February 2012 Bar Examination Sample Answers

Question 1 - Sample Answer # 1

Count 1: Substantive Due Process

It is unlikely that the ordinance will be held to violate substantive due process. At issue is whether the ordinance is rationally related to a legitimate government interest. Under the 14th Amendment, a state may not deprive a citizen of substantive due process. Cities are considered sub-entities of the states, so the 14th Amendment would apply to City. Where state action involves a fundamental right (such as privacy or speech), it will be upheld only if it is narrowly tailored to achieve a compelling government interest. Where a fundamental right is not involved, the state need only show that its action is rationally related to a legitimate government interest. The operation of a taxicab or limousine does not involve a fundamental right, so the rational basis test will apply in this case. City has a legitimate interest in protecting taxicab passengers and other drivers that share the road with taxi and limo drivers. The requirements that cab and limo drivers maintain insurance, comply with inspections, and hold a valid driving permit are rationally related to the objective of protecting passengers and drivers. Therefore, the ordinance does not violate substantive due process.

Count 2: Commerce Clause

It is unlikely that the ordinance violates the Commerce Clause. At issue is whether the ordinance has a substantial effect on interstate commerce.

The Commerce Clause gives the U.S. Congress the exclusive power to regulate interstate commerce including goods placed in interstate commerce, as well as the instrumentalities and channels of interstate commerce. Even where a state law does not address interstate activity on its face, it may still be held to violate the Commerce Clause if the cumulative effect of the regulation will have a substantial impact on interstate commerce and the subject matter of the regulation is primarily economic or business related. Finally, under the "dormant Commerce Clause doctrine," states are prohibited from regulating interstate commerce even in areas where Congress has not acted.

Here, the ordinance does not directly regulate interstate activity because it only addresses the operation of taxis and limos within the City. TCAG will argue that the residency requirement restricts the potential to sell a CPNC to an out-of-state buyer, and therefore will have a cumulative effect on interstate commerce. TCAG will further argue that the subject matter of the regulation is primarily economic because it involves a business license. The facts state that before the residency requirement, holders of CPNCs routinely solicited the sale and lease of CPNCs with non-city residents, but it does not state whether any of these buyers came from other states, or just from other cities within this state. Without further evidence, it appears unlikely that the ordinance would have a substantial effect on interstate commerce. Therefore, the ordinance does not violate the Commerce Clause.

Count 3: Equal Protection

It is unlikely that the ordinance violates equal protection. At issue is whether the length of the residency requirement is rationally related to a legitimate government interest. Under the Equal Protection Clause of the 14th Amendment, a state may not discriminate against different classes of persons under like circumstances. Where the discrimination involves a suspect classification, such as race, the discriminatory law must be narrowly tailored to achieve a compelling government interest. In cases involving a quasi-suspect classification, such as gender, the law must be substantially related to an important government interested. In all other cases, the law need only be rationally related to a legitimate government interest. Here, the ordinance states that only a resident of City may be a holder of a CPNC, thus discriminating against non-residents of City. Municipal residency is not a suspect or quasi-suspect classification, so the rational basis test applies. City will argue that it has a legitimate interest in fostering better familiarity with City amongst taxi and limo drivers, which would help the drivers get their passengers to their destinations faster and could potentially reduce traffic accidents caused by confused drivers. It would be up to the court do decide whether a one year residency requirement is rationally related to that interest, or whether the length of the requirement exceeds the rational basis. Courts have upheld residency requirements in other contexts such as voter registration. Therefore, it is unlikely that the ordinance violates equal protection.

Question 1 - Sample Answer # 2

(1) At issue is whether the ordinance is a violation of substantive due process. Substantive due process requires that the laws are reasonable and not arbitrary. If the law infringes upon a fundamental right, the law will be held invalid unless it is necessary to achieve a compelling government interest. The government bears the burden of proof to show that the law is narrowly tailored and there is no alternative means to achieve its objective. For all other rights, the courts will apply the rational basis standard, in which the challenger has the burden of proof to show that the law is not rationally related to a legitimate government interest. Here, the law does not involve a fundamental right. Thus, the rational basis standard will be applied. Under the facts, the City amended its ordinance to require the holder of a Certificate of Public Necessity and Convenience (CPNC) be a resident of City for at least one year preceding the date of application. A CPNC is required for the operation of a taxicab or limousine in the City. The legislative history shows that the intent of the residency requirement was to foster better familiarity with City. Although the ordinance subjects holders of CPNCs to imposition of fines and penalties, City has a legitimate interest in having its residents get better acquainted with the City before becoming a holder of a CPNC. The holders of CPNCs will still be able to solicit the sale and lease of CPNCs with non-city residents. Thus, the law is reasonable and not arbitrary, in contrary to TCAG's allegations. Therefore, TCAG's argument that the ordinance is in violation of its substantive due process rights will not past constitutional muster. Consequently, Count I of TCAG's complaint should be dismissed because there is no substantive due process violation.

(2) At issue is whether the ordinance is in violation of the Commerce Clause. The Commerce Clause provides that Congress may regulate the channels, instrumentalities, and activities that have a substantial effect on interstate commerce. Here, the ordinance regulates channels and instrumentalities of interstate commerce because it regulates the taxicab industry by requiring holders of CPNC to become a resident for one year before applying for a CPNC. Because the law regulates a field occupied by Congress, the law will be held invalid. However, the law is neutral on its face as it apply to all holders of a CPNC and does not discriminate between those holders that are in state versus out-of-state CPNC holders. Therefore, the law is nondiscriminatory. A law that is nondiscriminatory will be held invalid if its burdens substantially outweigh its benefits under the Dormant Commerce Clause. Here, the law imposes fines and penalties in form of suspension or revocation of the CPNC. However, the ordinance's burdens substantially outweigh its benefits as it requires holders to obtain a one year residency before applying for a CPNC. Thus, residents and nonresidents will not be able to operate a taxicab in the City until they meet the residency requirements and this will burden many drivers in the City whose income derive solely from their occupation as taxicab drivers. Even though the City has a legitimate interest in having its taxicab and limo drivers become better acquainted with the City to foster better business in the industry, the ordinance's burdens substantially outweigh its benefits. Therefore, the ordinance will be held unconstitutional as in violation of the Commerce Clause. Accordingly, Count II of TCAG's complaint should be upheld.

It should be noted that the ordinance does not violate against the Privileges & Immunities Clause of Art.4 of the U.S. Constitution as it applies equally to residents and nonresidents alike.

(3) At issue is whether the law violates the Equal Protection Clause. The Equal Protection Clause of the 14th Amendment of the U.S. Constitution provides that all persons shall have equal protection of the laws. The Equal Protection Clause applies where similarly situated persons are treated differently. If the law involves a fundamental right or suspect classification (national origin, race, or alienage), the law will be held invalid unless it is necessary to achieve a compelling government interest. If the law involves a quasi-suspect classification (legitimacy or gender), the law is held invalid unless it is substantially related to an important government interest. Lastly, if the law involves any other classification, the law will be held valid if it is rationally related to a legitimate government interest. Under the facts, the law does not involve a suspect or quasi-suspect classification. In addition, the law does not violate a fundamental right, such as the right to travel. Therefore, the law will be held valid if it is rationally related to a legitimate government interest. As discussed in (1) above, the law is rationally related to a legitimate government interest as the City has a legitimate interest in regulating the taxicab industry. Consequently, Count III of TCAG's complaint should be dismissed as there is no EPC violation.

Question 1 - Sample Answer # 3

As a preliminary point, state action is presumed for each sub-section below, as a government ordinance is at issue.

Count One: Suspension or Revocation and Substantive Due Process

The level of scrutiny applied to a state or local law alleged to violate substantive due process depends on whether the law regulates a fundamental right. Fundamental rights for substantive due process purposes include the right to privacy, the right to direct the upbringing of one's children, the right to marry, the right to procreate, and other such intimate matters. Laws regulating fundamental rights such as these will be subjected to strict scrutiny, wherein the court asks whether the law is necessary to further a compelling government interest. However, where the law affects only economic rights, the government need only meet rational basis review. Rational basis review asks whether the law is reasonably related to a legitimate government purpose. Here, the court looks at conceivable purposes, not evidence of actual purpose.

The provision permitting fines and penalties for failure to maintain current inspection, insurance, and permits is merely an economic regulation and will be upheld on rational basis review. City has a legitimate interest in ensuring that the taxicabs on its roads are insured, are mechanically sounds and comply with emissions requirements, and that the drivers of such cabs are duly permitted. The provision contemplates the safety of both passengers of the cabs and the general public in other cars and on foot. The regulation is clearly reasonably related to these interests, because it ensures that if these requirements are not met, the offender will be taken off the road at least until they are met. Because the regulation is rationally related to a legitimate government purpose, it does not violate substantive due process.

Count Two: Commerce Clause

A state or local law can violate the Commerce Clause by running afoul of the negative implications of the Commerce Clause, also known as the Dormant Commerce Clause. Where a law burdens interstate commerce but does not discriminate between out-of-state and in-state individuals but rather requires the same conduct from both classes, the test is whether the law is an undue burden on interstate commerce. For a law to pass this test, the burden on interstate commerce imposed by the law must be substantially outweighed by the benefit to the state imposing it. The Supreme Court has used this test to strike down an Illinois law requiring all commercial trucks traveling through the state to have curved mudflaps, effectively outlawing flat mudflaps for trucks in the state.

Here, the only portion of the ordinance that could reasonably be said to burden interstate commerce is the one year residency requirement, as it reduces transfers of CPNCs between current holders and those out-of-state individuals who would like to

purchase one and move to Georgia to use it. It is not clear that this even constitutes a burden on interstate commerce for the purposes of the dormant commerce clause. However, even if it is, the burden seems to be relatively slight, and law seems calculated to bear a reasonable benefit to Georgia in the form of competent cab drivers more familiar with their routes and the populace. Therefore the ordinance does not place an undue burden on interstate commerce.

