February 2013 Bar Examination Sample Answers

QUESTION 1 - Sample Answer # 1

(1) The issue here is whether or not the Smith's claim for wrongful death against the Bibb County Sheriff's Department for the death of their son, Bob Smith, will be barred under the doctrine of sovereign immunity. Under Georgia law, the doctrine of sovereign immunity operates to bar private citizens from bringing certain legal actions seeking money damages against state or local governments or against the entity's employees where the government entity will have to pay retroactive damages. Sovereign immunity usually exists for government employees who were performing discretionary acts within the scope of their government duties. However, sovereign immunity will not apply to government employees performing ministerial duties within the scope of the government employment. In addition, state and local governments have waived sovereign immunity for certain torts and retained sovereign immunity for other torts. Specifically, under Georgia law, state and local government entities have retained sovereign immunity for the negligent acts of their employees if the negligent act is deemed a discretionary act performed within the scope of employment. A discretionary act is defined as one that requires judgment on the part of the government employee. This differs from a ministerial act, which requires no judgment on the part of the employee. In addition, Georgia law requires that government entities that issue motor vehicles which are used in the performance of government functions is required to have them insured and thus will waive sovereign immunity for tortious conduct that occurs by a government employee in the use of the government vehicle up to a certain amount. In Georgia, that insurance on that motor vehicle will cover up to $1 million in damages per claimant for their loss but no more than $3 million per claim.

Here, Fife was an employee of the Bibb County Sheriff's Dept., which is considered to be a creature of the state government, and was operating a county government vehicle at the time of the accident killing Bob Smith occurred. Since Fife was pursuing a hit and run suspect while operating the county vehicle he observed while on patrol, it is arguable that Fife was performing a ministerial duty. However, it could also be argued that Fife stepped outside of his ministerial duty when he began chasing a suspect in hot pursuit and then decided to run the light of the major intersection with his lights and siren on so that he wouldn't lose the fleeing suspect. If Fife's actions in pursuing the Mercedes through the intersection with his lights and siren on are deemed to be discretionary, sovereign immunity might bar the Smith's claim for the wrongful death of their son. However, if Fife's actions are deemed ministerial, then sovereign immunity might not exist and the Smith's may pursue their wrongful death claim against the Bibb County Sheriff's Dept. Lastly, since the

accident involved a Bibb County Sheriff's Dept vehicle, sovereign immunity will at least be waived up to the amount of the insurance coverage, which is likely to be between $1 and $3 million dollars.

(2) In order to pursue their claim against the Bibb County Sheriff's Dept. for the wrongful death of their son, the Smith's are required under Georgia law to give a government entity one year anti litem notice. In Georgia, the standard for giving anti litem notice to a government entity depends on the type of government entity is involved. If the entity is a municipal government, 6 months anti litem notice is required. If the entity is a county government, which is an extension and creature of the state government, then 1 year anti litem notice is required. Since the claim involved in wrongful death, the Smiths will lose their right to bring this action if the statute of limitations expires. In Georgia, the statute of limitations on a wrongful death claim is 6 years from the date of death. Thus, if the Smith's wait more than 6 years to bring the action, the action will be barred by the statute of limitations.

(3) Yes, under Georgia law, Fife can be held personally liable for Bob Smith's death if the Smith's can show that Fife's decision and subsequent conduct in running the light at the intersection and driving in excess of 90 mph constituted willful, wanton, or malicious conduct. If Fife acted willfully, wantonly, or maliciously such as to show a conscious indifference to others of resulting harm that his conduct might cause, then Fife can be held personally liable for Smith's death. However, Fife could show that Smith was negligent in not observing the siren and flashing lights. In addition, Fife has a clean disciplinary record, so it might be tough to prove willful, wanton, or malicious conduct on Fife's part in running the intersection in pursuit of a fleeing suspect.

(4) Under Georgia law, the Smith's would have to show that Fife's decision in chasing the suspect at 90 mph and into a major intersection constituted willful, wanton, or malicious conduct. Fife, as a agent of the Bibb County Sheriff's dept, was acting within the scope of his employment.

QUESTION 1 - Sample Answer # 2

1. The doctrine of sovereign immunity states that a State cannot be sued by a citizen of the state without its permission. This immunity is extended to all state governmental officers and employees acting in the course of their employment for the state, as well as local governments and municipalities within a state. Sovereign immunity does not bar a claim against a state or local government official for their intentional torts or torts committed outside of their scope of employment. In the Smith's case, their son, Bob, was killed when Deputy Fife's car collided with his while deputy Fife was in pursuit of a fleeing suspect. As a deputy with the Bibb County Sheriff's Department, Fife is considered a state employee. Thus the doctrine of sovereign immunity will bar a suit against him for torts committed by him while he is acting in the course of his employment. A sheriff's job is to protect the public and pursuing a fleeing suspect who just committed a hit and run is in line with that duty. The state has waived immunity for specific acts of state or local government employees. State or local government employees retain immunity for discretionary acts, however, the states have waived it for ministerial acts, or acts which they have no choice but to do perform. Thus if a state or local government employee is negligent in performing his/her ministerial acts, the state can be held liable to others who are harmed by their negligence. The state is the one being sued, not the individual. The state is vicariously liable for the acts of its officer or employee while they are acting in the course of their employment. This is based on Respondent Superior, and is liability based on status and not direct liability. Here, as stated earlier, Fife was performing an act which was common of sheriffs, and is part of their overall duties. Thus if the high speed pursuit of a fleeing suspect is considered ministerial, then the state has waived immunity and the state can be sued.

2. The Smith's must follow the appropriate notice provisions for ante litem notice in order to have a right to sue for their son's death. The issue here is what is needed to establish a right to sue and when must it be done. Whenever a state has waived its immunity and is able to be sued for the acts of a state or local government employee, the plaintiff must provide the appropriate ante litem notice. When suing a state, the plaintiff must provide written notice of its claim to the party, explaining its cause of action, and this must be done within 12 months of the injury or when the injury is discovered. The notice is 6 months if it is a municipality that is being sued. After filing the appropriate notice, a plaintiff's claim will be barred if it is not brought within 2 years from the date of the injury or when its discovered.

Here, the Smiths must provide the sheriff's department with appropriate ante litem notice within 12 months from the date of their son's death. Or else their claim is barred. In addition, after providing the appropriate notice, the Smith's have 2 years from the date of Bob's death to bring the claim before a court, or else they are barred. The Smith's should know that since this is a claim against the state, damages are capped at 1 million per person, per tort, and 3 million per claim and punitive damages are not available.

In addition, a plaintiff still must show the elements of a negligence claim. that is the defendant owed a duty, there was a breach of the duty, causation and damages. Here,

as a police officer, Fife owed a duty of reasonable care to Bob while he was on patrol and driving on the roads. The breach of this duty occurred when Fife decided to pursue a suspect by going 90mph and proceeded intentionally, without slowing down, thru a red light. Fife was the actual and proximate cause of Bobs death, as he was driving the car when it collided with Bob, causing his death. It should be noted that the suspect is also a cause, because but for him fleeing Fife would not have pursued and hit Bob and his negligence in fleeing proximately caused Bob's death. Damages are obvious, as Bob has died.

3. Deputy Fife can be liable if it is proven that he was acting outside the course of his employment or acting with extreme recklessness. The issue is when can a government employee be held liable for his own torts. A government employee has no protection when they are acting outside of the scope of their employment, the state is not liable for their actions, but they are personally liable. The general rule is that if the actor is performing anything substantially related to his duties in the scope of his employment, then they are considered in the course of employment. However, if the actor is on a frolic, then this is outside the course of their employment and they can be held personally liable. The general rule is that a cop is not liable for accidents while pursing a fleeing suspect, however, if it is shown that the cop acted intentionally or the pursuit was done with extreme recklessness, then the cop can be held liable.

In this case, the Smith's will likely not be able to show that Fife was acting outside the scope of his employment because he was on patrol when he saw the driver hit the kid and drive away, he turned on his lights and proceeded to pursue the driver. Thus everything he did, while on patrol, was part of his duties as a police officer. The Smith's have a better argument that Fife acted with extreme recklessness. In order to prove Fife was acting with extreme reckless in conducting the chase, the Smith's can rely on the fact that Fife was going 90mph in pursuit and Fife saw the light turn red, yet, without slowing down, proceeded into the middle of the intersection, knowing the other way had a green light. If the Smith's can show that a ordinarily prudent police officer would have slowed down before flying thru a red light, then they have a great case to hold Fife personally liable for Bob's death.

4. If the suspect struck and killed Bob, Fife and the sheriff's department are not likely to be liable. The issue is can a police officer, while acting in the scope of his employment, be held liable for a fleeing suspects negligence. Cops are not liable for the negligence of a fleeing suspect, but the suspect is. If it can be shown that the cop acted recklessly and caused the suspect to flee then the cop might be liable for later actions of the suspect.

