and are valid. The agreement states that Bob will not practice medicine or see patients within a 25 mile radius of a specific list of offices. Not including the addresses of the clinics will not be an issue as long as the prohibited locations can be ascertained and it is likely that it can be easy to find the locations of the offices. The prohibition is restricted to offices where Bob actually saw patients for the corporation within the past two years. This limits the prohibited areas to areas Bob recently worked. The problem with this covenant is that it does not provide a time limit. The agreement cannot prevent Bob from working in these areas forever and since courts tend to narrowly construe these provisions it will likely be held not enforceable. Georgia has recently allowed "blue-penciling" of these agreements to allow the court to modify these agreements. It is unclear if the court would act to add a reasonable time frame to a non-compete that completely lacked such a provision.

2. At issue is whether the restrictive covenant in the shareholder agreement is enforceable against Bob. Shareholder agreements can restrict the sales of shares, especially in a close corporation such as this where there are only two shareholders. Shareholder agreements may also contain non-compete restrictions and there is no issue of consideration because it is part of a bargained for exchange. The agreements still must be of reasonable scope and duration. This agreement attempts to be much more broad in its prohibited territories, prohibiting "shareholder from coming directly or indirectly into the territory of any location at which the corporation is providing clinical services to provide professional

services." The agreement will likely be found to be too broad in that prevents Bob from participating in any market that the corporation's locations "providing clinical services." This definition of restricted territories includes locations that Bob has never practiced at and might expand to include more locations in the future and is too broad of a restriction on Bob. It also is not restrictive to the practice of medicine as it prohibits any professional services which could include other professions. As the covenant defines the geographic scope too broadly, the courts will likely not enforce it as they narrowly construe non-compete agreements.

3. At issue is whether the restrictive covenant in Chuck's employment agreement is enforceable. The non-compete agreement with Chuck provides a restriction on the duration of the agreement, 5 years. It also provides that he cannot compete within a 50 mile radius of any of the corporation's offices. This provision allows for consent to be obtained from the corporation which Abe appears not to be willing to give. Non-compete agreements can be obtained from an employee in Georgia without additional consideration other than continued employment and are valid. This agreement, like the shareholder non-compete with Bob, lists all offices of the corporation as part of the restricted territory and therefore may be found too broad of a restriction to be enforced. As Chuck is working in Donalsonville, not Iron City where the Climax Clinic is located there is even less of a chance of the agreement being enforced.

Question 2 - Sample Answer # 1

I. Legitimation

Bob must file a legitimation action in the Superior Court of the county in which Betty resides to establish his legal rights to the minor child. In Georgia, a father has no legal rights to a minor child born out of wedlock. The only party with legal rights to a minor child born out of wedlock is the child's mother. A biological father, however, may request legal rights to his child by filing a Petition for Legitimation in the county of the mother and child. Bob will need to take immediate steps to protect his interest in the minor child because a putative father can abandon his opportunity interest in an illegitimate child.

As an initial matter, however, we are told that Betty is pregnant with the child. Because Bob has not yet been granted legal rights to the minor child, Betty could place the child for adoption without Bob's consent. Therefore, Bob should immediately register with the putative father's registry. The putative father's registry is a registry kept by the Department of Human Resources reflecting putative father that assert that they are the biological father of a minor child. Bob will want to register because he will receive notification if Betty puts the minor child up for adoption upon birth of the child.

By filing a Petition for Legitimation in the Superior Court, Bob will assert that he is the biological father of the child, that he has intimate relations with the mother, and he is a fit and proper parent to have legal custody of the child. Bob may also file for temporary and permanent custody of the minor child and seek parenting time in the same petition. The law in Georgia previously required that a minor child be declared legitimate before a biological and legal father could be awarded temporary or permanent custody of the child with a right of parenting time. That law, however, has changed and now a biological father can seek physical custody and the right of parenting time in the same petition.

Further, Bob will want to begin setting aside child support for the minor child. Bob will want to take this step even though the child is not born. Bob earns a "very handsome salary" and should begin putting aside child support, into the registry of the court or a savings account, if the child is not yet born. Bob should take this step so that he can assure the judge in the Superior Court case that he is a fit and proper parent to have custody of the minor child. This is also a means for Bob to establish that he has not abandoned his opportunity interest in the minor child, whether born yet or not. A biological father has a constitutional right to establish legal rights to a minor child. However, a biological father can lose the right if he is not timely in pursuing his opportunity interest in the minor child. There are several ways in which a biological father may abandon his opportunity interest: by failing to provide child support, by waiting too long to seek to legitimate the child, and by failing to establish a familial relationship with the child.

Because Bob desires to protect his rights in the minor child, he should take immediate steps to protect himself and the child, including the filing of a legitimation action.

II. Child Custody Modification

Betty will be unsuccessful in modifying custody for two reasons. First, Betty cannot meet the legal standard. Second, an application of custody factors does not assist Betty in her quest for a modification of child custody.

A. Legal Standard

In an initial child custody case, a trial court applies the best interest of the child standard. However, in a child custody modification action, the non-moving party must establish that there has been a material and substantial change in circumstances that adversely affect the minor child. The change in circumstances cannot be that the non-custodial parent is now doing well. Instead, the focus is on the minor child and whether or not there has been a material and substantial change in circumstances adversely affecting the welfare of the minor child since the entry of the final custody order.

Here, five years have passed since Bob was awarded custody of the minor child. Betty is now doing well having "cleaned up her act." Betty owns her own home, completed a graduate level degree, and has landed a job that pays her a six-figure salary. While it is commendable that Betty is now stable, the trial court will focus on the minor child in making a determination as to whether or not to modify custody from the custodial parent to the non-custodial parent. We are not given any facts to assume that Bob has not been meeting the needs of the child or that there has been a material and substantial change in circumstances adversely affecting the welfare of the child. Therefore, assuming that Bob is stable and has been doing an excellent job of raising the child, Betty will not be successful in her child custody modification attempt. Because we are not given facts to assume that Bob has not been taking care of the child, it is likely that Betty cannot meet her burden of establishing a material and substantial change in circumstances affecting the welfare of the child.

B. Factors for Determining Custody

In an initial child custody determination, a trial court considers many factors, including the best interest of the minor child. In a child custody modification, however, there is a rebuttable presumption that arises that the custodial parent is the appropriate and fit parent to have custody of the child. The non-custodial

parent must overcome the presumption. Specifically, a final child custody order is conclusive between the parents and the non-custodial parent must prove that there has been a material and substantial circumstance adversely affecting the welfare of the minor child. The trial court will consider factors such as the child's ties to the community, the child's relationship with either parent, the ability of each parent to foster a relationship between the child and the non-custodial parent and extended family. Further, a trial court looks to how well the child is doing in her current custodial arrangement and if there has been a material and substantial change in circumstances since the entry of the final custody order. Because we are not given facts showing that Bob has not been meeting the needs of the child, it is unlikely that Betty will prevail.

Question 2 - Sample Answer # 2

1. The first step Bob should take is to register with the Putative Father Registry. This will have the effect of protecting his rights somewhat by requiring that he be provided notice of any action which would operate to his terminate parental rights or if Betty takes any other steps that would affect his rights before he can get before the court.

Bob may then file a Petition for Legitimacy with the Superior Court and submit evidence of paternity by way of DNA testing. A DNA test establishing at least a 97% probability of paternity gives rise to a presumption of paternity. Assuming this will be no problem for Bob to satisfy, proof of paternity will give rise to Bob's rights as a father notwithstanding that the child was born out of wedlock. Unless determined unfit as a parent, Bob has constitutional fundamental rights in the upbringing and education of his child. He may move for the court to award him custody of the child and/or visitation (if primary custody is granted to Betty - although the "tender years" doctrine has been abolished, there is still a presumption in favor of the child remaining with the primary caretaker as such is typically in the best interests of the child).

2a. In all matters involving children, the controlling standard is "the best interests of the child." Although Georgia no longer recognizes the "tender years" doctrine, there is a presumption that it is in the best interests of the child to be in the custody of the primary care giver. In this instance, the facts suggest that Bob has been the primary care giver of the child for more than five years. As a custody order has already been entered, Betty will have to make a showing of "substantial change of circumstances" in order for the court to revisit the award of custody. However, such a showing will not be required for the court to modify to permit Betty visitation without making any change as to the award of custody of the child. Of note, because this matter is not multi jurisdictional in nature, the UCCJEA (Uniform Child Custody Jurisdiction and Enforcement Act) does not come into play.