Count Three: Equal Protection

The first issue, to determine the level of scrutiny that a court should apply to the law in this equal protection challenge, is what it the classification being challenged. The classification here is between those who have been residents for a year or longer, and those who have not. Because this is not a classification based on race or national ancestry, or alienage, it does not warrant strict scrutiny. Because it is not a classification based on gender or illegitimacy, it does not warrant intermediate scrutiny. Rather, as a typical economic regulation, it warrants only rational basis scrutiny as outlined above. Rational basis review asks whether the regulation is reasonably related to a legitimate government interest. Accordingly, the court has held that a New Orleans ordinance requiring hotdog vendors to have been residents for several years does not violate Equal Protection.

Under this very deferential standard, the ordinance will be upheld. As above, Georgia has a legitimate interest, explicitly stated in the ordinance, in ensuring that its cab drivers are familiar with City, and the residency requirement is reasonably calculated to further that interest. Therefore, the ordinance does not violate Equal Protection.

Please note that this answer does not address whether the regulation in question violates the Privileges and Immunities clause by restricting the right of nonresidents to make a living as a cab driver for one year, as the facts indicate that such was not alleged in the complaint.

Question 2 - Sample Answer # 1

1. The issue is whether Dr. Houdoo's expert affidavit complies with Georgia's Expert Witness Statute. First, Georgia's Professional Negligence Statute requires that in order to assert a claim for professional malpractice (whether by a doctor, dentist, or more than 20 other professions under the statute), the claimant must file an expert affidavit. Further, the expert affidavit must comply with the Expert Witness Statute. The Expert Witness Statute requires that if it is an action for medical malpractice, the affiant must be licensed in the state where he practices, plus either 1) practiced the specialty as to which he is testifying for three of the last five years, or 2) taught at a duly accredited school in the area of practice for at least three of the last five years, and that it may be a doctor testifying in an action against a doctor of osteopathy, or vice versa. But, this requirement only applies to professional malpractice actions, not ordinary negligence. If ordinary negligence is asserted, then compliance with the Expert Witness Statute and Expert Affidavit Statute is not required. Georgia courts have held that when a nurse operated on a patient without consent, even though it appears like a battery claim, the issue of whether to operate in the interests of the patient is a professional negligence claim. Therefore, even if at first blush the action appears not to be for professional negligence, the substance of the action determines whether an expert is required to allege facts and testify as to the standard of care.

Here, Dr. Houdoo has not practiced or taught for at least three of the last five years. Instead, he has only been a faculty member for the last two years, which renders him ineligible as an expert affiant. Therefore, if the action against Dr. Peeper is a professional negligence action, then the affidavit will fail for lack of compliance with Georgia's Expert Witness Statute. But, operating on the wrong eye seems to be a question or ordinary negligence, not professional negligence. The standard of care could be readily ascertained by jurors in the subsequent trial. Therefore, it is unlikely that an expert affidavit is required against Dr. Peeper.

2. The issue is whether nurse's forgetfulness in leaving a blind patient in the bathroom for one hour is an action for ordinary negligence, which does not require an expert affidavit, or an action for professional negligence, which does require an expert affidavit. If it is an action for ordinary negligence, Local Hospital could raise an objection to Mr. Smith's failure to attach an expert affidavit to the claim. As noted above, what appears to be merely an ordinary negligence claim (a battery claim for lack of consent, for example) may also contain issues of professional negligence. On the facts, nurse's forgetfulness seems to be ordinary negligence, unless there is a certain professional standard of when to see to patient's left in the bathroom. It does appear that it is an obvious violation of a reasonable person standard for a nurse to leave a blind patient in the bathroom by himself. But, if there might be any professional standards which apply, the Local Hospital may object to the failure of Mr. Smith to attach an expert affidavit with his complaint.

3. The issue is whether Georgia's dismissal and renewal statutes allow Mr. Smith to refile after the statute of limitations has run. The statute of limitations on personal injury

claims is two years. The statute of limitations on medical malpractice claims is also two years. The statute of repose in a medical malpractice claim is five years. Georgia has special statutes that allow a plaintiff to dismiss a defective complaint after the statute of limitations has run. To do this, it must be dismissed before any order on the merits or the first witness is sworn in. Here, Mr. Smith dismissed the complaint before the court ruled on the issues. Plus, no counterclaim by the defendants had been filed that requires court approval for dismissal. Also, Mr. Smith served both defendants within the two year statute of limitations on July 1, 2010. As long as Mr. Smith pays court costs, attaches and describes the original action to his second complaint, and refiles the complaint within six months of the dismissal, the action will be renewed.

There is one special exception to the dismissal and renewal statutes: expert affidavits. A defendant can object, and, if the plaintiff does not correct the error within thirty days, then it cannot be dismissed and renewed. But, here, as noted above, both actions are probably not professional malpractice actions, the expert affidavit is probably not required, and Mr. Smith can dismiss, renew, and refile after six months.

4. According to Georgia's dismissal and renewal statutes, the earlier claims are dismissed without prejudice. Practically, the plaintiff has one dismissal as a matter of right. Even the defenses of the first action cannot be raised in the second. In order to utilize this effective means of renewing a claim for improper service or if a lawyer is not ready to proceed to trial, for example, an attorney must pay the court costs in the first actions, and, to be sure, also get the clerk to document that the attorney did pay costs. Second, the attorney must refile the action within the statute of limitations or within six months after dismissal, whichever is later. Third, the attorney must attach the a copy of the original complaint, the date of the dismissal and the date of the original filing to the renewed complaint. If Mr. Smith's attorney complies with all of the above, then the renewed action will be valid and not subject to any original defenses (as long as, as noted in no. 3, the expert affidavit was not defective).

Question 2 - Sample Answer # 2

1. Dr. Peeper should file a motion to strike the affidavit of Dr. Houdoo. The issue is whether Dr. Houdoo is qualified to offer an expert opinion on the subject matter of the case.

To offer an expert opinion, a witness must be qualified by his education or experience as an expert in the subject matter. The witness must further base his opinions on reliable facts and data, and the field of expertise or the theory upon which the expert's opinion rests must be found reliable and to have been applied reliably in the instant case.

Here, it does not appear that Dr. Houdoo would be qualified, either by his education or experience, to render an expert opinion in this case. The relevant subject matter is ophthalmologic surgery, which was performed by a board-certified retinal specialist and surgeon. Dr. Houdoo is only a licensed optometrist and faculty member in the field of optometry. He was never a medical doctor or surgeon, and he had been retired from the active practice for five years and only a faculty member for two or the last five years. Although it probably does not take more than basic optometry knowledge to know whether the correct eye was operated on, Dr. Houdoo would not have the proper qualifications to opine on the conditions of retinal surgery. For instance, he would not be able to opine regarding the knowledge and skill a retinal surgeon working in an emergency ward would have, nor would he have any knowledge of how to diagnose and operate on an eye in those conditions. As a result, he is not qualified to render an expert opinion. Thus, Dr. Peeper should object by moving to strike Dr. Houdoo's affidavit.

2. The issue is whether it was required for John to file an expert affidavit concerning the claim against the nurse, and also whether the Local Hospital (LH) can be held liable under vicarious liability.

Georgia requires expert affidavits to accompany complaints only for professional negligence, and not ordinary negligence. John is relying on ordinary negligence in his claim against the nurse and LH, and thus an affidavit was not required. Under the doctrine of respondeat superior, an employer may be held liable for the negligent actions of its employees that are committed within the scope of employment. Employers will not be held liable if the actions were outside the scope of employment or were intentional. Here, the nurse was clearly acting within the scope of her employment when she responded to John's call for escort to the bathroom. The nurse escorted him to the bathroom, but then failed to come back to escort him to bed. It does not appear that the nurse's actions were intentional, but rather simply negligent, and thus her actions can be imputed to the LH under vicarious liability. LH may also attempt to raise some sort of contributory/comparative negligence claim, arguing that John should not have attempted to leave on his own in his condition (blind), but such an argument would fail. If John's action was seen as an intervening event, it would be an entirely foreseeable event, actually caused by the nurse's negligence. Thus, LH should be held

liable under vicarious liability.

3. The issue is whether Georgia's renewal statute excuses John's failure to file within the statute of limitations.

Under Georgia's renewal statute, if a plaintiff voluntarily dismisses a complaint, he may refile the complaint one time without prejudice, even if the statute of limitations period has elapsed. If the statute of limitations period has elapsed, the plaintiff may still refile the complaint one time within six months of dismissal, subject to the requirement of paying any accrued costs.

Here, John's claims for medical malpractice and ordinary negligence arose on July 4, 2008. Both claims are subject to a two-year statute of limitations period. For medical malpractice claims, there is also a five-year date of "ultimate repose," beyond which a plaintiff cannot seek relief under any circumstances (absent tolling for a minor under 5). John brought his initial case on July 1, 2010, within the statute of limitations for both claims. On August 1, 2010, John voluntarily dismissed the complaint without prejudice. Under the renewal statute, John had six months from August 1, 2010 to refile the complaint, paying any accrued court costs. John refiled on January 10, 2011, within the six-month window, and paid the accrued costs. Thus, John's claim could properly be refiled on January 10, 2011 against both Dr. Peeper and the Local Hospital.

4. The issue is whether John's earlier dismissal prejudices his refiled complaint, and what steps he should take to avoid dismissal.