QUESTION 1 - Sample Answer # 3

TO: Partner in Charge
FROM: Applicant
RE: Smith v. Bibb County Sheriff's Dept.

In accordance with your instructions, I have prepared the following memorandum regarding the Smith's wrongful death claim:

I. Does the doctrine of sovereign immunity prevent the Smith's from recovering against Bibb County Sheriff's Department.

Georgia's Constitution provides that a government municipality may not be sued by an individual in a tort action unless the government municipality has expressly waived its sovereign immunity with respect to the type of suit plaintiff intends to file. If sovereign immunity has not been waived, the government will not be forced to defend such a suit. Specifically, for cases involving injuries related to motor vehicle accidents, a recent amendment to the Georgia Constitution has provided that a County municipality may be sued up to the amount of its liability insurance coverage. Here the Sheriff's Department is an arm of the Bibb County municipality and the wrongful death at issue here occurred in connection with Dep. Fife's operation of a county motor vehicle. Thus, according to Georgia's Constitution the Smiths may properly sue the county on its claim but are limited to a recover up to the amount of the county's liability insurance coverage.

II. What procedural steps must the Smith's take in order to properly file suit against Bibb County.

In accordance with Georgia's Constitution, before a plaintiff may file suit against a county entity, the plaintiff is required to send an ante litem notice to the appropriate county official (usually the county's commissioner/board) and a copy to the Board of Risk Assessor's. The ante-litem notice must specify a detailed description of plaintiff's claim, the date of injury, the nature of the injury and a computation of damages sought. Upon receipt of the ante-litem notice, the county is required to respond, in writing, either approving or rejecting the claim, within 30 days. In the event that the county fails to timely respond or rejects the claim the plaintiff may then file a claim. The law requires that for claims against state entities the plaintiff must send the ante-litem notice within 1 year of plaintiff's injury and within six months of the injury if claimed against a city or county government entity. Failure to timely send an ante-litem notice will result in plaintiff being barred from bringing suit against the government entity with respect to that particular claim.

III. May Deputy Fife be held personally liable for Bob Smith's death?

Ordinarily an individual is liable for all injuries caused as a result of their intentional or negligent acts. However, in regards to government employees, Georgia law has been modified to address the fact that prior to the modification, many plaintiffs would simply file suit against the individual government employee rather than the government entity in order

to avoid sovereign immunity consequences. In response, Georgia legislators amended the Constitution (and subsequent case law held) that if the individual was engaging in a ministerial function of his/her job at the time of plaintiff's injury, plaintiff must still follow the ante-litem procedures because suing the individual was tantamount to suing the government entity. However, if the individual was engaging in a discretionary function of his/her job at the time of plaintiff's injury, the individual could be sued without plaintiff going through the notice procedures. Georgia law defines a ministerial function as one where the individual is performing a duty in a manner prescribed by his employment. For example, a mailman was delivering mail in accordance with the policies and procedures set forth in his employment handbook. On the other hand, a discretionary function is one where the employee is left to his own judgment in performing the task and is not governed by any official policy or procedure. Here, it is likely that at the time of Bob Smith's death, Dep. Fife was engaging in a ministerial function. Typically, officers are instructed to follow departmental policies and regulations when engaged in vehicle pursuits of suspects. One such policy is typically than an officer may run a red light while engaged in pursuit of a suspect, if the officer's warning lights and sirens are activated. Here, Dep. Fife was pursuing a suspect, with his warning lights and sirens activated. At the time of the collision, thus it is likely that Dep. Fife was engaged in a ministerial rather than discretionary function. Thus he could not be held personally liable for the death of Bob Smith.

IV. Assuming the fleeing suspect struck and killed Bob Smith, can Dep. Fife and the Sheriff's Dept. Be held liable. Here, subject to the sovereign immunity problems outlined hereinabove, in order for Dep. Fife and the Sheriff's Dept. to be held liable the Smith's would only be able to recover on a negligence theory. The Smith's would need to prove the usual negligence elements: (1) duty, (2) breach of duty, (3) cause in fact of plaintiff's death, (4) proximate cause and (5) injury. The Smith's must show that Dep. Fife and the Sheriff's Dept. conducted the pursuit in such a way that they negligently caused the suspect to collide with Bob Smith's vehicle, thus causing his death.

QUESTION 2 - Sample Answer # 1

1. I would advise them to form a private for-profit corporation. The partners have expressed concern about their potential products liability from the re-manufacture, use and sale of their products. The liability protections of the corporate form would protect them from being held personally liable and restrict the collection of monetary judgements to the assets of the corporation. They also express an interest in making future decisions in a variety of ways dependent upon the importance of the decision. This type of decision making structure is reflected in the duties and responsibilities of the Board of Trustees, Voting Stockholders and Organizational Management within a corporate structure. This structure would also ease the transfer of a portion or the entirety of one of the owners interest to one or many other persons without diluting the influence of the other partners. By making the corporation a private corporation a public stock offering is not required and allows the three partners to maintain their equal ownership interests without having to share the interest with any additional parties through the sale of new stock.

To form this corporate entity the partners must file their business name and their intent to incorporate form with the Georgia Secretary of State. They must also execute Articles of Incorporation and Bylaws that delineate the number of shares to be issued, how profits and losses will be shared, the rights of shareholders, how decisions will be made and how the organization will be dissolved should the time arise. Both of these items should also be filed with the Georgia Secretary of State.

2. I would suggest that Juan, Kahn, and Lon set up a corporate structure with stock. Each would own the same amount of stock, representing their current equal investment in the organization. They would also each currently serve as board members. As time progressed, the stockholders would elect new board members allowing the original partners to step back in stages if they so chose in the future. This allows Kahn to move out of state without abandoning the corporation entirely, Lon to act in an advisory role as a board chair, and Juan can stay on as the corporation's CEO to handle day-to- day decision making. Juan would also draw a salary as a CEO to compensate him for his, more hands-on, full-time role managing the organization.

Board Members are liable to the shareholders for the ultimate fate of the corporation. They determine whether to pay dividends or reinvest the profit earned. They are responsible for the decisions of the organization when litigation may occur. They also are responsible for hiring and supervising the CEO. Shareholders are liable to one another for setting the general direction of the corporation. They elect the board of directors and it's officers. The CEO is responsible for the day to day decisions of the organization. He is liable for the conduct and decisions of his fellow employees and is accountable to the board of directors.

3. I would suggest that they complete bylaws for the organization that delineate the process that will be undertaken in the event one or more of the three current owners retire, become disabled or die. The bylaws are the guiding principles of a corporation. They list out contingency plans and procedures for the organization. They commit the corporation to an enforceable legal document that can ease the process. The bylaws governing future

transfer of interest by sale or gift of a party's ownership interest in the corporation should include the rights and duties of both the current stockholders as well as the potential future stockholder, such as the right of first refusal. These bylaws should be clear as to time, place, and method of transfer requirements.

4. I would suggest that economic rewards be structured in the following way. Juan should receive a salary in addition to his economic rewards as a partial owner. Juan's management of day-to-day affairs is equivalent to employment and therefore requires compensation by means of a salary. Lon and Juan should be compensated as preferred stock holders. This means that their shares of stock are worth more and also have a higher priority of payment than Khan's traditional stock will enjoy. This allows for a limited economic benefit for Lon while not diluting Khan's ownership shares. Lon will also have more control of the course of the organization as it's Board Chair.

5. The original owners could create a corporate foundation whose sole purpose is to give a percentage of their profits toward their aim of promoting non-economic social benefit to populations within South America and Africa. This corporate foundation would be a separate entity from the corporation and thus the shareholders do not have a vote in it's fulfillment of it's philanthropic mission. It would have it's own Board of Directors separate from the Board of the for-profit corporation. The annual contribution percentage of the corporation to the foundation can also be placed in the bylaws which require a 2/3s majority of voting shareholders to amend. This can help to deter and prevent one rogue shareholder from successfully ending a corporate philanthropy program.

QUESTION 2 - Sample Answer # 2

1. I would advise that Juan, Khan, and Lon ("JKL") form either a C-corporation or an S-corporation (closely held). An S corporation will subject JKL to more favorable tax treatment, however they will have to limit the number of shareholders to under 100 and there will be stock transfer restrictions. Further, an S corporation will provided even more centralized management. In either case, JKL will enjoy the four essential characteristics of a corporation: (1) limited liability, (2) perpetual existence, (3) free transferability (shares), and (4) centralized management. In order to form the corporation, JKL will need to draft Articles of Incorporation (AOI). The AOI will need to include the names of the directors, the addresses of directors, the address of the principal office, the name and address of the principal agent, and will need to create at least one class of stock with unlimited voting rights. The Articles of Incorporation should also state whether shareholders will be granted preemptive rights, powers and compensation for directors and officers, and whether decisions can be made by majority decision or whether a higher number of votes is required. While these things are encouraged to be included in the original AOI, they can also be added at a later time through an amendment provided the AOI are refiled. The AOI must be filed with the Secretary of State in Georgia. Once the AOI are properly filed and received by the Secretary of State, a de jure corporation will be formed.