2b. As noted above, to amend the order granting Bob custody of the child, Betty must show a "substantial change in circumstances." Arguably, such exists in this case - Betty has earned a graduate degree, obtained a well-paying job, purchased a new home, and has otherwise pulled herself together to become an upstanding and contributing member of society. Additionally however, the court will consider, above all, the best interests of the child. There is no indication of any questionable activities by either Betty or Bob that would potentially harm the child's physical, mental, emotional or moral health. In fact the only factor Betty has to raise is her recent change in circumstances as noted above. Because Bob has provided a stable environment for the child for the past five years and has by all accounts been a model father, the court may well find that it is not in the best interests of the child to remove him from his

home to live with his mother. Factors considered will also include whether a change would disrupt the child's education, social or emotional ties. Since the child is under 14, there is no presumption in favor of granting custody based on the child's election. Much more likely an outcome is that the court would award Betty visitation (if she did not already have visitation) or additional visitation.

Question 2 - Sample Answer # 3

1. The issue is how is Bob able to legitimize Betty's child.

When legitimizing a child, the state of Georgia requires that the father petition the court. The alleged father will file a claim in the Superior Court in the county where the mother resides since this court has jurisdiction over these issues. The father will file a complaint with the court and have it served on the mother by a sheriff within 5 days of the filing of the complaint. The service should be to her personally or at her home to a person of suitable age. The mother will have 30 days in which to respond to the complaint with an answer.

The process of legitimization may include the review of a putative father registry and/or the performance of a paternity test. The putative father's registry is a device designed by the state to document the names of fathers who were engaged in sexual intercourse with a woman at a particular time in the event that a custody issue arises and they want to be contacted to ensure their rights to the child are protected. This registry is helpful in establishing preliminary rights of a putative father, but they are not conclusive without a paternity test. A paternity test is performed to test biological traits such as DNA of the father and compare it to the child. In the event that the DNA matches, the court will legitimize the child and grant the father legal rights to the child.

2 a. The legal standard for making the custody determination is the "Best Interests of the Child".

In this case, the best interests of the child would be the continuity of their lives at home, at school and in their community. The child in this case has been with Bob for his entire life (five years) and has had no contact with his mother over that period of time. The facts provide that he is living in stable home environment and is living comfortably with Bob with his secure salary and his nice home in a quiet neighborhood. He is five years old and is most likely about to attend kindergarten. Even though Betty has finally gotten her life back on track, it may be a challenge to permit her to disrupt the continuity that has been established for the child over the last five years. Since Betty's parental rights have not been terminated, it is possible for her to request custody of the child. In Georgia, no contact with your child for over a year is enough to establish abandonment. Therefore, her absence and lack of contact with the child for over five years would establish grounds for Bob to initiate termination of Betty's parental rights.

2b. The issue is what factors should be established in considering the issue of custody.

Custody can be determined by the best interests of the child by considering:
1) Parents' wishes
2) Child's wishes
3) Parents' ability to provide adequately for the child
4) Child's stability at home, school and community

In this case, both parents want custody of the child. Since neither of the parents' rights have been terminated and they both appear to be fit parents, it is very likely that they have strong arguments for raising a custody issue in court. However, as mentioned above, termination of parental rights can be petitioned if the moving party can establish that the non-moving party has abandoned their child and is not fit to care for the child. In this case, both parents appear to be fit, however Betty has clearly abandoned the child by not maintaining contact with Bob and the child for over five years.

In Georgia, a child between the age of 11 and 13 has persuasion over a judge's decision regarding custody. If a child over the age of 14, the judge will defer to the decision the child makes unless the parent is unfit and it is not in their best interest to be with that parent. In this case, the child is only 5 years old therefore, the child's decision is irrelevant and their best interests will be considered and determined by the court.

In this case, both parents appear to be able to adequately provide for the child. Bob has been employed at his job for over five years and makes a decent salary. He also owns a home in a nice neighborhood in Atlanta, where he has raised his child since his birth and conducts himself as a model father. Betty, on the other hand, has recently obtained employment paying six figures and lives in an upscale community. It appears that she would be able to provide the child with adequate provisions as well.

However, since both parents have maintained their parental rights and are both able to provide for the child, the best interests of the child will probably be determined by the stability of the child's home, school and community. It is possible that the best interests of the child could be met by allowing Betty some form of custody of the child, but it would definitely have an effect on the stability of the home, school and community that the child has established over the last five years with Bob. If Bob does not raise the termination of Betty's parental rights, Betty would be entitled to fight for custody of the child. The court could take all the issues into consideration and make the determination based on the best interest of the child at the time.

Additionally, in Georgia, child custody can be modified if a material change takes place. The parent wanting to modify the custody order would petition the court to modify custody and the court would take all the aforementioned factors into consideration at the time of modification and custody could be adjusted accordingly.

Question 3 - Sample Answer # 1

The issue is whether Farm to Table can bring a strict liability claim against Evergreen for the damages to the pepper plants caused by the BLS. Under Georgia law, a claim based on strict products liability may only be asserted against the manufacturer of the goods in question. While Evergreen germinated the brigadier seeds in its greenhouse, it received these from Farm to Table. In turn, Farm to Table had purchased the seeds from a seed dealer before having them sent to Evergreen directly by the seed dealer. In this context, Evergreen is not a manufacturer of the brigadier plants because the seeds were not grown by them. Instead, Farm to Table should pursue a claim of damages against Evergreen based on a negligence theory based on their breach of duty regarding the BLS-infected pepper plants.

The issue is whether Farm to Table can bring a breach of warranty claim against Evergreen for the implied warranty of merchantability for the Brigadier plants. A claim under the implied warranty of merchantability can be raised against a commercial supplier of goods of a certain kind. Evergreen is not a commercial supplier of brigadier seeds, as evidenced by the fact that Farm to Table had a seed dealer ship the seed to Evergreen. In this case, Evergreen merely provided a service whereby they take their customer's seeds and grow them into seedlings. As such, Farm to Table cannot successfully pursue a claim based on the implied warranty of merchantability against Evergreen for the diseased Brigadier plants.

If the Stilleto and revolution plants were diseased instead of the Brigadier, then Farm to Table could make a claim for the implied warranty of merchantability. Evergreen purchased these seeds itself in order to grow them into seedlings, which makes them a seller of such goods. Therefore, the implied warranty of merchantability would apply if the stilletos and revolutions were diseased.

Farm to Table should be awarded expectation damages for its loss of the full benefit of its contract with Evergreen. Under Georgia contract law, expectation damages are designed to put the non-breaching party in the position it would have been in had the contract been performed to its terms. To do so, he must offer evidence of how much his sales were hurt based on the unavailability of the pepper plants. He must present evidence of how much brigadier plants were selling for this fall, and he should be awarded that amount of his lost profits. He may also offer evidence of past-year's sales of brigadier plants to indicate how badly his full sales were offered due to the total loss of the brigadier crops.

Question 3 - Sample Answer # 2

MEMORANDUM
TO: Partner
FROM: Applicant
DATE: February 22, 2011
RE: Farm to Table v. Evergreen

1. Farm to Table may bring a strict liability claim against Evergreen for the damages to the pepper plants caused by Bacterial Leaf Spot (BLS), but it is likely it would be unsuccessful. Strict liability claims are generally negligence claims reserved for when a party is engaging in inherently dangerous activities such as keeping wild animals for pets, for products liability claims or if legislation deems it a "strict liability" claim. Here, it is clear that raising plants is not an inherently dangerous activity.

Nor does Farm to Table have a products liability claim against Evergreen. To prove a products liability claim, they would have to prove that the product came from Evergreen, the merchant, which it did not. They would have to prove that it had a manufacturing or design defect, which is impossible for a plant. A products liability claim would not survive a motion for summary judgment out of the gate.

2. If Farm to Table brought a breach of warranty claim against Evergreen for the implied warranty of merchantability for the Brigadier plants, it would likely be unsuccessful. Under the UCC Article 2, a merchant, who is defined as someone who sells goods of a kind, issues a warranty with the goods they sell. These warranties can be express or implied. An express warranty is one that is expressly written

into the contract. An implied warranty is one that is implied in the sale of the goods basically acknowledging that the product the purchaser is buying is guaranteed by the merchant.

Here, Farm to Table does not have claim for breach of implied warranty of merchantability because they did not purchase the Brigadier seedlings from Evergreen. Rather, they bought the seedlings from another merchant and sent them to Evergreen. Evergreen then provided them the service of growing the seedlings into plants. Because they were providing a service instead of a good, there was no implied warranty of merchantability for the Brigadier.

However, should the Stilleto and Revolution plants have been diseased as well or instead of the Brigadier plants, Farm to Table would have likely had claim for implied warranty of merchantability. These two plants were purchased as seeds from Evergreen, and therefore fall under the goods category. The other part of the contract was for Evergreen to raise the plants, which as discussed above, is a service. Because both goods and services are the purpose of the contract, it would be up to the court to determine whether the contract qualified mostly as a "goods" contract or a "services" contract in determining whether an implied warranty of merchantability claim exists.