Under Georgia's renewal statute, the one allowed voluntary dismissal is without prejudice, meaning plaintiff can refile the same claims without concern for res judicata or collateral estoppel. Thus, John properly refiled his complaint and it can be considered by the trial court. However, there are two steps John should take to avoid dismissal. Both relate to the claim against Dr. Peeper. First, in Georgia, emergency room personnel are only liable for gross negligence. Public policy recognizes the importance of having prompt care in an emergency room setting, and thus emergency room personnel will only be liable for gross negligence. John should plead facts to support a finding of gross negligence. Second, John must find a qualified expert to submit an affidavit. As explained above in (1), Dr. Houdoo is not qualified to render an expert opinion in this matter, and thus the action risks dismissal if a qualified expert is not located to offer an opinion.

Question 2 - Sample Answer # 3

1. Dr. Peeper could object to Dr. Houdoo's affidavit on the ground that Dr. Houdoo was not qualified to make the affidavit. In a professional malpractice case, the plaintiff must file with his complaint an affidavit from a professional within the same field as the defendant wherein the affiant attests to the defendant's negligence/malpractice based upon the standards of their shared profession. Because Dr. Peeper is an ophthalmologist and Dr. Houdoo is a optometrist, they are not within the same field and thus Dr. Houdoo was incompetent to aver to Dr. Peeper's negligence as an ophthalmologist. Additionally, Dr. Houdoo was not actively involved even in the profession for which he would be qualified to make such an affidavit.

2. Local Hospital could object to the claim against its nurse on the ground that John did not include with his complaint an affidavit from a nursing professional averring that the nurse-defendant was negligent by professional standards within the nursing community. John will argue that his claim was based on ordinary negligence, as opposed to medical or professional negligence. However, regardless of the cause of action under which plaintiff pleads his complaint, where he complains of negligent provision of medical care, Georgia's Professional Negligence Statute will apply. Under the Professional Negligence Statute, an affidavit of negligence was required to be filed at the time the complaint was filed unless the plaintiff's lawyer filed a verified affidavit along with the complaint averring that he had been hired within 90 days of the expiration of the statute of limitations, that the statute will run within 15 days, and that he could not with reasonable diligence obtain the required affidavit before the statute would run, in which case he would have been allowed to supplement his pleading with the required affidavit within 45 days of filing the complaint. The facts given do not suggest that John's attorney took such action. John would also be allowed to supplement his pleading with the required affidavit if the judge found that John had the affidavit available at the time the complaint was filed and it was omitted by mistake.

3. John's complaint against Dr. Peeper could be refiled on January 10, 2011. A party may dismiss without prejudice once during litigation, prior to the impaneling of a jury or, in a bench trial, the swearing of the first witness, and may thereafter refile the complaint within the original limitations period or within six months from the date of the dismissal, whichever is later. Since John would be refiling on the same day as his dismissal, he would be so permitted. Further, there was no pending cross claim or motion for summary judgment that would have made the dismissal improper and the judge had not announced or entered a ruling on the parties' motions to dismiss, which would have also precluded John from dismissing the complaint without prejudice. The affidavit filed in support of his claim against Dr. Peeper will not operate to prevent John from refiling, because it was merely defective, not absent, and thus a dismissal with prejudice was not mandated. John would have been allowed an opportunity to cure the defects had the claim remained pending, and so he will be given the opportunity to "correct" the mistake upon refiling the complaint following a dismissal without prejudice. However, John may not refile his complaint against Local Hospital. Because he was required to file an expert affidavit with his complaint and failed to do so, under Georgia's

Professional Negligence Statute, John's complaint against Local Hospital is required to be dismissed with prejudice for such failure. A party may not voluntarily dismiss his complaint in order to avoid the application of this law. As such, the claim against Local Hospital would be barred.

4. Upon the refiling of John's complaint, the merits of his case will not be affected by the earlier dismissal. A party has an absolute right to voluntarily dismiss a case once without prejudice as long as the trial has not commenced, the judge has not announced a ruling that would amount to a judgment on the merits of the case, and the defendant does not have a counterclaim which could not proceed in the absence of the plaintiff's claims. Exercise of that right cannot be held against a plaintiff. However, John will not be able to dismiss the case a second time without prejudice. Additionally, to avoid a dismissal by the trial judge, John must file the appropriate affidavits as required by Georgia's Professional Negligence Statute in support of his claims.

Question 3 - Sample Answer # 1

1. Validity of 2005 Will

The handwritten changes made by Mr. Redfern to his 2005 Will do not affect its validity. The changes are merely handwritten on top of a validly executed will, and so there is no question as to the terms of the original will. In other words, a probate court will have no trouble determining which terms were original and which terms were added by Mr. Redfern in 2005. Further, he executed the Last Will and Testament with me and I keep copies of all legal documents that I prepare.

Additionally, for the reasons set forth below in part 2 of my explanation, the two changes made by hand did not revoke his Will. In Georgia, a will can be revoked by execution of a new will (either expressly or impliedly revoking the earlier one), by physical revocation, or by operation of law. The handwritten changes made by Mr. Redfern in 2009 neither constitute a new will, nor did they revoke this 2005 Will. It is still valid and will be properly probated according to its original terms.

2. Legal Effect of Two Changes Made by Hand

The two changes made by hand to Mr. Redfern's Will in early 2009 have no legal effect and the original Will is left unchanged from its 2005 terms. A will can be revoked in three ways: (1) the valid execution of a new will; (2) revocation by physical act; or (3) revocation by operation of law. The third way to revoke a will is inapplicable on these facts because there has been no marriage, divorce, or birth of a new child. However, the first two ways are arguably applicable and should be disposed of accordingly.

A will can be revoked by a new will if a new will expressly revokes the earlier will, or if a new will has conflicting terms such that the earlier will is revoked by implication. Mr. Redfern attempted to create a new valid will because he signed the two changes, and had two witnesses sign it as well. Georgia does not accept holographic wills as valid. This means that all wills must be in writing, signed by the testator, with the testator's signature attested to by two witnesses over the age of 14. The witnesses do not have to sign in each others presence or even watch the testator sign the will. However, the testator must at least attest to his signature of the will in the presence of the witnesses. To the contrary, Mr. Redfern gave the "new" will to his gardener to have the neighbors sign it as witnesses. Because the witnesses did not sign in the presence of the testator, the changes did not constitute a new valid will -- and the earlier 2005 will was not revoked.

Likewise, the physical act of destroying or changing a material part of the will acts as a revocation of the earlier will. In Georgia, revocation by physical act will only be effective if it is a revocation of the entire will, and not just a part of it. This can be shown by actual physical destruction of the entire will, or alteration of terms that are so material that the entire will is revoked by physical act. Mr. Redfern did not destroy the entire will, nor did he change any such material terms. He added an additional gift of $10,000 and doubled the sum he intends to give to each grandchild at the time of his death. Especially considering the substantial size of Mr. Redfern's estate, exceeding about

$4mil, these changes are not material.

Because Mr. Redern's two changes by hand did not revoke his earlier 2005 Will that I helped prepare, the changes have no legal effect.

3. Process to Appoint a Personal Representative
Mrs. Redfern need not worry because a named executor will not be forced to serve as the executor if she does not desire. Because the alternative executor Bill has since deceased, the Probate Court would need to appoint a personal representative to the estate. This can be done in a few ways. The Probate Court need not have any hearing or hold any proceedings if all of the beneficiaries to the estate agree. The beneficiaries (and the guardians of minors) can unanimously agree to appoint someone as the personal representative to take over as executor of the estate. In the absence of such agreement, the Probate Court will hold a hearing to determine who would best represent Mr. Redern's wishes and act as executor.

4. Bequest to Boys and Girls Club
The doctrine of Cy Pres applies to this issue. Under this doctrine, the charitable bequest to the Boys and Girls Club of Damascus will not be completely extinguished. Rather, it will go to any like organization with similar goals and purposes. It should go to another charitable organization so that the bequest will still fulfill the intention of Mr. Redfern.

5. Distribution of Remaining Assets of the Trust
Upon the death of Mrs. Redfern, the Will dictates that the remainder should go "per stirpes to his lineal descendants living at the death of his wife and him." Lineal descendants are the issue of the testator, meaning children and grandchildren whether by blood or adoption. Bill's adopted daughter would share in this distribution so long as she was legally adopted and there is a final decree of adoption. In the alternative, Georgia recognizes "virtual adoption" meaning there is an unfulfilled contract to adopt. Georgia would not recognize any sort of constructive adoption whereby the parents treated her as an adopted child. Regardless, I am fairly certain that Bill's adopted daughter was legally adopted, and so she would counted as a lineal descendant for the purposes of distribution.

Per stirpes means that each of the lineal descendants will share according to their line of inheritance. In other words, there are three lines to look at because Mr. Redfern had three children. Bill's line will get 1/3 of the remainder, and so his two children will take 1/6 each. Sam is not married and has no children and so he himself will take 1/3. Sally will take 1/3 of the remainder. Because she is still living, she will take that 1/3 and her children will take nothing on their own.

Question 3 - Sample Answer # 2

1. The handwritten changes made by Mr. Redfern to his 2005 Will did not affect its validity. The issue is whether the 2005 Will was revoked by physical act.

Georgia recognizes revocation of wills by physical action. Such physical action must affect a material part of the will. The most common method of physical act revocation is tearing a will into pieces, though striking through a material part of the will has the same effect. Georgia does not recognize, however, partial revocation by physical act. Physical acts are either ignored and ineffective, if they do not affect a material part of the will, or they revoke the entire will.

Here, Mr. Redfern clearly intended only to make two small changes to his will. The two provisions changed -- adding a charitable bequest and doubling his grandchildren's gifts -- were relatively minor and could not be said to affect a material part of Mr. Redfern's will. Thus, the striking through of those two provisions will not operate to partially revoke the 2005 Will, and thus the will is still valid.