2. I would recommend a board of directors be elected to govern the structure, and that the board of directors further select corporate officers. The initial board of directors in a corporation is formed by the incorporators, or the parties that form the corporation. Here, JKL are the incorporators and thus have the authority to elect the initial board of directors. The board of directors elected will serve annually, absent a contrary provision in the AOI, and the initial board of directors will serve until a new board of directors is voted in by the shareholders. Officers that are elected typically include a president, a vice president, a treasurer, and a secretary. The president is typically responsible for handling the day-to-day operations of the business, and thus Juan should be selected as president.

Each investor's equity interest in the business would be recognized through their voting rights. Presumably JKL will grant themselves majority shares in the corporations. This means they would potentially have the power to make all major decisions for the corporation. The extent of this power will depend on the specific terms of the AOI (e.g., how many shares of voting stock are created and sold, how many votes are needed to pass proposed decisions by the corporation). Shareholders are protected from liability in a corporation provided they don't engage in any activities that might "pierce the corporate veil." The corporate veil is pierced when it is found that either shareholders or directors are using the corporation to carry on fraudulent activity. This can be through the "alter ego" theory or for example when a corporation is using a subsidiary as a shell to carry on unlawful activity. Provided that shareholders are not engaging in any willful unlawful conduct, they will be shielded from personal liability on behalf of the corporation.

3. JKL should enter into a stock transfer restriction agreement. Transfer restrictions are generally upheld in Georgia if they are reasonable. Absolute restrictions are generally

disfavored. The agreement should include whether a unanimous decision must be reached in order for the ownership interest to be transferred. It should also indicate whether there is a limit to the amount of an ownership interest that can be transferred or whether a party can transfer his entire interest. Further, the agreement should state to whom the ownership interest can be transferred (e.g., surviving spouse only, any relative, only other owners). The purpose of this agreement would be to protect the remaining owners and to potentially guard against a random third party obtaining an equal ownership interest in the corporation. The parties should also lay out conditions that might justify a dissolution of the corporation. For example, if two of the owners die unexpectedly, or all of the owners are found to be mentally incompetent at some point in the future, there should be a protection in place to ensure the company is not run into the ground and that creditors and shareholders can be paid off adequately.

4. To structure the economic rewards of JKL in light of their varying participation, I would suggest three methods. First, JKL could provide for reasonable compensation for board directors and officers, assuming that each of them is elected to fill at least one of these positions. Board members and officers are entitled to reasonable compensation, or the amount of compensation specifically stated in the AOI. Secondly, JKL could provide for certain bonuses and stipends based on various activities in the bylaws. Because the bylaws are simply the internal structure of a corporation and are not filed with the Secretary of State, they are more easily amendable and may be more appropriate in laying out economic rewards for specific business tasks. If these tasks begin to change over time or if new tasks become necessary that warrant an economic reward, the bylaws could be amended to reflect these changes. Third, JKL could issue preferred stock to themselves. Preferred stock is given priority over the common stock issued by a corporation. If JKL issued themselves either participating or cumulative stock, they would always receive dividends before common stockholders.

5. JKL could refrain from stating a business purpose in their Articles of Corporation. As a for-profit corporation, JKL is not required to state a business purpose, and if one is not entered, the corporation may operate for any purpose not contrary to public policy. This would give JKL the freedom to promote a primary purpose of maximizing profits, without precluding philanthropic efforts by the corporation Under Georgia law, a for-profit corporation is not restricted to conducting only those activities that maximize profits. As long as JKL's corporation is still making a profit, their actions in South America and Africa will be permissible.

QUESTION 2 - Sample Answer # 3

1. Corporate Formation

Juan, Khan, and Lon should form a regular corporation under the Georgia Corporations Code, a so-called "C" Corporation, to allow for the greatest flexibility with transfer of interests, decision-making structure, and reduction in liability. We would file articles of incorporation with the Georgia Secretary of State after conducting a name search and simultaneously with paying the filing fees. Bylaws should also be executed although they would not need to be filed with the Secretary of State.

2. Governance Structure

Like all corporations, this corporation will require a board of directors (the "Board") to govern the corporation. A straight voting system is customary but in this instance they could agree to allot each the right to appoint one seat on the board. I would suggest that all three be on the board to manage the long-term strategy of the business and protect their own investment. This could best be accomplished by appointing them as the initial directors at the organizational meeting and/or in the bylaws. Each investor's equity interest would be manifested in shares of the corporation. These shares hold an equity interest but limit the holder's liability in the debts of the corporation itself.

3. Restricted Shares

In order to comply with securities laws and ensure voting power remains in the three initial board members, each should enter into a restricted stock agreement with the corporation. This agreement should contain a legend to be placed on the shares stating that there is a restriction and that the shares may only be transferred according to the Restricted Stock Agreement. It should also provide a right of first refusal to the corporation and then to the shareholders if the company declines to exercise its right. This provision would allow the corporation (or shareholders) the option to purchase the shares instead of any bona fide offeror at the price the offeror has offered to the shareholder. Thus, this will allow the original investors to ensure control remains in their hands if they so choose in the future. The agreement should also provide that if any of the holders decide to retire, as would be defined in the agreement to mean something inclusive of resignation from the board, the corporation shall redeem the shares and pay the shareholder. If the shareholder dies, the economic interest would temporarily transfer to the estate without voting rights at which time the corporation or other shareholders would redeem the shares. A similar clause would stipulate procedures should disability of any of the shareholders occur.

4. Officers

The Board controls the corporation in its entirety, however, the day-to-day operations of the business are through its officers. Therefore, Juan should be named President and CEO with Lon a vice president of their designation or merely a consultant if not engaged on a regular basis. In their capacities as officer, employee, or consultant, each of Juan and Lon would receive a salary for their ongoing contributions to the success of the business. If everyone agrees, a compensation plan could include additional shares issued for work in the corporation, providing for increased economic stake in the business in accordance with non-monetary contributions to the success of the business.

5. Protecting Social Aspect of Business

A corporation is only allowed to engage in business found in its articles of incorporation (charter) and bylaws. Otherwise, directors are liable for exceeding the scope of the allowable activities. To protect their desire to engage in social welfare activities that may or may not increase profits, this should be included as an explicit allowable activity of the corporation and be enshrined in its stated purpose. In addition, this fact should be disclosed in all sales of shares so that any new shareholders are fully aware of this aspect. Lastly, in order to protect this from change, amendment to the articles or bylaws should require a super-majority vote. Georgia law states that all actions require the vote of a majority unless otherwise stated in the bylaws or articles. A super-majority vote usually requires a vote of two-thirds or 75% of the shares to approve the action.

QUESTION 3 - Sample Answer # 1

1. Whether the modification to increase the price was effective.

This is a contract dealing with the sale of goods so the UCC applies. The contract is between two merchants. Because the contract is for the sale of goods in excess of $500 it requires a writing to meet the statute of frauds. A contract is the mutual agreement of the parties and it must be supported by consideration. Here the initial contract was signed by both parties and it had sufficient terms to be valid, the contract provides for the sale of a specific good, the artistic potter, and it specifies the price, $600 per pot, and the quantity of 50 pots each month for one year. This is an installment contract where the seller promised to deliver the pots and the buyer promised to pay for them, so it is supported by consideration. Generally a contract modification must also be supported by consideration, however for the sale of goods the UCC allows for a modification even if there is no consideration as long as it is made in good faith, however the modification must still meet the requirement under the statute of frauds.

Here the modification made on April 10 was signed by both parties and it was because the cost of the buyer went up due to the shortages of the Japanese Glaze, so it was in good faith. Even though seller had a pre-existing duty to deliver 50 pots at $600 and the modification changed the price to $700 and there appears to be no consideration, the modification is valid and the increase in the price is effective.

2. Who bore the risk of loss for the broken pots.

Whether the buyer or the seller bear the risk of loss for the broken pots depends on whether the contract was a shipment contract (Free on Board - North GA) or a delivery contract (Free on Board - Tifton). The contract calls for the pots to be delivered by common carrier on the first of each month, however it does not indicate what type of shipment it is, free on board the sellers place of business or the buyers place of business. The court may look at industry custom or past dealings between the parties, and it is possible that the court would say that since the contract did not specify that it was free on board Tifton, then the risk of loss shifted to the buyer once the seller placed the pots with the common carrier, so the buyer has the risk of loss and must pay for the broken pots too.

3. What cause of action does the seller have against the buyer

The seller may sue the buyer for breach of contract because it did not pay for the 50 pots even though it bore the risk of loss, and for cancelling the contract before its completion, before January since this was a contract for one year. The contract is an installment contract for a year, and the buyer has cancelled six months into it. The Seller may bring suit now because there has been an anticipatory repudiation by the buyer when it informed the seller on July 10 that it was cancelling the contract.