3. The amount of damages for the loss of Brigadier pepper crop by Farm to Table can be measured in two ways: either by the amount it cost Farm to Table to replace the pepper crop plus incidentals, or their lost profits by not having the Brigadier pepper plant. To prove its damages claim, Farm to Table will likely have to provide the copy of the report sent back from the lab stating the Brigadiers were diseased, but not only diseased, but that the actual cause of the disease was the same strand from that at Evergreen. Additionally, Farm to Table will also need to provide an invoice to prove how much they paid to replace the diseased pepper plants. Or, if they could not replace the plants with others on the market, they would have to prove their lost profits. They could probably prove lost profits by showing how many orders they had for Brigadier pepper plants and what the likely profit would have been for the sale of those plants.

Question 3 - Sample Answer # 3

1. The issue here is whether Farm to Table can seek strict liability damages, presumably under a theory of liability for a defective product. Georgia law permits recovery under a products liability action only against the "manufacturer" of the product (and in some cases against the manufacturer of a specific component), and not ordinarily against a distributor, seller or other intermediary (unlike many other jurisdictions that permit recovery in these actions all the way up the chain of control). The issue here is whether or not in the unique context of these seedlings, Evergreen can be considered the "manufacturer" of the defective product (in this case the diseased plants), or whether Evergreen was merely an intermediary service provider. The facts provide that Farm to Table actually purchased the offending Brigadier seeds from a "seed dealer" and then had the seeds sent from the dealer to Evergreen directly, so that Evergreen could grow the sprouts.

Of importance here, Article II of the Uniform Commercial Code ("UCC") governs the sale of goods, which pursuant to the UCC includes seeds and crops. However, with respect to the Brigadier seeds, the facts indicate that these seeds were actually sold to Farm to Table directly, and were not purchased from Evergreen. Rather, with respect to these particular seeds, Evergreen was providing services associated

with the initial planting (not goods). Because Evergreen did not actually sell the goods (i.e. the seeds) to Farm to Table, it would be inappropriate for the court to award any type of strict liability damages to Farm to Table based on a theory of products liability or otherwise. After all, with respect to these particular plants, Evergreen was providing services, not goods. It is worth noting that Farm to Table could contend that this is an indivisible contract that is primarily for goods (as opposed to services), based on the fact that the amounts for the various seeds and sprouts (the latter of which required services and not the sale of goods) were not invoiced separately. However, this theory is likely to fail based on the clear fact that with respect to the damages alleged, Evergreen was providing only services, and not goods.

2. No, this type of warranty claim would not be appropriate with respect to the Brigadier plants. Pursuant to Article II of the UCC, a merchant (as defined in the UCC), in addition to any express warranties that it may give, is deemed to give an implied warranty of merchantability with respect to its goods sold. A warranty of merchantability is a warranty by the merchant that the goods being sold are fit for their ordinary use. However, in order for the warranty of merchantability to apply in this scenario, Farm to Table must demonstrate that the Brigadier plants were goods purchased from Evergreen such that Article II of the UCC would apply (thereby giving rise to the implied warranty of merchantability). As discussed in Section 1, supra, this is problematic, because Farm to Table purchased the Brigadier seeds directly from a seed dealer and then drop shipped the seeds to Evergreen for planting and sprouting. Of critical importance, there is no evidence showing that Evergreen provided anything other than services with respect to the Brigadier plants. Again, as stated in Section 1, supra, Farm to Table could claim that the entirety of its order was predominately an order for "goods" and is therefore governed by the UCC (supported by the claim that the goods and services were not separately itemized), but this theory is unlikely to be successful.

This answer would change completely in the event that it were the Stiletto and Revolution plants that contracted the disease and caused the damage, because with respect to the Stiletto and Revolution plants, the facts are clear that Evergreen provided the seeds, which would seem to create a viable claim that the sale of these particular plants was a sale of goods and therefore governed by Article II of the UCC. In the event that this were found to be the case, the implied warranty of merchantability would attach and Farm to Table would have a more viable claim against Evergreen.

3. The measure of damages for Farm to Table's loss is likely to be based on contract. Certainly, Farm to Table will be able to recover the amounts paid to Evergreen for the diseased plants, assuming that Evergreen cannot make a showing that the source of the disease was within the seeds themselves, which were provided to Evergreen by the seed dealer that was selected by Farm to Table. Generally, loss profits and consequential damages are not available to parties in contract unless specifically provided for in an agreement between the parties. However, under this fact pattern it is possible that Evergreen could have liability beyond a mere breach of contract, and could have tort liability for general negligence. In this case, it is possible that Farm to Table could recover lost profits stemming from the ruined crops. In order to recover lost profits, Farm to Table's claims cannot be merely speculative, but must be reasonably ascertainable. If Farm to Table can provide particular and specific evidence as to lost profits, it is possible that it could make such a recovery under Georgia law.

Question 4 - Sample Answer # 1

Business Form

Common Law Partnership - This is the simplest business form and it requires no filing or formalities. Also, taxes are on a pass through basis to the partners. The major disadvantage is that all of the partners are personally liable for any debts of the partnership. Also, the partnership ceases to exist with the death of a partner or the removal of a partner.

For Profit Corporation - A corporation is the most sophisticated corporate form. It requires filing for creation and following formalities to protect its limited liability status. (Formalities include creation of bylaws, election of president, secretary, and treasurer, taking of minutes at meetings, holding an annual meeting, etc.) A disadvantage is that double taxation exists on the corporation's profits. The main advantage is limited liability and the ability to have multiple classes of stock. To form a corporation, articles of incorporation must be filed with the Secretary of State. The articles must include the corporation's name and purpose, the names and addresses of the members of the corporation, the name and address of the agent of the corporation, and the classes of stock and the number of shares. A corporation survives the death or replacement of members. (continual existence)

Professional Corporation - A professional corporation is a form of corporation that can only be made up of people licensed to practice a certain profession. Formation requires filing as detailed above under "For Profit Corporation." The advantage of a professional corporation is that no one who is not a member of the profession can obtain ownership. Another advantage is limited liability and continual existence.

Tenancy in Common - Tenancy in common is a way to hold a deed to real property. A tenant in common can sell or borrow against his share of the tenancy. Unlike Joint Tenancy where when one tenant dies, the other tenants automatically take the dead tenants share, a tenant in common can devise their share of the property. There is no liability protection for tenants in common.

Limited Partnership - A limited partnership allows limited liability to all limited partners. It requires filing and following of formalities. However, a general partner must be present and they do not enjoy limited liability. (In practice, the general partner is typically a corporation that already has limited liability.) The limited partners cannot actively manager the partnership. An LP has continual existence so long as one general partner remains.

Limited Liability Company - An LLC can be thought of as a lite corporation. It allows all members limited liability and requires filing and following of formalities. It also allows for pass through taxation. However, an LLC can only have one class of stock. An LLC has continual existence.

Best Choice: The best choice for the practice would be the professional corporation or the LLC. Both have limited liability protection and continual existence. The professional corporation has the advantage of limiting ownership to **only** architects. The LLC is a simple corporate form that allows flexibility and ease of pass through taxation that avoids the double taxation of the full corporation form. The LLC could allow the architects to allow non-architects to have equity ownership in the firm. The choice of form will be governed by whether the architects want to allow non-architects equity ownership. If so, an LLC is the best choice. If not a PC will be best.

Building

I would advise an LLC be created to own and manage the building. The LLC would allow the LLC

shareholders to apportion ownership any way they saw fit. (Based on contribution or any other measure.) The LLC would also grant limited liability protection to the shareholders which is critical if the building will be rented to other entities. Lastly, the LLC would provide for pass through taxation which would simplify taxes and reduce the amount of taxes paid. (Avoids double taxation of the Corporation form.) The LLC would allow both architects and non-architects to own a share of the building.

Sally and Business Manager could own stock and be on board or an officer

Corporation - Sally and the Business Manager could own stock and be on the board. There is no restriction based on occupation. The bylaws of the corporation may place some restrictions on who can be board members and officers. Generally the shareholders elect the board members at an annual meeting, and the board appoints the officers.

Professional Corporation - Sally and the Business manager could not own stock unless they were an architect. They could be an officer and serve on the board, however, they would have to excuse themselves from any decision that required an architect's license. The bylaws of the professional corporation may place some restrictions on who can be board members and officers. Generally the shareholders elect the board members at an annual meeting, and the board appoints the officers.

Limited Liability Company - Sally and the Business Manager could own stock and be on the board. There is no restriction based on occupation. The bylaws of the LLC may place some restrictions on who can be board members and officers. Generally the shareholders elect the board members at an annual meeting, and the board appoints the officers.

Professional Corporation - Stock on leaving or death

Since only members of a specific profession can own stock in a professional corporation, any member leaving or the estate of a dead member would have to receive the cash value of the stock they owned. This value could be calculated based on the bylaws or based on a valuation of the company performed by an appraiser.