2. The handwritten changes were not valid and will have no legal effect. The issue is whether the handwritten changes were properly executed and attested.
In Georgia, every will or codicil must be validly executed, meaning it must be in writing, signed by the testator, and witnessed by two subscribing witnesses. The testator must either sign or acknowledge his signature in the presence of the witnesses, and the testator must be present when the subscribing witnesses sign the will. It is not required for the two witnesses to be present with or sign in the presence of each other. Also in Georgia, holographic wills are not recognized, so handwritten wills and codicils must be validly executed and witnessed.

Here, Mr. Redfern attempted to make a change simply by striking through and handwriting on the 2005 Will. He did so without any witnesses, and he did not sign in the presence of any witnesses. In an attempt to meet the valid execution requirements, Mr. Redfern had his gardener take the Will to the couple next door to initial the changes, which they presumably did. Though Georgia allows for proxies in the signing of the testator's name, if the testator is present and unable to sign, the gardener could not "represent" Mr. Redfern for the purposes of satisfying the presence requirement of the execution. Mr. Redfern was not present when the couple initialed the changes, and thus the changes were not validly executed. Thus, the handwritten changes have no legal effect.

3. The Georgia Probate Court should hold a proceeding to appoint an administrator with the will annexed, which could be me (his attorney), any of his children, or anyone else who can sufficiently represent Mr. Redfern's estate's interest. Because Mrs. Redfern has expressed the desire not to be the executor, and because the only other named executor (Bill) is dead, the Georgia Probate Court will have to hold a hearing to appoint an administrator with the will annexed (AWWA) to oversee probate of Mr. Redfern's will. The AWWA must be selected by the Court taking into consideration the

testator's interests and the interests of the named beneficiaries. Proper persons for such appointment would be me, Mr. Redfern's attorney, since I drafted his 2005 Will, which, as explained in (1) above, is fully valid and ready for probate. Alternatively, the Court could appoint one of Mr. Redfern's other children, or any other individual who can sufficiently represent the estate.

4. The charitable bequest should go to another similar organization under the *cy pres* doctrine. The issue is what happens when a charitable bequest lapses. When a charitable gift lapses due to the extinction of a particular charity, Georgia applies the *cy pres* doctrine to conform most closely with the testator's intent. If not for the *cy pres* doctrine, the lapsed gift would fall into the residuary of testator's estate. As a result, courts have looked to equity to attain a result more in line with the intent of the testator. In this case, Mr. Redfern left $10,000 to the Boys and Girls Club of Damascus. Because the B&G Club of Damascus is no longer in existence, the Court must identify another similar charity for the gift to go to. Proper examples would be the Boys and Girls Club of another nearby town, or an organization within Damascus that exists for a similar purpose as did the Boys and Girls Club.

5. The issue is which individuals will take the trust assets under Mr. Redfern's will. According to the 2005 Will, the remainder of the one-half of Mr. Redfern's residuary estate that was placed into a trust was to be divided *per stirpes* to his "lineal descendants" living at the death of his wife and him.

One issue is whether Bill's adopted child qualifies as a "lineal descendant." Georgia law dictates that an adopted child is treated as biological issue in trusts and estates. Further, children born or adopted after the execution of a will are treated as issue, absent any intent in the will to the contrary. In this case, Mr. Redfern's inclusion of "lineal descendants" could be argued to be an intent to have his estate remain in the bloodline. However, the Will was made in 2005, and Bill did not adopt until 2007, so it is unlikely that Mr. Redfern intended the language in this way. The adopted child of Bill will be treated as a lineal descendant for the purposes of trust distribution.
The other issue is how to distribute the assets in a *per stirpes* arrangement. *Per stirpes* means "by the roots," meaning each child will receive an equal share, to be split among any further descendants according to that share. In this case, each of Mr. Redfern's children will receive one-third of the remaining trust assets. Because Bill is deceased, his two children will take one-half of that one-third share. (Bill's wife, and any other spouses, do not take because the language of the Will calls for the descendants to take.) Sam will receive one-third of the remainder. Finally, Sally will receive one-third, and her three children do not take anything until Sally's death.

Question 3 - Sample Answer # 3

1. The handwritten changes made by Mr. Redfern did not affect its validity. Georgia does recognize partial revocation of an instrument by physical act. Rather, the Georgia courts take an "all or nothing" approach to attempted changes to a will executed without proper testamentary formalities. If the court finds that the testator obliterated or revoked a material portion of the instrument, he will be found to have revoked the instrument in its entirety. If it is determined that the attempted changes did not cancel out a material portion or provision of the instrument, then the changes will be disregarded and the instrument will be probated as originally executed. Here, Mr. Redfern attempted to add an additional charitable gift and to increase the amount of the gifts left to his grandchildren. He did not attempt to change or cancel any material portion or provision of the will. Out of a $4,000,000 estate, the attempted changes would alter the disposition of only $35,000. It also would not have substantially changed the terms or beneficiaries of the will, as $25,000 of the $35,000 being changed would have been given to his grandchildren, who were already to receive bequests under his will. Therefore, the attempted changes will be ignored and of no effect on either the validity or the terms of the will.

2. There is no legal effect from the two changes Mr. Redfern attempted to make to his will. Mr. Redfern attempted to re-execute the will with requisite formalities following the changes, which, if properly done, would have given legal effect to both the bequest to his church and the modified terms of the bequests to his grandchildren. However, the changes were not properly witnessed under the Statute of Wills and therefore are of no effect. Mr. Redfern's initials would operate as his signature as long as he intended the initials to serve as his signature. It would make no difference that Mr. Redfern initialed the changes outside the presence of the witnesses as long as he then subscribed to the validity of the document and signature in their presence. But he failed to do this, instead sending the will with the gardener. Additionally, because the gardener took the will next door to be witnessed, it follows that the witnesses did not sign in the scope of Mr. Redfern's vision as would be required for the valid execution of a testamentary instrument. Because the document was not republished with proper testamentary formalities after the change and because Georgia does not recognize partial revocation by physical act, the two changes would be of no legal effect.

3. A person may decline an appointment as executor. Therefore, Mrs. Redfern may not be forced to serve as executor and may decline to do so and have the probate court appoint another as administrator of the will. In the face of Mrs. Redfern's declination to act, Mr. Redfern's second-choice appointment would be named executor, but for the fact that in this scenario he is deceased and therefore unable to serve. Because there is no valid, accepted appointment in the will, the court will make an appointment based upon a statutory order of preference. There being no willing and able executor named in the will, and the spouse being unwilling to serve, the next preference is one of Mr. Redfern's surviving children. As between the two of them, if both are of the age of majority and otherwise competent to serve, a decision between the two shall be made based upon factors such as willingness to serve, fiscal responsibility, capability of

serving considering time restraints, knowledge necessary, etc. If neither Sam nor Sally is willing to serve, or if neither of them is found capable of serving by the probate court, the court should consider other relatives of the age of majority. If none is found, or none is willing, any other interested person, including a creditor of the estate, may be appointed administrator.

4. Under the cy pres doctrine, upon determining that Mr. Redfern had a general charitable intent, the gift may be "reformed" by the court so as to give effect to that intent as nearly as possible by substituting a different Boys and Girls Club or by substituting a different charity in Damascus with a purpose similar to that of the Boys and Girls Club. If evidence is presented such that the court determines Mr. Redfern did not have a general charitable intent but instead intended a gift only to the Boys and Girls Club of Damascus, the gift will fail and will pass under the terms of his will as part of the residuary estate.

5. If all of Mr. Redfern's descendants, except for son Bill, are still living at the death of his wife, the remaining assets of the trust should be distributed one-sixth to each of Bill's two children; one-third to Sam; and one-third to Sally. This is because by the terms of the testamentary trust, the remainder was to be distributed per stirpes to his lineal descendants living at the death of his wife and him. "Per stirpes" translates "by the roots" and means that the initial division of the estate will be made at the child level, i.e., split into three separate, equal shares for each of Mr. Redfern's three children. Because Sam and Sally are still living, they will each take their one-third share, "cutting off" the inheritance rights of their respective children. Because Bill has predeceased the date of distribution, his one-third share will then be divided equally between his two children, leaving each of them a one-sixth share of the remainder of the trust.

Question 4 - Sample Answer # 1

1) Advice to Seller

As an attorney representing and advising Seller, it is very important that she understand her existing legal obligations to Bank and the consequences of violating the acceleration clause in her deed to secure debt.

(1)(i) Seller - "Subject to": Seller will violate the due-on-sale clause of the deed to secure debt if she sells her property to Buyer. Buyer lacks the resources necessary to pay the Bank all the sums currently owed by Seller secured by the deed if the Bank chooses to make them "immediately due and payable." The result is that Bank could foreclose on the property and, assuming Seller is under water on her home or it sells post foreclosure for less than she owes, she could find herself without a home and personally liable to Bank. The "subject to" method violates the due-on-sale clause because it involves Seller selling an interest in her property to Buyer without first obtaining Bank's prior written consent. From these facts, Bank is unlikely to consent to the transaction and will exercise the due-on-sale clause if Seller goes through with the sale without Bank's permission.

(1)(ii) Seller-Assumption

This option offers the advantage of complying with the terms of the Bank's deed to secure debt by requesting permission from the bank. Assuming the Bank agreed to this assumption, and it is unlikely the Bank will do so, Seller would remain liable on the loan if Buyer failed to make a payment, and her second mortgage would be behind Bank in priority. If Seller defaults, it is very likely Seller will not be able to recover the $10,000 in her second mortgage, because she will only get what is left over after Bank's initial loan is satisfied.

(1)(iii) Seller - "Bond for Title"

Agents third method for conveying the property would also violate the deed's due-on-sale clause. Although Seller would retain the legal title to the property, she would be giving Buyer equitable title which qualifies as an interest in the property, thus Bank could demand all sums secured by the deed "immediately due and payable." In this scenario, Seller lacks the funds to make that payment and Buyer, under the terms of the "Bond for Title" sale only owes seller $1,000 per month, thus Seller is stuck owing money she does not have, payable when she does not have it.