Generally there is a breach of a contract if the delivery of the good is not a perfect tender, if the seller did not send 50 unbroken pots and the buyer may reject the shipment or part

of the shipment. However because this was an installment contract, the buyer may not reject the shipment and the seller has a right to cure within a reasonable time. Because these are specialized large terra cotta artistic pottery, it is possible that a court would find that the time to cure the defect of the 25 broken pots may reasonably be more than one month, so the buyer did not have a right to cancel the contract just because 25 of the pots were broken.

4. What defenses would the buyer raise

The buyer would raise a defense that the seller was the one that breached because it failed to deliver the 50 pots in June, it did not deliver any pots in July, because the seller had a history of delivering less than 50 pots from the March and April deliveries, and that the seller failed to provide adequate assurances after the buyer demanded them.

The Seller could respond that it was not in breach because the seller waived the broken condition for March and April, also the seller had a right to cure the June shipment in a reasonable time because it was an installment contract, and the buyer's demand for assurances was improper because it was based on rumors, not on a reliable source.

5. What damages are available to the Seller

The seller may recover the expected profits from contract if the court finds that the buyer breached. The seller made $100 per pot so it would be entitled to $100 per pot for the 50 pots it would have sold for the remaining six months that would be $35,000 reduced to present value. If the court finds that the buyer bore the risk for the June shipment, then the seller would be entitled to that the 25 pots at $700 too. The seller would be entitled for any costs as well. The seller is not entitled to any consequential damages.

Any awards to the seller would be subject to being offset by any damages that the court finds for the buyer.

QUESTION 3 - Sample Answer # 2

1. Under common law, a contract modification is not valid unless it is accompanied by consideration. However, Article 2 of the UCC states that in a contract between merchants for goods, a contract modification need not include consideration, but just requires good faith on behalf of both parties. Therefore, the modification to increase the contract price from $600 to $700 per pot is valid, since the facts suggest there was good faith on the part of the Seller and the Buyer in agreeing to the modification.

2. The question is who has liability for the broken pots that were shipped in June. The rule is that if shipment is by common carrier, the seller is responsible for transporting the merchandise to the carrier. Once that transfer is complete, the liability shifts to the buyer. Here, the contract was for shipment via common carrier, and the Seller deposited the shipment into the common carrier's possession. The Buyer in this case would be expected to insure the shipments to cover the loss. Therefore, the Buyer, and not the Seller, bears the risk of loss for the damaged pots in the June shipment.

3. The Seller has a cause of action for breach of contract against Buyer for failure to pay for the 25 pots that arrived broken in the June shipment. Seller also has a cause of action for breach for stating in his demand letter of June 20 that he would refuse to accept any further deliveries of the pots until he received assurances that Seller could continue to perform. The Buyer has a right to seek assurances when he learns of information that raises doubts of another party's inability or unwillingness to perform under a contract. However, a party seeking assurances cannot unilaterally suspend performance of the contract pending a response from the other party. Here, although Buyer was justified in seeking assurances from Seller due to information he had received about a pending bankruptcy of Seller, Buyer did not provide Seller the opportunity to respond and provide assurances before taking any action on the contract. Therefore, Buyer prematurely breached the contract.

4. The Buyer may be able to raise defenses to a breach of contract claim. With respect to the demand for assurances, although Buyer stated that he would no longer perform under the contract if he did not receive adequate assurances from the Seller, the Buyer can argue that the Seller breached by failing to respond in a reasonable time to the demand for assurances and then followed this lack of response with a failure to perform on July 1 by not shipping pots to Buyer. The Buyer could reasonably conclude that failure to perform on the July 1 shipment was, in essence, the Seller's response. Buyer will have difficulty with this argument, however. Considering that Buyer has accepted late shipments (in May, for example, he accepted a shipment of 75 pots on May 15), it may be difficult for Buyer to convince the court that the lack of a shipment on July 1 should be read in that way.

5. The Seller can seek damages for 1) failure to pay for the 25 pots that were broken during shipment. The price of those pots was $700 per pot, so that would be $17,500 owed to Seller. Seller also can seek damages for breach of the contract, which includes shipments of 50 pots per month at a cost of $700. Because these are artistic pots and not

the type of item that has a ready market, Seller would be entitled to the benefit of the bargain with the Buyer. Each pot cost the Seller $600 to make, and the contract price is $700. Therefore, Seller would be entitled to $100 for each pot remaining in the contract. The contract provided for shipment of 50 pots per month, and shipments for January through June were delivered. Therefore, six months of deliveries at 50 pots per shipment would be 300 total pots at $100 per pot would be $30,000 in damages.

QUESTION 3 - Sample Answer # 3

1. Price Modification

UCC Art. 2 governs the contract between Buyer and Seller. The contract was a transaction for the sale of goods moveable at the time the contract was entered into. The traditional common law contract rule was that modifications to a contract needed to be supported by consideration in order to effective. However, because the UCC governs the transaction this rule does not apply. The Statute of Frauds is invoked here because the value of the contract is valued at over $500. The facts do not clearly state that the original contract was in writing. If the statute of frauds requires a writing, the contract must be in writing, contain the subject matter of the contract, the parties, and be signed by the party against whom enforcement is sought. If the original contract satisfies the statute of frauds, a modification to the contract may be agreed upon the parties and be effective if the addendum also satisfies the statute of frauds. The original contract was signed by both the parties, inferring a writing, and stated the subject matter of the transaction. The addendum did as well. Therefore, the price modification was sufficient.

2. Risk of Loss

The Buyer bore the risk of loss for the 25 broken pots that arrived on June 1. The UCC takes a flexible approach when dealing with contracts between merchants for the sale of goods. If certain terms are left out of a contract, the UCC provides gap-fillers to cover non-essential provisions that the parties did not specify in the original agreement. When specific delivery terms are left out of a contract, the UCC provides that the place of delivery is tender at the Seller's place of delivery. When no other contract terms say otherwise, Risk of Loss (ROLL) passes to the buyer upon the Seller's tender of delivery.

Here, the contract called for the pots to be shipped by common carrier. The contract did not specify a specific delivery term (FOB, etc.). Without specific contract terms, the tender of delivery was performed when the common carrier picked up the pots from the Seller's location. Therefore, Seller performed fully as to this particular installment, and the ROLL passed to the buyer upon Seller's tender.

3. Causes of Action for Seller

Seller may have a cause of action against Buyer for breach of contract. Seller can argue that Buyer wrongfully cancelled the contract on July 10th. In order for the Buyer to rightfully cancel the contract, it must show 1) the grounds for its insecurity was reasonable and from reliable sources; 2) it made a demand for written assurance that Buyer would perform on the contract; and 3) that a reasonable time is given for the Buyer to respond.

Here, there is no information as to the source of the rumors regarding Seller's impending bankruptcy. Further, the UCC generally states that typically 30 days is a reasonable time to respond for a demand of written assurances. Further, Buyer's past conduct in accepting late shipments, short orders, and not cancelling after rejecting the 25 broken pots, and the

agreement to the price increase seems to create a pattern of flexibility, making a cancellation of the contract on July 10 perhaps unreasonable. Seller will be able to offer course of performance evidence to show Buyer's continued flexibility throughout the six months the parties did business.

4. Buyer's Defenses

The Buyer will have a strong defense to Seller's breach of contract claim. First, it can show that it heard from reliable sources of Seller's impending bankruptcy. Courts often give the insecure party the benefit of the doubt when it hears through the business community of a party's inability to perform on a contract (especially due to bankruptcy). Further, it will argue that it made a proper written demand for assurance, and waiting 20 days until it cancelled the contract was reasonable in light of the rumors, the Seller's past late and short deliveries, the price increase it demanded in April, and the broken pots delivery on June 1 as corroborating evidence to its insecurity. When Buyer heard no word from Seller on the July 1 delivery date, nor received any written assurance from Seller as to its demand, the Seller will have a strong argument that it was right to cancel its contract.

5. Damages to Seller

If the Seller prevailed on the breach of contract claims, it could seek special damages in order to put it in the place Seller would have been had the contract been performed. Typically, a non-breaching Seller would recover the contract price of the goods minus the market value of the goods made at the time the contract was breached, plus incidental damages. Lost volume sellers (those that can sell as many of the product as it has and would not be made whole by traditional damages measures) may recover lost profits. However, this is likely not applicable to Seller here due to the uniqueness of the pots and the Seller's past trouble with making full deliveries. Nevertheless, lost profits are available when other damages measures would not make the Seller whole. Here, since the contract had a specified term (1 year), and a specified number of pots to be sold (50 per month) Seller could recover lost profits to put it in the position it would be in had Buyer fully performed. Here, that would be $30,000 for the 50 pots per month for the six months remaining in the year at $100 profit per pot.

QUESTION 4 - Sample Answer # 1

1. The issue is whether the pleadings are sufficient to meet the plausibility standard.

The Federal Rules of Civil Procedure require the complaint to contain a short and plain statement of the ultimate facts to show Plaintiff is entitled to its demand for relief. The complaint must also provide facts to assert jurisdiction. However, certain claims, such as fraud, as alleged in this case, require more than short plain statement of facts. Claims such as fraud must be plead with particularity, and the Plaintiff is required to specifically set out the facts as to the basis for his claim. The complaint must be signed and verified pursuant to Rule 11.