Filing

To form a PC, the architects would need to file the articles of incorporation with the Secretary of State. The articles would need to contain the corporation’s name and purpose, the names and addresses of the members of the corporation, the name and address of the agent of the corporation, and the classes of stock and the total number of shares. After incorporation, the architects should have a meeting to nominate a board and appoint officers. They should also adopt bylaws which will govern the PC. The bylaws do not have to be filed.

Conflict

As a lawyer representing all the architects, you cannot represent any one of them individually. You owe a fiduciary duty to all of them.

Question 4 - Sample Answer # 2

1) I would advise the three architects that the best choices for their architectural practice under Georgia law would be a corporation, a professional corporation, or a limited liability company. At issue is which entities provide the most shelter from liability, tax benefits, and ability to exercise control. A corporation could work for the architects. A corporation provides limited liability for its shareholders, officers and directors. If the architects formed a corporation, the corporation could be liable for malpractice claims, but the individual shareholders, officers, and directors would not be, absent intentional wrongful conduct. A professional corporation is, in essence, the same as a corporation but it is created by professionals, meaning lawyers, doctors, engineers, etc. Architects are also professionals, so the P.C. could work for them. The only problem would be how much activity the business manager would have in the corporation. A business manager is not an architect; therefore, he could cause a problem for the architects in creating a P.C. Probably the best entity for the architects to form is a limited liability company. A limited liability company receives the limited liability benefit of a corporation, but also receives pass-through taxation, which is superior to the taxation of a corporation. The "members" of a limited liability corporation do not face personal liability. As such, the architects would be protected from the malpractice claims of one another, and only the L.L.C. would be liable for debts.

I would advise the architects against creating a common law partnership, limited partnership, or tenancy in common, based on the goals they have elucidated. Again, at issue is the potential liability and lack of control the entities create for the architects. All that is needed for a common law partnership is two or more persons seeking to conduct a business for profit. Thus, the benefit is that they are easy to create because they do not even require a writing, unless for Statute of Fraud purposes. However, under a common law partnership, all partners are general partners. This means that they are jointly and severally liable. If there was a malpractice claim against Tom, the plaintiff could recover from Dick and/or Harry also. Since the architects want to avoid this situation, I would recommend against a common law partnership. Under a limited partnership, there is one or more general partners and one or more limited partners. General partners are jointly and severally liable, while limited partners enjoy limited liability. The problem for the architects would be that the limited partners of the partnership would not be able to exercise any day to day control over the partnership. They receive limited liability because they are expected to remain "silent partners." Tom, Dick, and Harry could not all do their jobs effectively if they were not allowed to exercise day to day control over the partnership. Lastly, I would advise against a tenancy in common. A tenancy in common is when each tenant has a portion of property with no right of survivorship. A tenancy in common is not typically seen as a business entity. The tenants of a tenancy in common are free to alienate their property at will. Therefore, with no discussion or formalities, one of the architects could sell his interest to another. This type of lack of oversight would probably not be desirable based on the architects' goal of wanting to create a "professional practice."

2) I would recommend that the architects and Sherry create a limited liability partnership. A limited liability partnership is, in essence, a general partnership where all partners get limited liability. This way, Sally could take the reigns as the managing partner of the building, but the architects could have some control if they so chose. Also, they would all be protected, even Sally from the debts and liability claims which arise from ownership of the building.

3) (a) Sally and their business manager could own stock and be a member of the board of directors or an officer of a corporation. Anyone approved by the corporation can be a shareholder of the corporation, even officers and directors. Also, the incorporators of the corporation (Tom, Dick, and Harry) could name

Sally and the business partner as directors of the corporation. Then the board of directors chooses officers.

(b) Sally and their business manager could own stock in the professional corporation but could not be on the Board or be officers. In a professional corporation, the directors and officers must be members of the profession. Since Sally and the business manager are not architects, they could not fill those positions.

(c) Sally and their business manager could own stock and be a member of a limited liability company. As in (3)(a), there are not restrictions on this matter.

4) If one of the architects were to leave the architectural profession, he could potentially seek a right of appraisal from the Board. Since the architects P.C. is not a public traded corporation, shareholders do not have the option of selling their shares to other architects on the market. He needs to be bought out.

5) To form a professional corporation, the architects would need to follow the process with which a corporation is created. They would need to file Articles of Incorporation with the Secretary of State. These Articles would need to include the names of the incorporators, the address of the registered office, the address of the principal place of business, the quantity of stock, etc. They would also need to certify that they are, in fact, professionals with a professional license.

5) I would need to explain to the architects that I could not effectively represent them individually and the entity at the same time. Under the Georgia Rules of Professional Conduct, lawyers must uphold the profession. As such, lawyers owe a duty to clients to avoid conflicts of interest. If I represent the entity, I must do what is in the best interest of the entity, to the demise of the individual architects. If I were to be given information by one of the architects that was detrimental to the entity, I would have to expose that information to act in the best interests of the entity. I would advise the architects that, should any problems come up in the future, they should each attain separate counsel. Meanwhile, I, as counsel for the entity, will safeguard its interests.

Question 4 - Sample Answer # 3

1. Under this scenario, the best choice of business form is probably a limited liability company ("LLC"), followed closely by a professional corporation ("PC"). Based on the professed business and financial objectives of the 3 architects, the business entity will need to provide limited liability to its equity holders, a flexible governance structure conducive to having a "business manager" and the possibility of admitting non-architect equity holders at a future date. The LLC is the only business form mentioned that meets each of these objectives. Under Georgia law, the members of a limited liability company are afforded a liability shield identical to that provided to shareholders in a traditional for-profit corporation. Therefore, in the event of a malpractice claim, the other members of the LLC that are not at fault will have limited liability and will not be financially responsible for the tort beyond the amount of their capital contributions. Of course, a member will always be liable for his own malpractice and no corporate or business form will establish otherwise. The LLC will also provide the architects with an option to be "member-managed" or "manager-managed" which is consistent with their objective of having a professional office manager. Finally, an LLC form will allow other non-architects to become equity investors (provided this is ethical in the profession), which would not be available in a PC, because Georgia law requires that at least 1

director, the President, and all shareholders of a PC be a member of the subject profession. It is also worth noting that an LLC will provide the members with pass-through tax treatment (like a partnership) and requires minimal formality (the members typically only need to file annual reports following the filing of the Articles of Organization).

As previously stated, a PC would also be an acceptable option, but it would possibly subject the architects to less favorable tax consequences and could also diminish their ability to obtain other equity investors because of the limitation on shareholders (Sally, for example, could not be an equity investor). As to the other discarded forms, a common law partnership (or general partnership) would be a terrible idea because there is no limitation of liability whatsoever, and although a limited partnership would be an incrementally better choice, it too is a terrible idea because it does not afford limited liability to its general partner and any limited partner that exercises control in the business. A corporation might be an option, but for its double taxation and the general formalities involved in comparison to an LLC. A tenancy in common is probably non-sensical if real estate is not involved.

2. I agree with the architects that the building should be held in a separate business entity for both tax and liability purposes. Again, I believe that an LLC provides the best form in this case because it provides limited liability, flexible governance (so that Sally can manage the property), and also allows for other investors that are not architects. The pass through tax benefits of an LLC make it very popular as a real estate holding company in Georgia and elsewhere. Going back to the previous choices presented in Section 1, neither a general partnership or limited partnership is advisable because of liability reasons, a PC is non-sensical because we are talking about the ownership of real property, a for-profit corporation will be subject to double taxation and should rarely be used as a real estate holding company, and a tenancy in common, although growing in popularity, is not a good idea because each of the investors would own a separate divided share with a right to access the whole property. This would be a recipe for controversy.

3(a). Business Corporation: Yes and Yes. Anyone can be elected a director and anyone can invest, subject to the governing documents of the company and federal and state securities laws.

3(b). Professional Corporation: No, they could not be shareholders. It is possible that they could be directors because Georgia law requires only that 1 director, the President and all shareholders be members of the profession.

3(c). Limited Liability Company. No, they could not own stock because an LLC does not issue stock. An LLC issues membership units. However, they both could own membership units, which is the functional equivalent of stock. Similarly, an LLC typically has managers and members, not a board of directors (although you can provide for a board of directors in your Operating Agreement). However, they could serve as managers or on any board that was created.

4. The company and the existing shareholders would have to buy the stock back, because stock in a professional corporation is not freely transferable like it is with respect to some regular corporations.

5. Forming a PC is very similar to forming a regular for profit corporation. The incorporators should file Articles of Incorporation with the Georgia Secretary of State pursuant to the Georgia Professional Corporation Act. Like a corporation, I would also recommend that the architects create a set of bylaws that govern the internal affairs of the company, and also put together a Stockholders' Agreement setting forth the relative rights of the various shareholders in relation to one another. They should also issue

themselves stock certificates.