(2)(i) Buyer - "Subject to"

I do not recommend Buyer accept the "subject to" method as Buyer would be purchasing property with a large mortgage immediately due if Bank exercises due-on-sale clause and without the funds to pay it. Bank could foreclosure on Seller's mortgage leaving Buyer without any title to the property.

(2)(ii) If Buyer can afford to make the payments, Seller was making, and bank accepts this "assumption" option, Buyer could use this method to purchase a home and as long as Buyer continues to meet his payment requirements, gain ownership in real estate. Bank is unlikely to accept an uncreditworthy Buyer, but if it does this option would be good for Buyer.

(2)(iii) As discussed in (1)(iii), the "land contract" option triggers the due on sale clause. Assuming no problems with the bank, Buyer also needs to be very careful to protect his interest in the property, because he is not receiving legal title at the outset and a lot can happen in the 100 months it takes to complete the installment land sales contract. For example, Georgia is a race-notice jurisdiction, and it is possible the delay in conveying legal title could permit additional encumbrances on the legal title to the property that would take priority ahead of Buyer.

(3) Professional Responsibility - The Wrap

The issue is whether an attorney can take on matters in which they lack competence under the Georgia Rules of Professional Conduct. The Georgia Rules of Professional Conduct require that an attorney only take on matters that he or she can handle with competence. This involves both time to handle, and more applicable in this case, knowledge and skills necessary to effective represent the client. Here, Wraps, are "complex and dangerous instruments" and if an attorney is not comfortable with his expertise in preparing these documents, the Georgia Rules of Professional Conduct would prohibit the attorney from accepting this assignment, unless competence can be gained through association with an attorney who is more experienced in this field (this requires client consent) or competence can be gained through self-education.

An attorney can not help a client defraud a third-party, and here it appears Wraps have been employed in the past to prevent lenders from learning borrowers have transferred legal titles to a new buyer. An attorney would need to refuse work that would result in defrauding a third party.

Finally, attorneys have the obligation to not only behave ethically but also to avoid even the appearance of impropriety. Even if the attorney could become competent enough to handle these Wraps, based on these facts it is likely the attorney's work could damage the public's perception of the legal community. It is also worth noting that the Agent's reminder that he sends his "normal" work to attorney and that attorney therefore "needs" to do this transaction is cause for concern. An attorney can not allow her own financial health or needs or those of her firm, to impact her professional responsibility decision-making.

Question 4 - Sample Answer # 2

(1) Advice to Seller

Selling the property to Buyer "subject to" the existing loan will not relieve Seller of personal liability for the indebtedness secured by the Bank's deed. Seller is obligated to make payments on the note, regardless of whether Seller owns the property. While Buyer can agree to be responsible for the payments, if Buyer defaults, Bank is entitled to pursue recovery from Seller. Also, because Seller will have transferred title to Buyer, the lender may declare the entire indebtedness due.

If Bank agrees to allow Buyer to "assume" the loan, Buyer needs to make sure that Buyer will be discharged from any liability. As a general rule, Buyer's assumption of the loan would not discharge Seller, so seller would still be secondarily liable on the note. Also, the second mortgage from Buyer would be subordinate to the rights of Bank. If Bank forecloses, there is a good chance that the sale proceeds would not be sufficient to cover both mortgages.

With a Land Contract, Seller would remain liable for the note to Bank and the property would still be subject to the Bank's security deed. Because Seller has transferred equitable title, the Bank can accelerate the indebtedness due on the loan.

(2) Advice of Buyer

If Buyer purchases the property "subject to" the existing loan and receives legal title by warranty deed, Bank may declare the entire amount outstanding on the note immediately due and payable. If Buyer or Seller do not pay the indebtedness, the Bank could then foreclose, leaving Buyer without the property and risking Buyer's subordinate second mortgage.

"Assumption" is probably the best option for Buyer, assuming Bank consents to Seller's sale of the property to Buyer. Buyer could assume Seller's loan obligation, which seem to be on pretty good terms, and Buyer would also receive title to the property.

With the Land Contract, Buyer would not get legal title to the property. Also, the property would still be encumbered by Bank's security deed. Buyer would have to rely on Seller to make the loan payments. If Seller failed to make the required payments, Bank could foreclose. In addition, by entering into the Land Contract and transferring equitable title, Seller transferred an interest in the property. Bank could therefore demand all sums secured by the deed to be immediately due and payable.

(3) Professional Conduct

I am concerned about my competency to handle this matter. One of the duties a lawyer owes to his/her clients is competency in the area of law he/she practices. Knowing that the issue here is complex and beyond the scope of my current skill set, I would want to consult with another attorney who is knowledgeable in this area of law; disclose my unfamiliarity with this area to the client and get the client's consent to educate myself in this area; or decline or withdraw from the representation.

Additionally, I am concerned about assisting the unauthorized practice of law. Agent proposes to prepare the contract using forms he/she received during a seminar.

Also, I am concerned about the duty of loyalty owed to my client. Agent is pressuring me to agree to a Wrap arrangement because he/she needs the commission, but this may not be in my client's best interest.

Question 4 - Sample Answer # 3

1. My initial discussion with Seller would be to point out Agent's clear conflict of interest in all three scenarios. The interests of the Seller and the Buyer necessarily are in opposition to each other. The common goal may be to transfer the property, but the ultimate goal is for Buyer and Seller to make the best deals possible. Seller's best deal would be to Buyer's detriment and vice versa. In addition, the Agent has a personal interest in selling the property for his own gain: namely to make a commission. So even before we looked at the suggested scenarios, Agent's motives lead me to a presumption against any of his "creative" suggestions.

That said and with respect to each proposition:

"Subject to": This scenario suggests to me an improper circumvention of the intent of the original parties (Bank and Seller) expressed in the "due-on-sale" clause. On its face, the bank is disallowing "all or part of "an interest" which is "sold or transferred" without its prior written consent.' This is broad language and suggests clearly that prior permission must be obtained for any type of transfer. Here, there is a clear transfer of at least some interest on the property. Hence, the prior written approval must be obtained from the bank. Upon notice of this proposal, the bank could demand that the entire sum of $80,000 less any principal paid would be paid immediately. The Buyer is only paying $10,000 in cash. Given Seller's financial troubles, I cannot see where she would be able to make up the difference to the bank. Moreover, by taking "subject to" Seller's loan, Seller's responsibility to make payments to the bank is not forgiven. If Buyer fails to make the payments, it seems that Seller might be responsible to make the payments.

"Assumption: Here, two of the above problems are resolved. First, the bank will definitely be placed on notice of the transaction. Second, Buyer is assuming the loan, so if Buyer fails to make payments, Seller would not be responsible. The due on sale clause does not prohibit subordiate liens, so technically, the second mortgage should not be a problem with the bank. Legal title is transferred to the Buyer so all risk of loss is on the Buyer. So Seller stops paying the mortgage and gets $10,000 cash at closing. This seems to be a viable solution, provided Seller is willing to handle the procedural issues of holding a mortgage.

"Bond for Title" Here again, the bank must be notified, because equitable title constitutes an interest that is transferrd to the Buyer. Seller still retains responsibility for making payments to the bank. The monthly payments made by the Buyer do not give any interest. So Buyer is getting an interest free loan from Seller while Seller continues to pay interest on the mortgage. Lastly, if Seller retains legal title, she will assuming the risk of any property damage or injury to third parties while the property is under the controll of Buyer. I would advise against this option.

2. "Subject to: Here, again, the bank may demand immediate payment in full of the debt. We know Buyer cannot make this payment, so the property can be foreclosed.

Since Buyer hasn't assumed the mortgage, any monies leftover after payment of the debt legally goes to the Seller. Buyer would no recoup any monies he spent. So he would lose the $10,000 and would be subject to the mortgage he gave the Seller.

"Assumption" Buyer must be willing to assume an $80,000 morgage at a fixed rate of 4%. If the bank allows assumption and the buyer is willing to pay $100,000 for the property, this may be an option.

"Bond for Title": The question must be raised as to what happens if Buyer cannot continue making payments. He doesn't have legal title. He hasn't met the full purchase price. It would appear that he would lose all the money he paid up unitl the date of his default on payment. This does nto appear to be a good deal.

3. The Agent's proposal violates multiple rules of professional conduct and should be avoided:

a. conflict of interest: An attorney must not assume a case that would result in a conflict of interest. Here, the Buyer' s interest and the Seller's interest can never coincide, and no attorney should attempt such a representation.

b. The representation here is in the Agent's best interest, for which he seems to be threatening the withholding of closings. Giving closings is a form of payment. Taking payment from someone other than a client is forbidden. It begs the question: who is the client? the agent or the Buyer/Seller. Certainly, the agent's interests do not coincide with the Buyer/Sellers

c. An attorney should not assume a complicated matter unless he is certain he can adequately do so. Here, the wrap seems inordinately complicated and it would be advisable to refer it to a more experienced attorney. It appears that inexperience here could greatly harm a client.

MPT 1 - Sample Answer # 1

Introduction:

The proposed legislation will provide royalties to artists when their visual arts, such as an original painting, sculpture, or drawing, are resold. The artist will receive five percent of the profit from such sale. In the event the artist is deceased, his or her heirs will receive the royalties up until 70 years after the artist's death.

Why Legislation is Necessary and Appropriate:

Providing royalties to artists on the resales of works of visual art are aligned with the already established law of requiring creative work artists to be paid for reproductions of their music, literature, and drama. Works of visual art, such as original paintings, sculptures, and drawings, are rarely reproduced. In a study by the Olympia Art Collective in 2004, only seven percent of a visual artists' income is from the sale of reproduction rights. The remaining 93 percent is from the sale of original works.