It is likely Plaintiff failed to meet this burden in the pleadings. He stated Defendant helped his father in completing the application, and then "committed fraud and unduly influenced" his father into listing him as the beneficiary, when Defendant was not the intended beneficiary. Plaintiff fails to provide any underlying facts other than the general allegations as to these claims. Thus, his claim against Defendant is not sufficient on its face. There is also no example as to how Defendant "fraudulently" or "falsely" claimed to be the sole beneficiary. There are simply no particular facts on the face of the complaint, and thus, the complaint fails plausibility.

Moreover, it appears the face of the complaint would show personal jurisdiction is proper. This provides the federal court the power to bring the Defendants into court. The complaint states both Defendants are citizens of Georgia. Thus, they would be considered domiciled in the state of Georgia, which would mean both defendants would be subject to general personal jurisdiction of the federal district court residing over Northern District of Georgia. Further, venue also seems proper since both defendants are being sued in the district in which they reside. Further, there is subject matter jurisdiction because all Plaintiff's are diverse from all defendants; Plaintiff resides in Alabama, while both defendants reside in Georgia. Also, it appears plaintiff made a good-faith demand which would result in damages for over $75,000, which is other requirement for diversity subject matter jurisdiction when in diversity. Thus, on its face, the complaint seems to satisfy jurisdictional requirements.

2. The issue is whether a Rule 12 or 56 motion should be filed before or after the answer.

A rule 12 motion, if filed, should be filed prior to Defendant's answer, because after the Defendant answers, any defenses (except subject matter jurisdiction, mainly) is waived if not included in the answer. For instance, the 12(b) defenses for lack of personal jurisdiction, improper venue, improper service, or improper service of process may all be waived if not included in the first responsive pleading. Thus, these defenses should always be included before the answer, or at least in the first responsive pleading. If a rule 12 motion is filed, such as 12(b)(6) for a failure to state a claim, it is important to include all other applicable defenses which might be waived if not included.

Thus, in this case, Defendant should file a 12(b) motion and include all defenses prior to the answer. Plaintiff could argue failure to state a claim and pleadings are so broad that Defendant cannot respond. Defendant may also want to include venue, if improper, or lack of personal jurisdiction, since D is not suing our defendant as part of the $75,000. Defendant may also argue Plaintiff has not proven an injury since the money has not been disbursed, and this matter really is more of equity and determining the rights of parties.

On the other hand, Rule 56 motion for summary judgment or request for judgment on the pleadings may only be filed 30 days after Defendant has served its answer, or 45 days from the day the complaint was served (whichever comes later). After Defendant answers Plaintiff, Defendant may argue there is no genuine issue of material fact, and Defendant is entitled to judgment as a matter of law. Defendant may also be able to seek costs if successful. This would only be necessary if the 12(b) motions did not result in dismissal.

3. The issue is the considerations when filing Rule 12 or 56 motions, pertaining to expense, efficiency, and legal effect.

A rule 12 motion is the more efficient and less expensive than a Rule 56 motion. A rule 12 motion may be filed before an answer has to be filed, and can be based solely on the face of the plaintiff's complaint. However, the legal effect is less damaging to the Plaintiff. Plaintiff, as a matter of right, has 1 opportunity to amend the pleadings prior to the Defendant's answer. Further, they could also seek court order for the right to amend the pleading which would likely be granted. Thus, in this case, the Plaintiff would likely just amend and state more specific facts.

On the other hand, although a rule 56 motion costs the firm more, it has a more damaging legal effect on the Plaintiff. A rule 56 motion would require the Defendant to discover the facts in response to the Plaintiff's complaint, since it comes after an answer; such a motion may even come during discovery. Thus, it is not as simple as filing the motion based on the inadequacies of the Plaintiff's complaint on its face. However, the legal effect would likely bar Plaintiff from filing another claim, because it would be a judgment on the merits or pleadings. This would bar Plaintiff's future claim pursuant to "claim preclusion" or if more specific, "issue perclusion.” Claim preclusion would bar Plaintiff from amending the complaint and getting a second shot because there would have been a judgment on the merits, between the same parties (Plaintiff and Defendant), and the claim would have been actually litigated and necessary as part of the judgment.

QUESTION 4 - Sample Answer # 2

1. After Bell Atlantic Corp v Twombly a claim must do more than simply provide notice pleading. Now in order to plead a viable claim a plaintiff must meet the plausibility standard which requires alleging sufficient facts to establish jurisdiction as well as the plaintiff's claim.

Plaintiff's complaint does sufficiently establish subject matter and personal jurisdiction of the Federal Court. Specifically that the parties are diverse (Plaintiff resides in Alabama and Defendant resides in the Atlanta Division of the United States District Court for the Northern District of Georgia) and that the controversy amount of exceeds $75,000 (as it is $500,000). Thus jurisdiction is properly alleged.

The facts must establish each element of the cause of action and allege which acts of the defendant satisfy those elements. Legal conclusions and vague or ambiguous language is insufficient to satisfy this standard. When the plaintiff pleads a claim of genuine fraud more specificity is required to detail what acts of the defendant specifically led to the cause of action

Plaintiff has not alleged sufficient facts to establish a claim of fraud and undue influence against Defendant. Such a claim is established when a plaintiff can show that the defendant made a material misstatement of fact, scienter, the material misstatement was made to induce the hearer to rely on the statement, and the hearer actually relied on the statement to his detriment. Undue influence is established when a plaintiff can show that the free will of the victim was overborne by the defendant's improper influence and the defendant had a close relationship with the defendant.

Here plaintiff has alleged that his father was defrauded and unduly influenced by defendant. As to the fraud cause of action, Plaintiff establishes that a material misstatement was made but fails to point to a specific misstatement. However, this lack of specificity is likely not prejudicial to plaintiff because she has pled sufficient facts to establish that the misstatement was made. His father did not know how to write or read English and thus could not have filled out the life insurance policy himself. But the Plaintiff fails to establish under what circumstances the Defendant made such a statement. Plaintiff's claim only draws the conclusion that because the Defendant was listed as the beneficiary of the life insurance policy, he must have been the one to complete the insurance policy for the father. Such legal conclusions are insufficient to satisfy the plausibility standard. As to the undue influence claim, Plaintiff has not alleged any facts that evidence his father's will be overborne. Although the father was unable to read or write English, there is no evidence that the relationship between the father and Defendant was one in which the Defendant was able to manipulate and exert improper influence. Thus Plaintiffs claim does not meet the plausibility standard.

2. The Rule 12 motion as well as the Rule 56 motion should be filed after the Defendant files his answer. The Defendant must file an answer within 30 days of service of the complaint or he could be subject to a default judgment. Under a default judgment the Defendant is deemed to have admitted all of the factual allegations as alleged in the Plaintiff's complaint and only a hearing on damages is awarded. In order to avoid default, the Defendant should first file his answer and then should proceed to file his Rule 12 motion as well as the Rule 56 motion.

The Rule 12 Motion can be filed along with the Answer. Such a motion asserts that Plaintiff has failed to state a claim upon which relief can be granted. For the reasons listed above (in ONE), Plaintiff's complaint fails to establish the necessary elements of her fraud and undue influence claim thus proceeding under this Motion would likely succeed. However if this motion fails the parties will proceed to discovery. At the close of discovery the Defendant can move for the Rule 56 motion, also known as Motion for summary judgment. Such a motion is proper when the Plaintiff has failed to establish and genuine issue of material fact entitling Plaintiff to relief and as such Defendant is warranted judgment as a matter of law. Defendant would likely succeed on this motion because discovery would reveal testimony of the Agent who drafted the policy for the Father and can attest that the Defendant was not there at the time the policy was drafted and that the Father requested his name be placed on the policy by his own free will. Unless the Plaintiff can establish other issues of material fact that negate this testimony, Defendant's Rule 56 Motion will succeed.

The Motion should be filed after the answer and after discovery because a Rule 56 motion pierces the pleadings and considers the facts the parties have presented in evidence of their claim. As such the Rule 12 motion should be filed along with the answer and the Rule 56 Motion should be made after discovery has ended.

3. The most efficient and least expensive defense for Defendant is the Rule 12 Motion because Defendant can be file it earlier than a Rule 56 Motion. A failure to state a claim motion can be filed along with the parties' pleadings. However a Rule 56 Motion must come at the close of discovery which can prove to be a strenuous and costly process. Also the Rule 12 Motion can eliminate the Plaintiff's claim in totality, as the Plaintiff has failed to establish a cause of action requiring adjudication of law. However Rule 56 Motion can be granted in part and denied in part as it pertains to the Plaintiff's claim or damages. Thus Defendant will save more money and time in filing a well-pled Rule 12 Motion and will likely succeed as the complaint filed by Plaintiff does not show a plausible cause of action. However Defendant will also likely succeed on a Rule 56 Motion as the facts show the Father did not consult Defendant in drafting the life insurance policy, had no knowledge of the existence of the policy and was not even present when the policy was drafted. Thus witness testimony by the Agent of the insurance company will establish that the Plaintiff can't state or prove any other genuine issue of material fact regarding his fraud and undue influence claim.