6. As counsel for the company, I would owe a duty to represent the company and to at all times act in the best interests of the company. When you represent the company you do not and cannot represent the individual shareholders because it is an inherent conflict of interest. You may give legal advice to the individuals from time to time, but I would make clear that this advice is being dispensed to them as representatives of the company, and not in any of their individual capacities. I would also have them sign an Engagement Letter to this effect. In the event of a dispute among the 3 individuals in the future, I would explain to them that I cannot and will not represent them and they will have to seek individual counsel, though I can certainly remain as counsel for the company in such dispute.

MPT 1 - Sample Answer # 1

(1) - Memo for Meeting with Jennifer Butler regarding legal effect of September 1, 2003 ceremonial marriage between Jennifer and Robert Hill

The ceremonial marriage between Jennifer Butler and Robert Hill on September 1, 2003 had no legal effect because of Robert's earlier marriage to another party that had not been dissolved at the time of the ceremony. Under Section 301 of the Franklin Family Code, a marriage involving a minor that has not been consented to by the minor's parents or guardian or where a licensed physician has not certified that the woman to be married is pregnant, the marriage is voidable. However, if the parties subsequently ratify the marriage when the minor reaches majority the marriage will be held valid. In this case, Jennifer was a minor at the time of the ceremony, and she did not have her parent’s permission to marry and, despite being actually pregnant, she did not have a certificate from a licensed physician stating that she was pregnant. Thus, the marriage was voidable at the time it was entered into. However, Jennifer and Robert's subsequent actions upon Jennifer attaining majority satisfy Section 301(b) of the Franklin Family Code. Under this section, continued cohabitation as husband and wife after reaching the age of consent is specifically listed as constituting ratification. Jennifer and Robert maintained their marital household for many years after Jennifer obtained majority, and, thus, their marriage was ratified and Jennifer's minority at the time of the marriage is not an impediment to legal recognition of the marriage.

Despite Jennifer's minority not impeding legal effect of the ceremonial marriage, the ceremony did not create a valid marriage because Robert was married to another at the time of the ceremony. Under Section 310 of the Franklin Family Code, a marriage entered into prior to the dissolution of an earlier marriage of one of the parties is prohibited. In Hager v. Hager, the Franklin Court of Appeal held that a bigamous marriage is void *ab initio*, and, not withstanding Section 301 of the Franklin Family Code, the marriage cannot be ratified. In Hager, a bigamous marriage was held to be absolutely void, and it was held that it was as if the marriage had not been performed. Here, Robert was married to Serena Hill at the time of his marriage to Jennifer. Thus, under Hager v. Hager, their marriage ceremony was invalid *ab initio* and the marriage ceremony had no legal effect.

(2) - Closing Argument for (1) a valid marriage and (2) the home was marital property and Jennifer is entitled to more than 50 percent of its value

Jennifer Butler is seeking a divorce from Robert Hill. Mrs. Butler respectfully asks this court to recognize

the common law marriage between herself and Mr. Hill to recognize the home at 123 Newton Street as marital property and grant Mrs. Butler a greater share of the home for the reasons that follow. A summary of the marriage between Mrs Butler and Robert Hill follows. A marriage ceremony was performed between Jennifer Butler and Robert Hill on September 1, 2003 (Marriage Certificate). At the time of the marriage ceremony, Mrs. Butler was a minor and pregnant with the child of Robert Hill. In addition, Robert Hill was married to Serena Hill at the time of the ceremony and did not obtain a divorce until 2008 (Divorce Decree). Mrs. Butler was unaware of Robert's prior marriage. Shortly after the ceremony, Robert Hill began verbally abusing Mrs. Butler. Despite this, Jennifer and Robert held themselves out to the world as husband and wife and had two children together. Jennifer took care of the children, and Jennifer and Robert each contributed to the family financially but Robert earned about twice as much as Mrs. Butler. In 2008, Mrs. Butler and Robert Hill purchased a house at 123 Newton Street (Deed). They used the refund they received from their joint tax return to fund the purchase. In 2010, Robert began having an affair with a coworker. In addition, Robert lent the coworker $10,000. Mrs. Butler filed for divorce upon learning of Robert's infidelity.

A shown below, Jennifer Butler and Robert Hill are legally married under a common law marriage. Mrs. Butler stipulates that the marriage ceremony performed between herself and Robert Hill had no legal effect because Robert Hill was married to Serena Hill at the time of the marriage ceremony and the ceremony could not be ratified by the couple's subsequent conduct (Hager v. Hager). However, a common law marriage is established where (1) there is a manifestation of mutual agreement, (2) the parties are able to enter into a valid marriage, (3) that the parties are presently married, (4) followed by cohabitation, (5) and the parties hold themselves out to the community as being husband and wife (East v. East). In this case, Mrs. Butler and Robert Hill had a common law marriage. In 2008, Robert Hill received a final decree of divorce that dissolved his marriage to Serena Hill (Divorce Decree). Thus, as of the time of the final divorce judgement, Robert Hill was legally able to marry. Also, as of 2008, Jennifer had reached majority, and, thus, she was also legally able to marry. In 2009, Jennifer and Robert Hill had a wedding anniversary party (Invitation). At this party, the couple presented themselves to their friends and family as husband and wife. In addition, Robert Hill specifically stated that marrying Mrs. Butler was the smartest thing he's ever done. After this party, the couple continued to cohabitate at 123 Newton Street until their separation. Thus, the elements of a common law marriage were satisfied after Robert Hill's divorce from Serena Hill. Mrs. Butler and Robert Hill (1) manifested their mutual agreement, (2) were able to enter into a valid marriage, (3) were presently married, (4) cohabitated, and (5) held themselves out to the community as being husband and wife. Accordingly, Mrs. Butler respectfully asks this court to recognize the common law marriage between herself and Robert Hill.

Mrs. Butler asks this court to recognize the home at 123 Newton Street as marital property. The home was purchased using a refund from Mrs. Butler and Robert Hill's joint tax return. Under Section 410 of the Franklin Family Code separate property is distinguished from marital property. Separate property is purchased prior to the marriage or with separate funds. Here, the house was purchased after Robert Hill divorced Serena Hill, and after the common law marriage between Mrs. Butler and Robert Hill arose. In addition, the home was purchased using marital funds and the mortgage payments were made using marital funds. Thus, rather, than separate property the home is marital property. Accordingly, Mrs. Butler respectfully asks the court to recognize the house at 123 Newton Street as marital property.

Mrs. Butler asks this court to grant her a great interest in the house at 123 Newton Street for the following reasons. Under Section 410 of the Franklin Family Code marital property may be distributed by the court according to statutory factors that include (1) the needs of each party, (2) each party's contribution as a homemaker and (3) the circumstances that contributed to the estrangement of the

parties. Here, Mrs. Butler makes half of Robert Hill's income. Thus, she has a greater need. Mrs. Butler is also the primary caretaker for the couple's children. Thus, she contributed to the family as a caretaker. Also, Robert Hill's infidelity was the primary reason for this divorce. In Charles v. Charles, the Franklin Court of Appeals held that an extramarital affair can justify a disproportionate division of marital property where there are specific added burdens suffered by the non-offending spouse. Here, Robert Hill loaned his paramour $10,000. This money came from the Mrs. Butler and Robert Hill's martial assets and thus burdened Mrs. Butler. Accordingly, for the reasons stated above Mrs. Butler respectfully requests a greater interest in the marital home at 123 Newton Street. Robert Hill may point to the short duration of their marriage as a factor against unequal division, however as discussed above the short duration of their marriage is due to Robert Hill's bigamy and infidelity. Thus, this factor should not weigh against Mrs. Butler.

Accordingly, for the reasons stated above, Mrs Butler respectfully asks this court to recognize the common law marriage between herself and to recognize the home at 123 Newton Street as marital property and grant Mrs. Butler a greater share of the marital home.

MPT 1 - Sample Answer # 2

MEMORANDUM
TO: SOPHIA WIGGINS
FROM: APPLICANT
DATE: FEBRUARY 22, 2011
RE: JENNIFER BUTLER V. ROBERT HILL

The issue here is whether Jennifer's marriage is a valid marriage pursuant to Franklin Family Code Section 301. As Jennifer was 17 years of age at the time she married Robert, she will be considered underage pursuant to Section (a) of the Code. As such, in order for her marriage to be valid, she must either receive consent from a parent or guardian or have a certificate from a licensed physician stating that she is pregnant or has given birth to a child. Now Jennifer was pregnant at the time she married Robert on September 1, 2003. However, there is no evidence to suggest that she had a certificate from a licensed physician attesting to her pregnancy. She did provide a signed consent form. However, the consent form was forged and, therefore, would be considered invalid.