Works of visual art vastly appreciate in value as a young, unknown artist hones his talent and becomes an established name in the art industry. However, such artists do not reap the benefit of his or her hard work and labor. Ninety-seven percent of visual artists earn less than $35,000 a year, according to the Olympia Art Collective study. Furthermore, heirs received less than $2,000 a year from the deceased artists' works, which mostly comprised of selling original unsold works. However, auction houses and art galleries made $62 million dollars in profits from resales alone in 2004. These businesses are making millions of dollars off of an artist's work while artist's widows, such as Lawrence Huggins's wife, life in poverty.

There is a higher cost to creating a work of visual art than other creative artists due to the expensive materials and tools. In theory, such costs should be compensated later on at the sale of the works. However, evidenced by the little income a visual artist earns each year, those costs are left a burden.

There is an incorrect perception that this royalty will only benefit already established artists and not the starving unknown artists. In testimony by Jerome Krieger, owner of an Olympia art gallery, he claims that the vast majority of artists never make it to the resale market. However, he fails to reference any studies or evidence that would support such a generalized claim. With auction houses and art galleries making $62 million dollar profits annually, there clearly is a large and profitable market for resales that could not be sustained by only a few, famous artists.

The royalty will assists visual artists in developing their own talent. Currently, art galleries invest in an artist in order to develop his or her career. If artists were able to obtain just 5% from the profit of resold works, the artist would have a stronger economic foundation to invest in himself or herself. Even with art galleries losing 5% of its $62 million dollar profits, the galleries would remain solvent and able to develop new potential.

The royalty will attract new artists to Franklin because they will be able to realize the full benefit of their hard work. When new, inspiring talent moves into the area, the art collectors will follow. This force can only help both the artists and auction houses.

Why Any Legal Obligation Is Not Valid:

Some have argued that the proposed legislation is valid because of the preemption provision in the 1976 Copyright Act. However, this is not true.

Under Section 301a of the 1976 Copyright Act ("Act"), the Act essentially "trumps" any state law that conflicts with the Act. In the case of Franklin Press Service, the court outlined a two-step process to determine if the Act "trumps" other laws. First, the work must "come within the subject matter of the copyright." Pictorial, graphic, and sculptural works (such as paintings, drawings and sculptures) are considered to be within the subject matter of the Act.

Second, the rights involved must be within the "exclusive rights" granted by the copyright owner. This is where the proposed legislation if clearly not "trumped" by the Act. Under Section 106 of the Act, the owner of a copyright can distribute copies of the work to the public. Under Section 109(a) of the Act, the owner of a copy can sell that copy without the copyright owner's permission.

Here, the issue is not about copies of visual art. This proposed legislation only applies to the actual original work, and the royalties only apply to that original work being resold at a profit. This is an element that legitimately differs from the "exclusive rights" granted to a copyright owner in the Act. Since the proposed legislation does not fall under the second part of the test, it is therefore not "trumped" by the Act.

In conclusion, the 1976 Copyright Act does not preempt the proposed legislation, thus it is valid.

MPT 1 - Sample Answer # 2

Introduction:
Franklin Assembly Bill 38 (FA 38) will mandate a modest royalty to visual artists for certain resales of their works. Artists are important contributors to the culture of Franklin, yet many of them barely eke out a living. This proposed bill supports Franklin artist and offers them a fair return on their work.

FA 38 gives a five percent royalty to Franklin artists and their heirs for sales of visual art, including paintings, sculptures, and drawings on sales that occur in Franklin or for sales by residents of Franklin. The royalty is determined based on the profit from the sale. No royalty need by paid on the initial sale of the work by the artists, on any resale that nets a profit of less than $1000, or on any resale by an art dealer to an art dealer within 10 years of the initial sale by the artist. This royalty may, by written contract, be increased. This royalty may not be dismissed by contract. Failure to pay the royalty results in a claim for damages. (FA 38.)

This bill differs, in many important ways, from the proposed legislation that was tabled in Olympia in 2006. FA 38 was drafted to address some of the objections to the Olympia bill and is thus a bill that we can all support.

This legislation is necessary and appropriate.
The vast majority of visual artists earn a very low income from the sale of their work. Generally, heirs of artists receive at most a few thousand dollars annually from the sales of deceased artists work. (Testimony of Carol Whitmore.) In contrast to these modest incomes, the total sale of arts in the state of Franklin is a million-dollar business. (By way of comparison, in Columbia in 2004, art sales totaled $62 million dollars.) (Whitmore.) As a matter of equity and fairness, artists should be compensated for the resale of their work.

Many visual artists receive no renumeration from the resale of their works. In contrast to music or literature, or works which can be mass-produced, most paintings and sculptures are never reproduced. Under current law, artists only receive remuneration on the initial sale of the work by the artist. For subsequent sales, artist receive nothing. Whitmore. This creates a harsh economic reality for artists, and one which FA 38 will mitigate.

Currently, when a collector or dealer sells an art work at a great profit, the artist receives nothing. Just as collectors receive huge profits when art works appreciate in value, so should the artist. (Whitmore.)

The resale royalties provided for in this bill will also permit artists to defray some of the costs of materials, which can be quite expensive. (Whitmore.)

This law does not merely reward the established and affluent artist. First, even established and successful artists should be entitled to a fair profit from the resale of

their work. Second, the current bill supports not only established artist, but any artists the sale of who's work nets a profit of $1000, a fairly modest sum. (Whitmore, Krieger.) Royalties to heirs are limited in time to the 70 years following the artists death and FA 38 does not apply to artists who are already dead. (FA 38.)

This law will not dry up the Franklin market in visual arts. As noted above, Franklin has a thriving arts market. A modest sale of 5% on certain sales will not have any negative effect on the market. Some might argue that the royalty will drive collectors out of state, and point to the decreased sales in Columbia after the royalty was enacted there. However, the art market in Columbia ultimately rebounded. (Krieger, Whitmore.)

This carefully crafted law allows gallery owners to develop a market for new artists by exempting both initial sale and those sales from art dealers to art dealers within ten years of the initial sale of the work. As such, it balances the need for gallerists to develop new artists with the need for artists to be fairly rewarded for the resale of their works. (Krieger.)

This law does not discourage investment in art or restrict free trade or private property rights. An art collector is still permitted to invest in art and will still be rewarded should that art increase in value. Under the new law however, the artist will also share in that bounty.

If the art does not increase in value, there is no royalty paid since the royalty is determined based on the profit from the sale. (Krieger, FA 38.) Since the royalty only comes into play if there is a profit of $1000, and the royalty on such a sale would be a modest $50, the administrative costs of the resale royalty are not so high as to discourage sales. Moreover, in such an example, the reseller would still retain 95% of the profit ($950). Certainly, everyone can agree this is fair.

<u>There is no valid legal objection to Franklin Assembly Bill 38.</u>

Bill 38 is not preempted by the 1976 Copyright Act (Title 17 USC § 301(a)) (the Act). Federal law preempts state law where is completely occupies the field on the subject matter at issue; there is no room for state legislation where there is preemption. The 1976 Copyright Act contains a specific preemption clause: "All legal or equitable rights that are equivalent to the exclusive rights within the general scope of copyright . . . are governed exclusively by this title." No person is entitled to any "equivalent right" under state law. Preemption is always a question of Congress's intent: has Congress exercised its full power and thus barred state's from all power over the subject matter? (Goldstein v. California.) In this case, the answer is no.

The rights at issue under the Act are the rights to distribute copies of the copyrighted work to the public by sale; after the initial sale, subsequent sales are not under the control fo the copyright owner. The fact that the 1976 Act contains a preemption clause is not determinative. In Franklin Press Service v. E-Updates, the Franklin

Court of Appeals considered a claim that Franklin's common law tort of misappropriate was preempted by the Act and found that it was not. (Franklin Press.) There are two criteria, both of which must be met for preemption. First, the work at issue, must "come within the subject matter of copyright." Section 102 of the Act sets forth which works come with in the scope of the Act. Copyright protection is accorded to "original works of authorship fixed in any tangible medium of expression" and includes pictures and sculptures. (§ 102.) Clearly, the visual arts covered by FA 38 come within the scope of the federal law.

Second, the rights involved must be within the exclusive rights granted to a copyright owner. (Franklin Press.) Sections 106 and 109 of the Act note that a copyright owner has the exclusive rights to distribute copies, but does not prohibit a lawful owner of a copy from reselling that copy. State laws that include elements that "legitimately differ" from the rights in a copyright are not within the subject matter of copyright and are not preempted by the Act. (Franklin Press.) Here, the right at issue is not copyright - or the right to distribute copies - but the right to receive payment for the resale of an original work. As such, the Act does not preempt FA 38. Because FA 38 accords a different right to artists and gives rise to a legal claim with different elements (a covered sale with a profit of over $1000 and no royalties paid), there is no preemption.

In Samuelston v. Rogers, the USC Court of Appeals held that the Columbia Act, a predecessor of this act, was not preempted by the 1909 Copyright Act. There, the 1909 Act granted a copyright owner the exclusive right to vend the copyrighted work, but did not otherwise restrict the transfer of copyrighted work, after the first sale. It contained no preemption clause. The Columbia Act required resale royalties. The Samuelston court held that the Columbia Act was not preempted because it not did not impinge on the artist's ability to sell his work and applied only after he had sold a copy of the work - as such, like FA 38 - it provided an additional right not granted by the 1909 Act. Finally, that the resale of art may create an economic liability to the artists, does not create a legal restraint on the transfer of work. Although the 1909 Act contained no explicit preemption clause, the end result of analysis is the sale: FA 38 provides an additional state right that is not preempted by federal law.

Please support FA 38.