QUESTION 4 - Sample Answer # 3

1. The issue is what is necessary for a complaint in federal court to allege fraud to be sufficient under the Twombly standard and state law regarding fraud. A complaint must allege subject matter jurisdiction, must contain a brief statement of the claim that shows the claim is plausible under Twombly and must also contain a demand for relief. Under the federal rules, fraud must be pleaded with specificity. In this case, the complaint properly alleges subject matter jurisdiction in federal court. Subject matter jurisdiction requires either diversity or federal question jurisdiction. In a diversity case, no plaintiff can be from the same state as any defendant and the amount in controversy must be greater than $75,000. Here, the Plaintiff is a resident of Alabama and the Defendants reside in Georgia. The Complaint avers an amount in controversy of in excess of $500,000.00. Therefore there is subject matter jurisdiction on the face of the complaint. In order for the claim to be considered plausible as a fraud claim, it must be pleaded with specificity. The complaint clearly contains a demand for relief, as it requests a declaratory judgment as well as payment of the proceeds, thus the third element is met.

The issue remaining is whether fraud is specifically pleaded. The elements of fraud would need to be pleaded in accordance with the law of Georgia. In a diversity case, the substantive law of the state where the federal court sits applies. Here, the court is in the Northern District of Georgia and thus Georgia state law governs the claim for fraud. Under Georgia law, fraud is an intentional misrepresentation of a material fact that induces detrimental reliance on the party of the induced party and leads to damages on the part of that party as a result of the intentional misrepresentation. The complaint alleges that "Defendant assisted in completing the life insurance that was submitted to the Company" because Boris could not read or write English. The complaint further alleges that "Defendant committed fraud and unduly influenced Boris into listing him as the beneficiary and falsely and fraudulently identified himself as the nephew of the decedent in the application" and that "Defendant was not the intended beneficiary". The complaint further alleges that Defendant "fraudulently and falsely claims to be the sole beneficiary". This is arguably not as specific as would be required under Georgia state law. There is no specific allegation about intentional conduct or misrepresentation on the part of the Defendant other than general assertions that Defendant committed fraud and unduly influenced Boris. In order to comply with the specific pleading requirements, the complaint should provide more detail about the intentional fraudulent conduct alleged.

2. The issue is whether a FRCP Rule 12 or FRCP Rule 56 motion should be filed before or after the Defendant's answer. Under the federal rules, filing a Rule 12 motion suspends the time for the Defendant to file an answer. The Defendant does not have to file an answer until 14 days after the court rules on the Rule 12 motion to dismiss. Because the time for the answer will be suspended the Rule 12 motion should be filed before the answer is filed. A Rule 56 motion is appropriate after some discovery is taken and therefore should not be filed before the answer. Typically a Rule 56 motion is made 30 days after the close of discovery. A Rule 12 motion, which alleges a failure to state a claim upon which relief can be granted, will allow the Defendant to determine whether a valid claim under the facts as alleged really does stand. A Rule 56 motion is based on affidavits

and other documents that are taken under oath. Therefore a Rule 12 motion is more appropriate before the answer is filed and a Rule 56 motion maybe be made after the answer is filed and some discovery is taken.

3. The issue is whether FRCP Rule 12 or Rule 56 is more efficient for a Defendant and what the legal effect is of prevailing under either rule. Under FRCP Rule 12, Defendant can move to dismiss prior to filing an answer and the time to respond will be tolled as mentioned above. If the Defendant's motion to dismiss is granted, the court is stating that the Plaintiff has failed to state a claim upon which relief can be granted. If this motion is granted and the Defendant does not have to respond with an answer, it is extremely economically efficient for the Defendant. The Defendant will not have to pay to conduct any discovery and the Defendant will not have to pay attorney's fees to file an answer and other documents. In terms of efficiency, Rule 56 is filed as a motion for summary judgment after some discovery is taken. This will involve filing an answer prior to filing this motion and conducting discovery which will be expensive for the Defendant. It will be much more economically efficient if a motion to dismiss is granted under FRCP 12. As previously mentioned a Rule 56 motion requires that documents be attested to under oath in order to be considered evidence for purposes of the ruling. This requires additional costs in conducting discovery. If the Rule 56 motion is granted, the court is ruling that there is no genuine issue of material fact and that the Defendant is entitled to judgment as a matter of law. A ruling under Rule 12 or Rule 56 are both considered "final" and Plaintiff would be able to appeal from either. However, judges often grant a Plaintiff the chance to amend and refile the complaint in lieu of granting a Rule 12 motion or judges could decide to grant the Rule 12 motion without prejudice and with leave to refile. In this case involved in this question, a federal judge might decide to grant the motion to dismiss on the basis that fraud is not specifically pleaded, giving the Plaintiff an opportunity to amend the complaint. However, if the Rule 12 motion is granted without specifying that it was "without prejudice", the effect will be that it can be appealed as a final judgment, just as a judgment under Rule 56.

MPT 1 - Sample Answer # 1

To: Wendy Martel
From: Examinee
Re: Panelli settlement funds distribution
Date: February 26, 2013

This opinion letter addresses the questions you raised about your legal and ethical duties and obligations regarding the $600,000 settlement obtained while representing David Panelli, M.D. We have researched the applicable law and Franklin's Rules of Professional Conduct to reach our opinion on how you should proceed with your client. Please contact us if you have any remaining questions.

1. Disclosure of the settlement to Rebecca Blair

In his email to you on February 22, 2013, Dr. Panelli forbade you from informing Rebecca Blair that the parties had reached a settlement, and forbade you to disburse any funds from the settlement to her. The first question is whether you have a duty to disclose the settlement to Blair, or to abide by your client's commands. It is our opinion that you must disclose the fact of settlement to Blair under the Franklin Rules of Professional Conduct, and that disclosure of the fact of the settlement is reasonably necessary to carry out your duties as an attorney in this state.

Franklin's Rules of Professional Conduct require attorneys to abide by the client's decisions in most matters relative to reaching the objectives of representation (Rule 1.2), but the requirement is tempered by the duties an attorney owes not only to the client, but to the court and others to whom the attorney owes fiduciary duties.

In addition to Rule 1.2, a lawyer is required to keep confidential information relating to representation unless the client gives informed consent to disclose, or if it falls under several specific categories in Rule 1.6. Here, Dr. Panelli would prefer that you honor your duty not to disclose any confidential information and refrain from informing Blair of the settlement, but that information does not appear to be the type of information contemplated by the Rule.

The typical situation in which disclosure of information to a third party would be permissable under Rule 1.6 would involve instances in which the client were attempting to commit a criminal or fraudulent act that could substantially harm the body of a person or the financial interests of a person. That doesn't appear to be the case in this instance, because there are no crimes of which Dr. Pannelli is seeking your assistance, and a command not to inform Blair of the settlement doesn't rise to the level of fraud in the code. A failure to disclose information is not the stuff fraud is made of.

However, Blair has filed her lien on the settlement property and that filing may compel you to reveal information about the settlement regardless of Dr. Pannelli's instructions. Rule

1.6(b)(6) allows you to reveal the fact of the settlement if you reasonably believe such disclosure is necessary to comply with "other law or a court order." While the lien isn't law or court order, it could become a court order down the road. It may be better to be safe than sorry in this instance.

Admittedly, the exceptions for the confidentiality of information in Rule 1.6 aren't strong enough standing alone to compel disclosure to Blair, but when coupled with Rule 1.15 on the safeguarding of property, as well as the State Bar Ethics Opinion No. 2003-101, disclosure to Blair is absolutely warranted.

Rule 1.15(d) states that a lawyer, "upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person." The term "shall" creates an affirmative obligation on your part to inform Blair. She is a third party with an interest in the settlement property evidenced most concretely in the filing of her lien. There is clearly a duty to inform under this section.

State Bar Ethics Opinion No. 2003-101 makes clear that you owe a fiduciary duty to Blair as well, and that failure to inform her of the settlement could be found a breach of this duty and open you up to liability to her. An attorney has a duty to protect a third party's interests when he knows of the interest, and must prevent wrongful interference by the client with that interest. This is the fiduciary duty you owe to Blair. You know of Blair's interest in the settlement for her work on the case for two years. With this knowledge, you entered into a fiduciary duty with Blair by the nature of your relationship, and this duty is by operation of law. The duty requires you to deal with Blair with "utmost good faith and fairness and to disclose to (her) material facts relating to (Blair's) interest in the funds." (Ethics Opinion citing Cf. Johnson v State Bar). We will discuss your duties related to the actual funds below, but at a minimum your fiduciary duty to Blair requires disclosure of the settlement.