Section (B) of 301 provides that an otherwise voidable marriage may be ratified and become completely binding when the underage party reaches the age of consent. Ratification can be established by showing that the parties continued to cohabitate as husband and wife after reaching the age of consent. Here, there is evidence that Jennifer and Robert continued to cohabitate after Jennifer and Robert held themselves out as husband and wife after Jennifer reached the age of consent. However, there is the issue of Robert's other marriage to Serena Hill. Section 310(1)(a) of the Franklin Family Code provides that a marriage entered into prior to the dissolution of an earlier marriage is prohibited. Unfortunately, the Franklin Court of Appeals has held, in *Hager v. Hager*, that a voidable marriage under Section 301 cannot be later ratified if that marriage is specifically prohibited. In *Hager*, the Court specifically looked at whether an otherwise voidable marriage under Section 301 could be ratified if one of the parties was already married at the time the initial marriage was entered into. The Court found that all marriages which are prohibited by law because one of the parties has a spouse then living are absolutely void and,

therefore, have no effect.

As such, based on the Court's ruling in *Hager*, Jennifer's marriage will have no legal effect under Section 301 of the Franklin Family Code.

CLOSING ARGUMENT

As you have seen today, Jennifer Butler was forced into a marriage, pregnant at the age of 17. Her parents did not consent to the marriage and, therefore, caught in a difficult situation, she allowed her soon to be husband, Robert, to forge a parental consent form to allow the two to be married. Unbeknownst to Jennifer, at the time Jennifer and Robert married in September of 2003, Robert was already married to another woman, Serena Hill. However, Robert assured Jennifer that he was single.

Jennifer and Robert lived together as husband and wife for the next 7 years. They bore two children together and in September of 2008, they purchased a family home with proceeds from their joint income tax refund. However, during the entire marriage, Jennifer endured endless verbal and emotional abuse by Robert. Despite the abuse, Jennifer remained with Robert, and continued to raise their two children and to contribute financially to the family. Now Jennifer has discovered that Robert is having an affair with a co-worker and has even lent the co-worker $10,000.00. This was too much for Jennifer and she is now seeking a divorce.

Now Robert has tried to argue that there is no valid marriage due to the fact that he was married to another woman at the time he married Jennifer. It is true that Robert was married to Serena Hill at the time he married Jennifer in September 2003 and, therefore, their marriage is not valid pursuant to Section 310 of the Franklin Family Code. However, Jennifer and Robert do have a valid common law marriage pursuant to Section 309 of the Franklin Family Code which provides that a common law marriage is valid if both parties are 18 and the marriage is not prohibited by Section 310.

As discussed, Section 310 prohibits a marriage entered into prior to the dissolution of an earlier marriage. Here, Robert and Serena were divorced in April of 2008. However, Jennifer and Robert continued to hold themselves out as husband and wife until 2011. As such, a common law marriage was subsequently established following Robert's divorce from Serena. The Franklin Court of Appeals has established that a common law marriage requires an agreement by the parties to enter into a valid marriage and can be established following the removal of a legal impediment such as divorce as Robert's divorce from Serena here. In order to establish common law marriage, the parties must hold themselves out to the community as husband and wife and must continue to cohabitate. Here, it is evident that Robert and Jennifer continued to cohabitate from April of 2008 until recently when Robert moved out. Further, in the Summer of 2008, they decided to purchase the home that they had been renting as a family for 5 years together. As Louis Milligan testified, Robert and Jennifer have always held themselves out as husband and wife to the community. They even held 6th wedding anniversary party in September of 2009. All of this suggests that both Robert and Jennifer intended to enter into a valid marriage as husband and wife and a valid common law marriage existed between the two.

With regard to the marital property, Robert is trying to argue that the home purchase in September of 2008 is not marital property and, therefore, should not be included in the distribution of assets. Robert's argument fails. Section 410 of the Franklin Family Code provides that the court shall assign to each party his or her sole property acquired prior to the marriage and separate property acquired during the marriage by gift, bequest, devise or descent. The home acquired by Robert was a purchase and was

done so during the marriage and, therefore, would not qualify as a gift, bequest, devise or descent. In all other cases property accumulated during the marriage shall be assigned in a manner that is equitable, just and reasonable, regardless of whether the title is held individually. Here, the title in the home by Robert is as a single individual. Therefore, while Robert may try and argue that this property belongs to him solely, the property was acquired during the marriage and, therefore should be included in the distribution of marital assets.

With regard to the percentage in the home, Jennifer is entitled to more than 50% of its value. As discussed, Section 410 provides that all property should be distributed in a matter that is equitable, just, and reasonable and after taking into account several factors, one of which includes the circumstances which contributed to the estrangement of the parties. The Franklin Court of Appeals has held that division of marital property need not be equal, but must only be fair and equitable and that an extramarital affair can be taken into consideration when determining the division of property if the affair places an additional burden on the non-offending spouse. It has been well-established here, that Robert was involved in an extra-marital affair with a co-worker. Not only did Robert have an affair with his co-worker, he lent her $10,000.00, money which came out of his family's funds. All of this created additional burden on Jennifer and her ability to cope with her family. As such, she should be entitled more than 50% of the value of the home.

MPT 1 - Sample Answer # 3

To: Sophia Wiggins
From: Applicant
RE: Jennifer Butler Memo

You have asked me to draft a short memo explaining whether Jennifer and Robert's September 1, 2003, ceremonial wedding had any legal effect under Franklin Family Code S.301 ("301"). While the ceremonial marriage itself was not valid at the time the couple entered into it because Robert was still legally married to Serena Hill, they entered into a valid common law marriage upon his divorce. Under 301 (a), because Jennifer was only 17 years old at the time she sought to marry Robert, she needed either parental consent, or a doctor's letter indicating that she was pregnant. While Jennifer was in fact pregnant, and gave birth to their first child just 10 weeks after the ceremony, she elected not to obtain a doctor's note. Instead the couple married under the ruse of a forged parental consent that Robert signed. Had there been no legal impediments to the marriage, the voidable marriage could have been ratified under the conditions outlined in 301(b), which requires generally that the couple continue representing themselves as married, evidenced by cohabitation, etc. upon reaching the age of majority. The couple would easily meet the ratification requirement. Robert was already of age, and Jennifer turned the legal age of 18 in 2004. From 2004 through 2010, the couple behaved and presented themselves as being married. They continued to cohabitate, eventually jointly purchasing their matrimonial domicile after renting it together for five years. The couple had another child in 2007, William Hill. The couple maintained a joint checking account, and even held a wedding anniversary party at their home in 2009 purporting to celebrate their 6th wedding anniversary (I have enclosed the invitation for your review). By all accounts, Jennifer thought she was legally married to Robert, she behaved that way, and held herself out that way, but the issue becomes was the marriage able to be ratified given that Robert was still legally married to another woman for the first 4 and ½ years of his "marriage" to

Jennifer. In that sense, though the ceremonial marriage itself was void ab initio (see Hager), the public ceremony in 2003 (showing intent to marry), along with later steps the couple took after Robert's divorce was finalized in 2008, combine to allow this marriage to ripen and be ratified as a legal common law marriage from April 15, 2008 through the termination taking place (see Owen).

CLOSING ARGUMENT

Your honor, this case is about a man, Robert Hill, who duped a naive young woman into marrying him while he was still married to another woman. Instead of at least honoring his vows to one of his wives, he emotionally abused that young woman, even as she became the mother to two of his children. He continued his deceitful behavior by secretly trying to purchase their matrimonial home in his name only, even though Jennifer Butler contributed to its purchase. Robert Hill eventually continued his pattern of using and discarding women by beginning an affair with his co-worker and eventually giving that woman $10,000 of the family's hard earned money. Finally, he stands before you today asking you to look the other way and effectively endorse his misdeeds by voiding the couple's marriage, and awarding him the family home even as he threatens to throw his wife and two young children into the street and "change the locks." Your honor, we ask you hold Mr. Hill accountable for his actions, you recognize the validity of the couple's marriage, and you award Ms. Butler the family home as well as a favorable equitable distribution of the remaining family assets.
Robert Hill stands before you guilty of adultery against his first wife, Serena Hill. His unwitting accomplice in that act, Ms. Jennifer Butler, was also the unwitting accomplice to Mr. Hill's subsequent crime of bigamy, which Hager instructs could subject him to criminal prosecution! Ms. Butler was only 17 at the time, pregnant with Mr. Hill's child, and ignorant to the fact that she was marrying a sociopath who was still legally married to another woman. Mr. Hill now asks you to punish Ms. Butler for his misdeeds by declaring their marriage null. Mr. Hill is wrong - there was in fact a valid marriage, and the facts are indisputable. While Mr. Hill will point to Hagar to support his position that the September 1, 2003, marriage was void ab initio because he was still legally married to Serena Hill at the time, he completely misses the bigger picture. While the 2003 marriage may have, in fact, been void, the events of April 15, 2008, changed the equation. On that date, Mr. Hill became legally divorced from his first wife Serena Hill. From that point through August 2010, he and Ms. Butler have lived together in what Franklin recognizes to be a valid common law marriage. In Owen, the court laid out the basic test for common law marriages. The court highlighted (1) manifestation of mutual agreement, (2) by parties able to enter into a valid marriage, (3) that they are presently married, and (4) cohabitation, and (5) holding themselves out as husband and wife. In this case, the mutual agreement continued to exist. The couple had been living together prior to that date, and beyond. Once Mr. Hill's first marriage dissolved, both parties were able to enter into a valid marriage. They continued to be married, they cohabitated, and they held themselves out as husband and wife. You heard the testimony of Louisa Milligan who told you of their 2009 6th Wedding anniversary she attended at the couple's home. Robert called his marriage to Jennifer "the smartest thing he'd ever done." If only Ms. Butler could say the same... In contrast to Owen, this couple conducted their business as a married couple, rather than single persons. Mr. Hill standing before you now disavowing the marriage is shameful and he should be estopped from denying it's existence based on Owen and his subsequent ratification.