MPT 2 - Sample Answer # 1

Rawson Hughes & Conrad [letterhead]

Mr. Juan Moreno
WPE Property Development, Inc.
6002 Circle Drive
Springfiled, Franklin 33755

February 28, 2012

Dear Juan:

As you know, the statute of limitations for your claim against Trident in relation to the Forest Avenue project runs in 15 days. As I previously mentioned to you, Trident has not returned our agreement to toll the Statute of Limitations. As a result, if you do not file suit against Trident within the next 15 days, the law provides that you may be barred permanently from suing Trident for its negligence. More specifically, if you file a lawsuit after the Statute of Limitations has run, Trident through counsel may file a motion to dismiss, in which it argues that the Statute of Limitations has run as its defense. The general rule for statutes of limitations provides that the motion would be granted.

There are some exceptions, which I explain below. The law provides for two theories on which a court will still allow a plaintiff to sue after the statute of limitations has run.

(1) **Equitable estoppel**. This requires that: (a) the defendant did or said something intended to induce the plaintiff to believe something and to act upon that belief, (b) the plaintiff was induced to act based upon that, and (c) the plaintiff used "due diligence," meaning that the plaintiff didn't ignore highly suspicious circumstances. These three elements must be proved by clear and convincing evidence. As applied specifically to a defendant's actions or words in relation to a statute of limitations, where a defendant takes active steps to prevent a plaintiff from suing in time. Merchants (2010.) The defendant's active steps need not be fraudulent. Merchants.

There is an argument to be made that, within the past year, Trident's counsel made statements to me that were intended to induce WPE not to file suit. On April 13, 2011, in a meeting on April 25, 2011, in a June 16th, 2011 communication, on October 6, 2011, and in communications in January, 2012, Trident made representations to me that it intended to settle the case, and urged us not to file suit. Most pointedly, on June 16th, Trident counsel stated that Trident agreed "in principal' to our settlement agreement and stated: "We are going to get this resolved....In my view, settlement discussions are on track, and there is no need for a lawsuit." Additionally, at a meeting on January 10, 2012, Trident counsel indicated that it would agree to toll the statute of limitations for six months. (Importantly, however, it did not follow up by signing an agreement. If it did sign such an agreement, it would be enforceable and

the Statute of Limitations would be considered tolled by the courts. Henley v. Yunker.)

We may further argue before that court that your case is similar to that of Merchants. In that case, the defendant insurance company assured a plaintiff that it would "honor" its claim several times, but indicated that it was burdened by the paperwork and required additional time to do so. Similarly, in our case, Trident's numerous statements assured us that Trident intended to settle.

However, a court might find that we did not act as we should with respect to "highly suspicious circumstances." In our case, the fact that Trident repeatedly stated that it would settle, but kept putting off settlement, might be a dilatory tactic that we should be wary of. Furthermore, the fact that Trident agreed in a meeting with us to toll the Statute of Limitations, but refused to sign the agreement, is further evidence of "highly suspicious circumstances." As a result of these two issues, I cannot tell you with confidence that there is a high likelihood of us prevailing on an equitable estoppel claim. It is very possible that a court would not find that we have proved equitable estoppel by clear and convincing evidence.

Additionally, Trident may argue that its statements to us were not actually "misleading" because they did not state definitively that we would settle, since no settlement agreement terms were finally agreed to before the statute of limitations. In Henley v. Yunger, for example, the Court of Appeal found that an insurance company's statement to an unrepresented plaintiff that he had "plenty of time" to file a lawsuit was not misleading, because it did not indicate a specific period of time that the plaintiff had to file suit, and the facts as presented to the court were unclear as to when the statement was made. Trident never gave us a specific date by which it promised to make a settlement final.

(2) **Promissory estoppel.** This requires: (a) a promise by the defendant who asserts the Statute of Limitations as a defense, such that the person who makes the promise would reasonably expect to induce action by the plaintiff (b) the promise actually induces action or forbearance by the plaintiff, and (3) injustice can only be avoided by enforcement of the promise. This type of estoppel differs from equitable estoppel, in that the representation by the defendant that is at issue is the promise of the defendant, not the representation of fact. DeSonto (2005.) A conditional promise cannot be reasonably relied upon in promissory estoppel, and it is also unreasonable to rely on an oral promise where there is a written contract. Desonto.

Viewed in the context of promissory estoppel, we may argue that Trident's counsel made two promises: (1) that it would settle before the statute of limitations, which would make it unnecessary for us to file suit before the Statute of Limitations, and (2) that it would agree to toll the statute of limitations. As to the second element (promise induced action or forbearance by the plaintiff), we may argue that we decided not to sue before the statute of limitations in reliance on its promise.

There is a problem as to the second element: inducing reliance. On the one hand, it is reasonable that we have delayed filing suit *before the statute of limitations has run*, since suggested that it would settle. However, it becomes imprudent to rely on a promise to settle if, at the time of the Statute of Limitations running, the settlement has not been reached. Given Trident's delays - that we have been discussing settlement for well over 9 months now-- it is not reasonable to believe that settlement will occur before the tolling. As of January 25, 2012, all the Trident did was suggest additional terms, without signing an agreement to toll the Statute of Limitations.

As to any promises: we should not proceed with an argument that it promised to agree to toll the statute of limitations. A plaintiff cannot reasonably rely on an oral agreement of a defendant where there's a written contract at issue (DeSonto) to do so would be unreasonable.

I believe that the facts strongly support an argument that Trident made a promise to settle before the statute of limitations. This is based on the email stating "We are going to get this resolved....In my view, settlement discussions are on track, and there is no need for a lawsuit," and by a further statement of Trident's counsel, "There is no need to file your complaint."

However, even if Trident did make such a promise, as I explained above, I do not believe that a court would find that we could have reasonably relied on their promise, since they failed to sign our agreement to toll the statute of limitations, and failed to settle before the statute of limitations ran, and their dilatory actions in settlement make it unreasonable to rely on the promise.

Conclusion
In conclusion, if you hope to recover anything from Trident, I strongly suggest that you permit me to file suit on your behalf within the next few days. I understand that you have other considerations, including the fact that you believe that the value of Trident's other business is far more substantial than Forest Avenue project, and your desire to avoid adverse publicity. Thus, I leave the decision in your hands.

Please provide me with your decision within the next ten days.

Very truly yours,

Thomas Perkins, Managing Partner

MPT 2 - Sample Answer # 2

Dear Juan,

If we fail to file a complaint against Trident by the March statute of limitations date, Trident will almost certainly raise a statute of limitations defense if we ever do sue them. If they succeed in raising this defense, we would lose all of our claims against them. However, we do have a strong argument that the doctrine of equitable estoppel will apply to bar them from asserting a statute of limitations defense. We could also potentially argue that Trident cannot assert the statute of limitations defense under the doctrine of promissory estoppel, but it is a weaker argument.

Equitable estoppel is a doctrine recognized by courts to avoid unfairness when the strict application of the rule of law would result in some sort of injustice in the case. Essentially, it means that a party is "estopped" from asserting a claim or defense because of their own bad behavior. To assert it, a plaintiff must show that "(1) the defendant has done or said something that was intended or calculated to induce the plaintiff to believe in the existence of certain facts and to act upon the belief; (2) the plaintiff, influenced thereby, has actually done some act to his or her injury which he or she otherwise would not have done; and (3) the plaintiff has exercised due diligence inasmuch as equitable estoppel is not available to a person who conducts himself or herself with a careless indifference or ignores highly suspicious circumstances which should warn of danger or loss." *Henley*. I believe that we have a good argument that Trident will be equitably estopped from asserting the statute of limitations defense because of its many statements that we should not file the complaint, that settlement will be successful, and that Trident will indemnify us for all of our damages.

This is not the first time that a plaintiff has argued that the defendant is equitably estopped from asserting the statute of limitations because of things that it has said as a part of settlement negotiations. In *Merchants Mutual Insurance Co. v. Budd*, the plaintiff corresponded with the defendant for years trying to get the claim settled out of court. The defendant, much like Trident in our situation, continued to insist that it would get to it soon but had other issues that were currently taking priority, but that it would ultimately "honor your subrogation claim." Ultimately, the statute of limitations ran, and, when the plaintiff tried to file suit, the defendant argued a statute of limitations defense. The court, however, held that the defendant was equitably estopped, saying that "[o]ne cannot justly or equitably lull his adversary into false sense of security, and thereby cause him or her to subject a claim to the bar of the statute, and then be permitted to plead this very delay caused by such conduct as a defense to the action when brought." Further, the court stated that the defendant did not need to act fraudulently to be barred by equitable estoppel, noting that "unintentionally deceptive acts that lull or induce the plaintiff to delay filing his or her claim may trigger [equitable estoppel]." The court specifically pointed to instances where the defendant promised that it would honor the plaintiff's claim in order to get extensions from the plaintiff in filing the lawsuit, and said that the defendant could not

now take advantage of its "dilatory tactics" to defeat the plaintiff's claim. Therefore, the court found that the defendant was equitably estopped from arguing a statute of limitations defense, and allowed the lawsuit to proceed.

Our case is very similar to *Merchants Mutual*. Trident, just like the defendant in *Merchants Mutual*, repeatedly told us that it would "make WPE whole" and that "our settlement discussions are indeed on track" to get extensions from filing the lawsuit. In fact, Trident took things a step further than the defendant in *Merchants Mutual*. When we raised the statute of limitations issue, Trident repeatedly responded with assurances that settlement would be reached and that "[t]here is no need to file your complaint." In fact, Trident even orally told us that it would toll the statute of limitations. Based on this conduct, we can certainly argue that the result in *Merchant's Mutual* is justified here as well. After all, the *Merchants Mutual* court specifically stated that "the doctrine of equitable estoppel allows a plaintiff to avoid a bar of the statute of limitations if the defendant takes active steps to prevent a plaintiff from suing on time, for example, by promising not to plead the statute of limitations." All of Trident's other conduct is equally analogous to the defendant's in *Merchant's Mutual*, and we could argue that it served "lull or induce" us to not file the complaint.