Further, Rule 1.4(a)(5) requires that you respond to your client and inform him that you will be notifying Blair of the settlement, and failure to do so could warrant discipline under the rule for failing to consult with Dr. Pannelli when his demand was contrary to your ethical and fiduciary responsibilities to Blair.

2. Distribution of the funds in possession

$600,000 has been deposited into the trust account for distribution to your client and you for the professional services rendered. The question is, to whom should these funds be distributed, and when. It is our opinion that you should distribute $400,000 immediately to your client, Dr. Pannelli, and that the remaining $200,000 must be kept in the trust until the dispute regarding payment to Blair has been settled.

State Bar Ethics Opinion No 2003-101, in conjunction with Rule 1.15, requires disbursement of the funds entitled to the client, but that the remaining funds in dispute be kept in the account until the dispute is settled. $400,000 represents 2/3 of the settlement, and the client, under the contingent fee structure used by yourself and Blair, is entitled to

such. In his email to you Panelli sought immediate disbursement to him of the funds. It is appropriate that amount be distributed to him. The remaining $200,000 is 1/3 of the funds set aside as compensation for the legal work completed to reach the settlement. Both you and Blair had a contingent fee structure for your work, claiming 1/3 of any eventual settlement. It is from this remaining $200,000 that any disbursement to Blair should come.

This is supported by Clements v Summerfield (Franklin Supreme Court, 1992), in which the court found that where an attorney had been dismissed from representing a client after work had been done in support of the client's claim, that dismissed attorney could bring a claim of fees under quantum meruit for the reasonable value of services provided. The court's opinion noted the necessity for the contingency in a contingent fee contract to have occurred, and that a court in equity could determine such a value on a case-by-case basis. In a footnote supporting its opinion, the court illustrated the means by which a dismissed attorney and successor attorney might be compensated, and clearly foresaw a structure in which any funds in dispute would be allocated from the 1/3 contingent fee awarded in the overall recovery.

With regard to the $200,000 remaining, you should consult with Dr. Pannelli and encourage him to reach an agreement with Blair about how she should be compensated for her work. It is not your job or position to unilaterally arbitrate this dispute, for you are clearly a party in interest. Dr. Pannelli obviously values the work you accomplished and wants you to have the entire sum. Your interest would cloud your ability to objectively arbitrate the dispute between Pannelli and Blair. Blair certainly put in significant effort in the two years she represented Pannelli. You may be able to enlighten Pannelli on the role Blair played in his eventual settlement, and the value contributed. It would be wise to keep it very simple, perhaps letting Pannelli know that the complaint and discovery constituted roughly ½ of the work done on the case, and even if Pannelli feels your work was what reached the settlement, it is clear Blair's work at least aided in the recovery. It will be up to Pannelli and Blair to reach a conclusion on this matter of how to distribute the $200,000 amongst the two of you. If these parties cannot reach an agreement, you should seek guidance from the court on how to settle this dispute, and inform both Pannelli and Blair of your need to involve the court.

3. Conclusion

It is our opinion that you must disclose to Blair that a settlement has been reached, and consult with Pannelli about how he proposes to settle the dispute regarding payment of fees to Blair. You should distribute only the $400,000 to Pannelli now, and retain the remainder in the trust account until the dispute can be settled by the Pannelli and Blair, or by the court if necessary. To take any of the $200,000 for yourself, even if you believe you are entitled to it, could open you up to a breach of your fiduciary duties owed to Blair, and could open Blair up to liability for breach of contract.

MPT 1 - Sample Answer # 2

To: Wendy Martel
From: Applicant
Re: David Panelli Matter
Date: February 26, 2013

Dear Mrs. Martel,

STATEMENT OF THE QUESTION

How should you (Mrs. Martel) proceed after having received settlement funds for a client, having notified the client of receipt of funds, and been instructed by the client not to pay any fees to the previous attorney?

SHORT ANSWER TO THE QUESTION

In the instant case, you have several options. The first of which is mandated by the rules of professional conduct. You should first inform your client of the issues so that the client may make an informed decision on how to proceed. In addition to this, you should keep the funds in a separate account from your own so as to be compliant with the Professional Rules of Conduct. You must also disburse all funds to the rightful owners of the property that are not in dispute pursuant to the Professional Rules of Conduct. Once you have done the preceeding things, you must also hold the disputed amount between your client and the discharged attorney, Mrs. Blair. You must explain to both parties that you are holding the funds and cannot represent either party in a dispute between them. If your client and Mrs. Blair are able to resolve the dispute on their own, Mrs. Martel may disburse The funds pursuant to the agreement. If they are not able to reach as resolution, Mrs. Martel will need to seek guidance from the court in resolving the matter.

ANALYSIS

INFORMING THE CLIENT:

Mrs. Martel, you have an obligation under the Professional Rules of Conduct (Rule 1.4 and B) to keep the client informed of the status of the ongoing representation, and explain things reasonably well enough so as to allow the client to make and informed decision. Here, I understand that you have already made your client aware that you have received the settlement payment. This is a good first step. That said, you must go further and explain to him that Blair also has rights that stem from her representation and the work she did for the client.

WHAT ARE THE RIGHTS OF BLAIR?
Pursuant to the decision in *Clements v. Summerfeld*, a discharged attorney has a right to receive his/her contingency fee once that contingency has occurred. Additionally from that

decision, "the contingency specified may occur after the attorney's representation has terminated and another attorney has taken his or her place." This is what has occurred here because you have replaced Blair after she had already been granted a contingency fee by the client, and was subsequently fired. Thus, the court in *Clements* goes on to say that "the discharged attorney's right to, and cause of action for, fees is limited to quantum meruit." As you are aware, this will mean that Blair is entitled to receive the reasonable value of her services rendered during her representation. Additionally, you did the right thing by obligating that you will pay any claim to Blair because the court further discusses that the portion owed to the discharged attorney will come out of any fees owed to the attorney on record as it would be unjust to have the client be burdened by the prospect of paying the original attorney's full fees plus the fees to you, the successor attorney.

HOW YOU SHOULD MOVE FORWARD?

As previously mentioned, you should explain Blair's rights to the client and what the steps will be moving forward. Once you have done that, you must keep the settlement funds in a separate account from your own as prescribed by rule 1.15(d) of the Rules of Professional Conduct. This will prevent you from commingling funds and accidentally spending the money which does not belong to you. Additionally, while informing the client of the proceeding steps, you must inform him that you are under an obligation to let Blair know that you have received the funds as she has a right to some of the money. Rule 1. 6 of the Rules of Professional Conduct specify that "a lawyer may reveal information relating to the representation of a client the extent the lawyer reasonably believes...to prevent, mitigate, or rectify substantial injury to the financial interests or property of another...."

In conjunction with this rule, the case Greenbaum vs. State Bar exemplifies that you are acting not only as a fiduciary to your client but also to Blair because you knew of the contingency fee she was owed at the time your representation was initiated. In the Greenbaum case, an attorney engaged in the representation of a client where the client agreed that $10000 of the recovery would be given to a Physician. The court rules that under 1.15 of the Rules of Professional Conduct.

Third parties may have lawful claims against funds held in trust by and attorney, such as a client's creditor who has a lien on funds recovered in a personal injury action. An attorney may have a duty to protect such a third party claim against wrongful interference by the client, as when the attorney has entered into a fiduciary relationship with the third party.

Thus, the *Greenbaum* court referenced another case, *CF. Johnson v. State Bar* and said "As a result, the Attorney entered into a fiduciary relationship with the Physician by operation of aw and subjected himself to the fiduciary duties to deal with Physician with utmost good faith and fairness and to disclose to Physician material facts relating to the Physician's interest in the funds." This is the standard you should use as it relates to your duty to Blair with respect to the funds. You must keep her informed as to what is going on with the funds because you owe her a fiduciary duty to her as a result of her lien and the

fact that you had knowledge that she is a creditor with respect the recovery your client gets during your representation.

Once you have informed Blair and your client that you have received the funds, and you have kept them in a separate account, you must disburse the funds to people that are entitled to receive them. As previously mentioned, you will bear the burden of sharing the contingency fee received with Blair, and thus you should give all $400,000 that Mr. Panelli is owed to him and retain the other 200,000 to be split between you and Blair. At this point, it will be up to Mr. Panelli and Blair to work out what her fee will be. The difficulty here is that as previously mentioned, Blair is entitled to what the reasonable value of her services was, and according to the Clemens court, what fees are reasonable depends on the facts and the scope of the representation agreed to. Thus, if Mr. Panelli and Blair are able to reach an agreement, you should disburse the funds to Blair pursuant to the agreement, and keep the remainder of the funds as your fee. Should Mr. Panelli and Blair not be able to reach an agreement, you will have to take further action and "seek guidance of the court" as set forth in Ethics Opinion No. 2003-101. At that point, the court will determine what fees are reasonable and the amount that Blair will be entitled to. Once the court has made that determination, you should disburse The funds in an amount prescribed by the court order to Blair and keep the rest as your fee. If you have any further question, please do not hesitate to give us as call at our office at 1-800-4WM-WLAW.