Having shown why this marriage is valid we now petition the court to award Ms. Butler the family home as well as more than 50% of the family assets. Mr. Hill argues that the home is not a family home at all, but his home in which he has allowed Ms. Butler and his children to remain as an act of his charity. Now that he's tired of them, he has ordered them out onto the street. The home is in fact a family home, Mr. Hill's duplicity notwithstanding. Franklin code 410 ("410") (b) very clearly states that "all

property...accumulated during the marriage, regardless of whether title is held individually" should be distributed equitably upon consideration of guiding factors. It is undisputed that the home was accumulated during the valid marriage. Mr. Hill took deed, in his individual name to presumably dupe his naive wife again, on August 12, 2008. This was 6 months after his first divorce, and more than 2 years prior to the ultimate end of his marriage to Ms. Butler. Therefore, as 410(b) makes clear, regardless of how he took title, the "married couple" bought a joint home with proceeds from a joint tax refund.

In determining equitable distribution, 410(b) instructs the court to examine multiple factors, including "(12) the circumstances which contributed to the estrangement of the parties." Here, the reasons for estrangement are clear. Ms. Butler discovered that not only was Mr. Hill having an affair with his co-worker, but he had also given that woman $10,000 of the family's money - money Ms. Butler struggled to contribute. In addition, as Mr. Hill was moving out, Ms. Butler discovered his original transgression by way of a divorce decree. She had suffered emotional abuse at the hands of this manipulator for years, but these were the last straws. For her health and her children's health, Ms. Butler needed to end the marriage. Charles is the case that guides the interpretation of the 410(b) factors. The case makes clear that "equitable" doesn't mean "equal" and the court should carefully examine the record prior to distributing property. "When misconduct of one spouse changes the balance so that the other must assume a greater share" of the marriage burden, it is appropriate to factor that into the distribution. Charles. In this case, Mr. Hill's affair was an emotional strain on their marriage, and deprived the children of a fully-engaged father. More importantly, his giving $10,000 of the family's hard earned income to his mistress clearly forced Ms. Butler to "assume a greater share" of the load. Other 410(b) factors such as employability, sources of income, etc. all favor a greater distribution to Ms. Butler as she is the lesser earner in this marriage. Charles makes clear that the court may consider "any relevant factors" in fashioning an award. In that case, the wife's extra-marital affair, without any of the added financial burden present here, netted her only 40% of the distribution.

By awarding Ms. Butler the family home and greater than 50% property award, the court will ensure that Mr. Hill can't make good on his promise to throw his family into the street. Thank you.

MPT 2 - Sample Answer # 1

County Counsel's Office
Magnolia County
Suite 530
5400 Western Ave.
Harley, Franklin 33069

To: Lily Byron, Deputy County Counsel
From: Applicant
Date: February 22, 2011
Re: Proposed Condemnation Action

MEMORANDUM

I. WHETHER A STATE CONDEMNATION ACTION TO ACQUIRE AN EASEMENT FOR THE AT-

GRADE CROSSING OF PLYMOUTH'S RAILROAD TRACK IS PREEMPTED UNDER THE FEDERAL INTERSTATE COMMERCE COMMISSION TERMINATION ACT (ICCTA)•

Condemnation, or eminent domain, is the power of the federal, state, or local government to take private property for "public use" so long as the government pays "just compensation," or fair market value of the property as of a certain date. Butte County v. 105,000 Square Feet of Land. Public use includes roads. Butte. At times, federal law preempts or invalidates conflicting state law pursuant to the Supremacy Clause of the US Constitution. Congressional intent, express or implied, must be analyzed in determining if a federal law preempts a state law. Preemption is a fact specific, case-by-case inquiry. Conroe County v. Atlantic Railroad Co.

The ICCTA, a federal law, is intended to "promote a safe and efficient rail transportation system," and to "ensure development and continuation of a sound rail transportation system with effective rail carriers." Butte. Specifically, Congress sought to ensure that states would not regulate rail transportation in a manner that conflicts with or undermines the ICCTA. Preemption concerns the degree to which a challenged state action burdens rail transpiration. Consideration of county's condemnation of Plymouth's land is a two fold inquiry: (1) whether its intended use prevents or unreasonably interferes with railroad operations; and (2) if the county's intended use poses undue safety risks.

A. Does the County's intended use of Plymouth's property prevent or unreasonably interfere with railroad operations

State and local regulation is permissible where it does not interfere with interstate rail operations. Butte. Where a county's building of a sewer would impede railcar operations temporarily but a viable alternative existed, the volume of railroad traffic is low on that specific track, construction of a sewer would not ultimately burden rail service, and where the City would design and construct a sewer to minimize interference with railroad operations, the Franklin Court of Appeals held that the proposed sewer would not interfere with rail operations. City of Elk Grove v. B&R Railroad. Further, the Franklin Court of Appeals found that where a reasonable alternative existed for the Railroad's operation- another mode of access to equipment blocked by the proposed easement, the proposed easement did not interfere with railroad operations. Butte. Where a state law has the effect of requiring the railroad to undergo substantial capital improvements, that law is preempted by the ICCTA. Conroe.

Here, the County's proposed connector road will help ease traffic congestion and provide the only access to a large residential subdivision. Although Plymouth objects to the potential impact of the at-grade crossing on its operations, it declined to cite any specific concerns. Rather, Plymouth suggested that based on "past experience, crossings would increase track maintenance costs and interfere with operations." Here, it appears that the County is willing to take all necessary steps to minimize the impact on Plymouth. Unlike Conroe, where the Railroad company presented affidavits and testimony of the interference of the proposed crossing, Plymouth failed to produce comparable evidence. Plymouth's objections simply state past experience- but do not provide any direct correlation between the County's proposal. Unless substantial, track maintenance is unlikely to be enough of an interference with railroad operations tor require preemption. There is no indication of the potential financial impact of increased maintenance. Further, while some construction will be required, there is no indication that there are no other feasible alternatives to direct traffic during this minor delay. Although the track at hand is active, unlike the track in Butte, it is unlikely that the at-gate crossing will completely impede operations if a feasible alternative exists. Therefore, the County's intended use of Plymouth's property will not prevent or unreasonably interfere with railroad operations.

B. Does the County's intended use pose undue safety risks

Generally, routine, non conflicting uses, including easements for at-grade road crossings, wire crossings and underground sewer crossings, are not preempted if they do not impede rail operations or pose undue safety risks. Butte. While a safety risk is always present when an active railroad track is involved, a County's maintenance of a 50-foot setback distance from the active railroad track and fencing to prevent access to the active rail would prevent any undue safety risk despite active pedestrian and bicycle traffic. Butte. Alternatively, courts found an undue safety risk where citizens were concerned with emergency vehicles being able to proceed through blocked crossing, broken trains 140 feet from the crossing created a visual hazard, and that trains must be parked in a manner where drivers can see past both tracks from each side of the crossing. Conroe.

Here, Plymouth argues that the anticipated heavy use of the connector road poses a potential risks to vehicles at the proposed crossing. The new development will be large, and contain retail, office, institutional, multi-family and single-family residences, and recreational spaces. While the proposed connector will undoubtedly increase traffic, the County also proposes to have the at-grade crossing as a "Quiet Zone" where a quadruple gate system blocks vehicle traffic and prevents cars from driving around or between crossing arms in the path of oncoming train. The county can fund the entire project and the quiet zone. In addition, the County intends to post numerous traffic safety and control devices for at-grade crossings including active and passive devices to warn passengers of the railroad track and prevent access immediately before, during and after a train using tracks. Passive devices include warning signs, markings on pavement, and crossing signs. Active devices include flash light signals, automatic gates, and overhead flashing light signals. The gate system and the substantial addition of warning signs will likely negate potential undue safety risks. Although more than 20 trains pass over the SH44 and SH50 per day, the safety measures proposed by the County are likely adequate to counter safety.