However, our argument, while strong, is not ironclad. To argue equitable estoppel, "the plaintiff must exercise due diligence such that his reliance on the defendant's conduct is reasonable." *Henley*. We must be able to show that we exercised due diligence in believing Trident's assurances that it would settle and that we did not need to file a complaint. In another recent case, *Henley v. Yunker*, the court specifically found that the plaintiff could not argue equitable estoppel because he had not reasonably relied on the defendant's assurances that he "had plenty of time to make a claim." However, this case is almost certainly distinguishable from our situation because the plaintiff there only received that one assurance, at an unspecified time, that the statute of limitations had not run, along with a request for documentation right before it ran, which he relied on as an implicit agreement not to assert the statute of limitations. In our case, we received our last assurance that Trident would "reimburse WPE for any losses" less than two months before the statute of limitations was due to expire,and we have received multiple other similar assurances before that. Further, we are not relying on some request for documents as an assurance that Trident will not assert a statute of limitations claim--we are relying on their oral promise not to assert the statute of limitations. Trident could argue that it was not reasonable for us to rely on an oral assurance when Trident did not sign the written agreement not to sue, but we should be able to point to the fact that they repeatedly promised to sign it, and that we believed them because of our long course of dealings with them.

Finally, as noted at the beginning of my letter, we could also argue promissory estoppel to avoid the statute of limitations defense, but it is not a strong argument. Promissory estoppel is very similar to equitable estoppel. The primary difference between the two is that promissory estoppel deals with reliance on a promise, while equitable estoppel deals with reliance on a representation of fact. To prove a claim of

promissory estoppel, a plaintiff must show that (1) the promissor made a promise which it should reasonably expect to induce reliance on the part of the promisee; (2) it actually did induce such reliance; (3) the reliance was reasonable; and (4) injustice can be avoided only by the enforcement of the promise." DeSonto. Notably, a "promise" for the purposes of equitable estoppel cannot be an expression of future intention, cannot be conditional in any way. DeSonto. In our situation, the promise that we would most likely want to assert is Trident's oral promise to toll the statute of limitations. This promise was not conditional, but it is an "expression of future intention," which Franklin courts have found is not a sufficiently definite promise for the purposes of promissory estoppel. After all, Trident made its promise back on January 10, 2012, more than two months before the statute of limitations ran, and they could possibly argue that their subsequent failure to sign the agreement showed that they did not intend to keep their promise, and that we did not reasonably rely on it. Therefore, I believe that this is the weaker claim.

I hope that this letter has answered your questions. Please contact me if you have any further questions or wish to discuss this matter.

Sincerely,

Thomas Perkins

MPT 2 - Sample Answer # 3

Dear Juan:

As you are aware, we have been in discussions with Trident regarding both a settlement agreement and a tolling of the statute of limitations to facilitate such agreement. Trident has been largely uncooperative and to date, we do not have a settlement agreement or a tolling agreement signed. The statute of limitations period for WPE to file a compliant against Trident expires in fifteen days and it is absolutely critical that you understand the risks of allowing such period to expire.

As a general matter of Franklin law, once the statute of limitations period has expired, a plaintiff *will not* be able to file a complaint against a defendant for a particular transaction or occurrence, regardless of how much damage is suffered as a result of such occurrence. Courts have repeatedly denied plaintiffs' day in court on statute of limitations grounds, citing the defendant's interests in fairness and timely notice. What this means for WPE is that, if the statute of limitations is allowed to run out, there is a substantial likelihood that WPE will be completely unable to recover damages from Trident. Considering the potential scope of liability here (current and back taxes, negative publicity, potential lawsuits, etc.), we believe it is in WPE's best interests to file a complaint before the expiration of the statute of limitations unless we execute a settlement agreement or tolling agreement with Trident prior to such expiration.

Despite the foregoing, we realize that WPE is loathe to file a complaint in this situation for a variety of reasons. Ultimately you and your colleagues at WPE will have to make a business decision on this matter, and we will of course follow your instructions. Should you determine that it is not in the best interests of WPE to file a complaint before the statute of limitations runs out, there are a few other possibilities of which you should be aware.

Courts have broad discretion to grant what is known as "equitable relief" when the conduct of parties involved in a dispute suggests that strict application of the law would result in injustice. There are three types of equitable relief which may be available to us should Trident attempt to raise a statute of limitations defense to our claim in the future. First, we could attempt to establish an implied or "quasi" contract. Second, we could argue that Trident should be prevented from using the statute of limitations as a defense on a theory of "equitable estoppel." Third, we could argue that Trident should be prevented from using the statute of limitations as a defense on a theory of "promissory estoppel."

Implied or Quasi Contract. The Franklin Court of Appeal stated in the 2005 case, *Henley*, that it is possible for two parties to agree to a tolling of the statute of limitations in Franklin. For any agreement to be enforceable, it must be supported by mutual consideration (meaning both parties to the agreement must give something up), and the court in Henley suggested that the requirement of consideration is often inherently present in an agreement to toll the statute of limitations. This inherent

consideration takes the form of defendant giving up the right to bar suit after the expiration of the statute and plaintiff temporarily giving up its right to cut off settlement negotiations and sue the defendant, allowing the parties additional time to reach a settlement (which presumably is preferable to litigation for the defendant).

Since Trident has not returned our tolling agreement letter, the essential element of a contract - an agreement or "meeting of the minds" between the parties, would have to be implied from the course of dealing. In this matter, we believe that proving an agreement between the parties may be possible. On April 26, 2011 Meg Hamilton of Trident sent an email which said in relevant part "should WPE incur any reasonably ascertainable loss, Trident *will* make WPE whole." Again on January 25, 2012, Meg sent an email saying that Trident will "reimburse WPE for any losses." These statements are both qualified by Meg's statement that they are not admitting or conceding fault. But for the purposes of implied contract, this should not matter. The implied agreement is that Trident will indemnify WPE and in exchange, WPE will not resort to litigation. WPE has not resorted to litigation, so it has upheld its end of the bargain. Accordingly, a court could compel Trident to uphold its end of the bargain and indemnify WPE for any ascertainable losses.

Equitable Estoppel. This doctrine is well established in Franklin and was invoked just recently in the Franklin Court of Appeals in the *Merchant's Mutual* case, and was also invoked in *Henley*. The application of equitable estoppel requires that (1) the defendant said or did something intended to induce plaintiff to do or believe something, (2) plaintiff has actually done that something, and (3) plaintiff has been diligent in its own conduct.

Here, we believe that element 1 is easily established if Trident does in fact try to raise a statute of limitations defense in the future. Their repeated statements regarding their intent and desire to settle would have been clearly designed to cause WPE to not file a complaint. Likewise, element 2 is easily established if, in reliance on these statements WPE does not, in fact, file a complaint.

The potential downfall here lies with the 3rd element. In applying equitable estoppel, Franklin courts are primarily concerned with protecting the 'innocent' and perhaps unsophisticated person. Given the course of our dealings with Trident, a court may well hold that WPE cannot use equitable estoppel because WPE "ignored highly suspicious circumstances which should warn of danger or loss." If the court makes such a finding, we will not be able to recover under an equitable estoppel theory. I do note however, that the January 25, 2012 email from Meg referring to the need to calculate percentages for partnership allocation purposes could be, and might actually be, legitimate. Using this email we could make a strong argument that we were reasonably relying on Trident's statements.
It may be possible however, under *Merchant's Mutual* to nevertheless recover under equitable estoppel if we can prove that Trident "effectively conceded" liability for WPE's claim. For instance, on June 16, 2011 Meg sent me an email saying that her client had agreed in principle to the draft settlement. Based on the contents of the

draft settlement, this may mean that they agreed to liability. The April 26, 2011 and January 25, 2012 emails from Meg are however, less likely to satisfy this condition since they explicitly state that Trident was not "admitting or conceding fault."

Promissory Estoppel. The Franklin Court of Appeal requires four elements to prevail on a theory of promissory estoppel, as set forth in *DeSonto*. First, there must be a promise by defendant designed to induce or forebear action. Second, such inducement or forbearance must occur. Third, the inducement or forbearance must be reasonable. And fourth, injustice can be avoided only by enforcement of the promise.

Promissory estoppel requires a clear and definite promise, which we may or may not be able to establish here, based on our correspondence with Trident. The closest thing to a clear and definite promise may be in the April 26, 2011 email discussed above, but it is conditional. Meg was clearly contemplating additional conditions and or modifications to the agreement. We can however, show with relative ease that this was designed to encourage WPE to not file a complaint and that WPE did not file a complaint.

The glaring problem with this theory is however, the following: in *DeSonto*, the Franklin Court of Appeal held that "where it is clear that the parties contemplate a formal written contract, it is unreasonable for a party to act in reliance on an oral promise until the writing has been executed." It is abundantly clear from our correspondence with Trident that a formal written contract is contemplated. We drafted an agreement, they acknowledged receipt of that agreement, and even said that their comments would be forthcoming. I do not imagine that any amount of creative interpretation could overcome this issue.

For the sake of completeness, we probably could show the fourth element - that injustice could only be avoided by enforcement of the promise. Although, like with equitable estoppel, a court could hold that we knew or should have known that Trident's promises were empty.

In sum, I will reiterate our belief that the best course of action for WPE is to file a complaint against Trident before the statute of limitations runs out, unless it receives a valid settlement agreement or tolling of the statute prior to such date. However, in the event WPE determines that it is in the best interests of the company to not file a complaint, we will have reasonable arguments that based on the repeated statements and delay caused by Trident, Trident is estopped from asserting the statute of limitations as a defense, because they will be using it as a sword and such use will justify equitable relief.