Further, Plymouth contends that it will not grant an easement unless County agrees to indemnify it from any harm that may result to persons or vehicles as a result of the at-grade crossing. However, the Franklin County Court of Appeals held that indemnification arguments relate to allocation of risk, not regulation of rail transportation. City of Elk. Therefore, Plymouth cannot condition the grant of an easement on indemnification.

Conclusion

Here, because the county's intended use does not unreasonably interfere with railroad operations, nor does the county's intended use pose undue safety risks, an action for condemnation will not be preempted under the ICCTA.

MPT 2 - Sample Answer # 2

To: Lily Byron, Deputy County Counsel
From: Applicant
Date: February 22, 2011

RE: Proposed Condemnation Action

MEMORANDUM

Based on your request, I have drafted a memo addressing whether a condemnation action to acquire an easement for an at-grade crossing over Plymouth's railroad track would be preempted under the ICCTA. Though this is a fact-specific inquiry, it is likely that a court will not find that the easement is preempted by the ICCTA.

There are two factors that a court considers when deciding whether the taking is preempted by the ICCTA based on the Supremacy Clause of the U.S. Constitution. As a preliminary matter, the state or local action must qualify as taking for public use, based on the footnote in Butte County since this case involves an easement (which was specifically mentioned as a taking in Butte county, and since it has various public uses, including building the region's mobility system, easing congestion and creating a shortcut to drivers, it should qualify. The courts do not seem to be affected by the presence of private uses (Conroe County involved access to a private development) so Red Bluff should not affect the designation as public use here either.

The Courts look at the following two questions in determining whether there is a preemption: 1) Does the intended use prevent or unreasonably interfere with railroad operations? and 2) Does the intended use pose undue safety risks? It is worth noting that currently there is some lack of clarity regarding both the intended use and the burdens on Plymouth, since the county has not yet decided what security measures will be used, and Plymouth's stated concerns are vague as well.

That being said, the intended use by the County of its easements will probably not unreasonably interfere with Plymouth's operations. The various courts have held the following factors not to impermissibly interfere with railroads: minor blocks to signal equipment where the company can still access it by car (Butte); continued general access for maintenance (Butte); spur track being out of service for 1 week (Elk Grove); and speculative allegations regarding timetables for completion and need for trained subcontractors (Elk Grove). In contrast, the courts found an unreasonable interference where there was insufficient room for loading and unloading trains (Morgan City) and where the sitting would condemn both an active ad a passing track that was found to be "integral" to railroad business. (Conroe).

Plymouth has not alleged with specificity, at this point, facts that rise to the level of disruption in Morgan City or Conroe. The Conroe Court focused on the burden on the railroad in altering its speed, train length and scheduling; and in requiring it to build substantial capital improvements. While Plymouth may experience some delays, there will not be the extensive delays seen in Conroe for braking and brake testing. Nor will it need substantial improvements, scheduling changes or altered train lengths. In addition, Plymouth fails to raise specific factors that will raise its maintenance costs. Should its pleadings be sufficiently vague in summary judgement or at trial, it will likely be deemed too speculative, similar to Elk Grove. Similarly, Plymouth will not be benefitted by its claims of liability and indemnification, since those claims were deemed inapplicable in Elk Grove to a preemption argument.

With respect to the second factor, the court will ask whether the intended use poses an undue safety risk. Based on the case law, the factors raised may be properly counted by the county. As one court noted, there will always be safety risks when railroad crossings at grade occur, but the question is whether those risks are undue. The Butte court found that there was no undue risk when a security fence was placed around the railway and there was 50' from the pedestrian trail, even if 25' from the

parking lot. In contrast, the Conroe court found that the visual hazard of long trains and delay to emergency vehicles was a sufficient burden to warrant preemption. Here, the use of heavy freight trains that take half a mile to stop may pose concerns. However, it appears that the devices proposed by the Quiet Zone designation would alleviate these concerns to some extent - constant warning technology, quadruple gates, and minimal need for reduced speeds. If this level of security is utilized, the Court will likely view the protections as sufficient to minimize the risk. Moreover, the slow stopping time for the trains was not linked by Plymouth to some other risk, such as to emergency vehicles or passing cars. As long as the gates are working properly, they should negate the need to stop the trains altogether. Therefore, the court should rule that the easement is not preempted by ICCTA.

MPT 2 - Sample Answer # 3

Memorandum

The issue at hand is whether a condemnation action to acquire the easement for the at-grade crossing of Plymouth's railroad track would be preempted under the ICCTA.

The general proposition of preemption is that state laws that interfere with federal law must be invalidated under the Supremacy Clause of the Constitution. To determine whether laws conflict, a court must examine the congressional intent, both implicitly and explicitly.

In 1995, Congress passed the ICCTA to "promote a safe and efficient rail transportation system" and to "ensure development and continuation of a sound rail system with effective competition." Butte County v. 105,000 ft. of Land. Thus, a court's inquiry must focus on (1) whether the County's intended use of Plymouth's property would prevent or unreasonably interfere with railroad operations, and (2) whether the County's intended use would pose undue safety risks.

The first issue is whether the construction would prevent or unreasonably interfere with railroad operations. Typically, routine crossings, such as the one here, are not preempted. An exception was carved out in Conroe Co. V. Atlantic Railroad Co., where the court found that impeding rail operations would allow preemption.

The record indicates that the crossing will occur at a single track segment of Plymouth's line. There is not a passing track, nor is there a staging area for loading and unloading trains, such as the track in Conroe Co. V. Atlantic. The county also plans significant safety features such as warning signs, pavement markings, lights, gates and crossings. These safety devices come at a cost, however. Typically, a train must reduce its speed by 5 to 15 miles per hour. In an attempt to mitigate this issue, the county is implementing a Quiet Zone which minimizes the train's reduction in speed, though it is unclear how effective this is.

With regard to its first claim, Plymouth contends that track maintenance costs would rise and interference would also result from the crossing. When pressed for details, Plymouth only offered that the problem had arisen before, but declined to offer specifics. In a related case, Elk Grove v. R&R Railroad, the court addressed a railroad's claims of interference. In denying its claim, the Court noted that although the railroad claimed significant interference, it failed to provide any evidence. Likewise, here, Plymouth's vague claims of other examples are not substantial such as the claim in Conroe County v. Atlantic

Railroad. In Conroe Co., the railroad was able to show extensive interference with its railroad. Indeed, specific examples included testimony affidavits, and calculated losses. Further, the railroad showed actual numbers of delays resulting from dividing trains, track blockages, and other interference. In contrast Plymouth merely cites to a possible 5-15 mile per hour reduction that the County may be able to mitigate. Plymouth offers no evidence as to whether the County's mitigation plan is effective. Thus, in accordance with Conroe Co. and Elk Grove, Plymouth has not met its burden of showing that the crossing would prevent or unreasonably interfere with railroad operations.

The second inquiry that the Court must address is whether the County's proposed use would pose undue safety risks. The railroad's concerns surround whether cars and pedestrians can safely cross the tracks. It is agreed that the crossing will be used frequently by cars, and this concerns Plymouth. Indeed, Plymouth cites to the danger of freight trains as they take over ½ mile to stop with the emergency brakes. If a car was stopped on the track, a freight train would need over ½ mile of notice to stop to avoid a dangerous collision.

The County contends that it would implement safety features at the crossing. The County does not dispute that safety is always at risk at a crossing. (Butte County). Indeed, the county does everything possible to make the crossing as safe as possible. Other options to access residential developments have proven too costly. In Conroe Co. the Court complains that the County had to use Atlantic's busy section when alternatives were available. Here, the County is using the only route available to the proposed residential development (Conroe Co.). In doing so, the County does everything possible to make the crossing safe. Indeed, if a car disregards signs, painted markers, flashing lights, and lowering gates, Plymouth's complaint about possible liability almost certainly falls partially on the driver of the car. Moreover, City of Elk Grove v. B&R Railroad indicates that insurance and indemnification issues are not relevant to preemption claims. Instead, the Court notes that it involves allocation of risk, not the regulation of rail transportation.

The issue here was whether the ICCTA would preempt the aforementioned rail crossing. Plymouth had the burden to prove interference with rail operations and an undue safety hazard. Plymouth presented scant specific evidence of any possible interference. Additionally, as the court noted in Butte County, safety is always an issue at a crossing. But the safety risk must be undue. Plymouth argues that a train may not be able to stop in time. This is not unusual for any railroad crossing. Beyond this argument, Plymouth provides no other evidence of safety issues.

Finally, should Plymouth argue that Conroe Co. stands for the proposition that a crossing may not affect speed, the court should note that Plymouth never presented any evidence otherwise. In fact, the county anticipated the problem and mitigated it through the proposed Quiet Zone.

The County's proposed crossing would not impermissibly interfere with railroad operations. Moreover, no safety risk has reached the level established by Conroe Co. as undue. Accordingly, the Court should hold that the proposed action is not preempted by the ICCTA.