Very truly yours,

MPT 1 - Sample Answer # 3

TO: Wendy Martel
FROM: Examinee
RE: Opinion Letter regarding Panelli settlement
DATE: February 28, 2013

Dear Ms. Martel;

I am writing this letter in response to your request from our office after reviewing the facts and relevant authorities.

This letter is an answer to your question of how to proceed now that you have the settlement funds, to be in compliance with Franklin's ethical rules, considering your duty to your client (Panelli) and Blair (his former attorney).

Considering the applicable authority and facts in your situation I would recommend that disburse to Panelli that he is entitled to after you deposit the check into your trust account (do this promptly) since any funds that may be due to Blair will likely come from your contingent fee (I will further explain this later), hold that money in the trust account because it is in dispute. If Panelli and Blair cannot resolve their dispute, you should then seek guidance from THE Court and so inform both Panelli and Blair (Ethics Opinion No. 2003-01).

Your duty to Panelli as his attorney under Rules of Profession Conduct

One issue you face is the fact that Panelli has clearly stated to you that he doesn't want you to pay any money from the settlement to Blair, let alone tell her of the settlement. Of course, under the Rules of Professional conduct, an attorney "shall abide by a client's decisions concerning the objectives of representation and, ... shall consult with the client as to the means by which they are to be pursued (Rule 1.2) As an attorney, as you know, you must consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law". (Rule 1.4(a)(5)).

Lastly, to be in compliance with Franklin's ethics rules, "a lawyer should reveal information relating to the representation of a client unless the client gives informed consent; unless you must do so to prevent a crime or fraud that is reasonably certain to result in substantial injury to the financial interests of property of another (Rule 1.6).

You clearly have a duty to Panelli that create issues for you in regards to your cooperation with Blair. Panelli has made it very clear from his email that he wants Blair to "remain fired" and he forbids you to "tell her anything about the settlement or to give her anything". Looking at Rule 1.2 especially, it may be reasonable to think you must follow his decisions. However, the Rules also allow you, and require you to prevent your client from committing a crime or fraud, under Rule 1.6. Although it is a more distant concern, it is key that you

ensure Panelli doesn't face further legal issues with Blair, considering the lien she has against interested parties which would include Panelli. You also don't want to encounter any issues in allowing Panelli's use of your services to result in any potential crime or fraud against Blair. Considering this, it is important in your duty to Panelli to communicate the potential limitation of your representation (under Rule 1.6) considering the expectation he has set for you (Rule 1.4).

Your duty to Blair at issue of your compliance with Franklin's Rules

While you have a clear duty to Panelli as his attorney, you also have a duty to Blair. Discussed in the "Ethics Opinion No. 2003-101" an attorney will have a fiduciary relationship with a third party by operation of law, subjecting herself to deal with the third party with utmost good faith and fairness (Ethics Opinion). In this opinion, the State Bar of Franklin considered the situation where a third party has a conflicting claim with property held in a trust. Referring to Rule 1.15, the Court mentions that [a]n attorney may have a duty to protect such a third party claim against wrongful interference by the client, as when the attorney has entered into a fiduciary relationship with the third party "(Ethics Opinion)".

If the attorney has knowledge of the existence of Physician's intent in the funds in question, the attorney has entered into a fiduciary relationship by operation of law.

Because you were clearly aware of Blair's interest, so much that you even obligated yourself to pay any claim she might have out of the $600,000, you have created a fiduciary relationship with her. If you don't deal with this issue in a good faith and fairness, you may be subject to compensatory and perhaps punitive damages, and Panelli may be liable for breach of contract. Since it is not clear cut that Panelli is right in preventing payment to Blair, and considering your fiduciary duty to Blair, you should not act in favor of either Panelli or Blair, and should seek guidance from the Court and inform both parties.

Likely outcome if dispute goes to Court

In Clements v. Summerfield, the Court dealt with a very similar situation, in that a lawyer challenged his former clients refusal to pay him after retaining a new attorney. Here, the Court upheld the previous decision that the attorney lead no cause of action. In particular, the Court noted that when a contingency occurs after the attorney's representation has terminated, his right to fees is limited to quantum meruit (Clements). Otherwise, the client's right to disclose may be unduly burdened. The Court also notes that these fees may be paid as a share of the total fees payable to the successor attorney. (Clements)

Considering the facts in your situation, you will likely, if at all, need to prepare for paying Blair out of your contingency fee. These fees will be limited to the value of Blair's services rendered during her representation. She will not get the full amount of her contingency arrangement. As such, I recommend you leave the $200,00 portion you are taking in trust, until a court can decide if she is owed anything, and if so, how much.

MPT 2 - Sample Answer # 1

State of Franklin
District Court of Oak County

In the Matter of the Petition of
Don and Frances Loden
For Guardianship and Temporary Custody of
Will Fox, a minor (DOB 1/3/03)

Brief in Support of the Motion to Transfer Case to Blackhawk Tribal Court

Statement of the Case

Betty Fox, as a member of the Blackhawk Tribe, seeks removal of a child custody petition for THE guardianship and custody of her grandson, Will Fox, to the Blackhawk Tribal Court. Following the incapacitation of Will's father in a car accident, Will's maternal grandparents, Don and Frances Loden, filed a petition for guardianship and temporary custody of Will in the District Court of Oak County. As a recognized member of the Blackhawk Tribe, Betty seeks removal of the petition to the Blackhawk Tribal Court because Will is an Indian Child of the Blackhawk Tribe and jurisdiction for custody matters concerning an Indian Child properly rests with the appropriate Tribal Court pursuant to the Indian Child Welfare Act of 1978 (ICWA).

Statement of Facts: Omitted per your instructions.

Argument

I. Removal to Tribal Court is appropriate because Will Fox is an Indian Child as defined by ICWA.

Will Fox meets the definition of an Indian child pursuant to ICWA § 1903 which defines an Indian Child as an unmarried person under eighteen who is either a member of an Indian Tribe, eligible to become a member, or is the biological child of a member. As Will is ten years old, the biological child of a member of the Blackhawk tribe, and a member of the Tribe himself, he is and Indian Child for purposes of § 1903 and removal of a child custody hearing pursuant to the ICWA. Although Will's mother was not a member of the tribe and he lived off of the reservation prior to his father's accident, Will has successfully assimilated into tribal culture. Furthermore, Will has attended tribal functions since he was six years old, which further evidences his connection to the Tribe.

II. The Blackhawk Tribe is an Indian Tribe and has jurisdiction in custody matters concerning Will Fox as an Indian Child of The Tribe.

Pursuant to ICWA § 1911, a Tribal Court has jurisdiction in child custody proceedings concerning an Indian Child of the Tribe. As Will Fox is an Indian Child of the Blackhawk Tribe, the Blackhawk Tribal Court is the appropriate court to hear proceedings concerning his guardianship and custody. Evidence of the Blackhawk Tribal Court's authority and recognition under the ICWA is evidenced in the letter from Sam Waters, ICWA Director. Waters' letter also confirmed Will's membership in the Tribe in addition to that of his grandmother and father.

III. The Loden's Petition for Guardianship and Temporary Custody satisfies the requirement of a Child Custody Proceeding in which Jurisdiction rests in the Blackhawk Tribal Court.

Pursuant to ICWA § 1902, a child custody proceeding includes any action removing an Indian child from his parent or Indian custodian to the home of a guardian or conservator where the parent or Indian guardian cannot have the child returned upon demand, but where parental rights have not been terminated. In re Custody of R.M., the Franklin Supreme Court held that a petition for physical and legal custody of a child fell within the auspices of the ICWA as a proceeding for foster care placement. In reaching its determination, the court recognized the ICWA definition of foster care as encompassing situations in which (1) a child is removed from his parent or Indian guardian, (2) temporarily placed in a foster home or the home of a guardian or conservator, (3) the parent or Indian Guardian cannot have the child returned upon demand, and (3) parental rights have not been terminated.

In filing their action, the Loden's seek to remove Will from the custody of his father and his grandmother - his Indian custodian. As such, their petition satisfies the requirement of foster care placement under the ICWA and is grounds for removal of the case to the Blackhawk Tribal Court. See In re Custody of R.M. (rejecting the petitioner's argument that an action for legal and physical custody did not constitute an action for foster care). Although the Loden's may argue that they seek only temporary custody, they nevertheless seek to obtain custody and interfere with the rights of his Indian custodians.

V. Removal to to Blackhawk Tribal Court is proper as there is no good cause for denying removal in this case.

There is no good cause to prohibit removal of the Loden's petition to the Blackhawk Tribal Court. Pursuant to ICWA § 1911, unless good cause is shown for denying transfer, any state court proceeding for the foster care or placement of an Indian child shall be transferred to the jurisdiction of the appropriate Indian Tribe. See also, In re Custody of R.M.(finding no good cause for removal despite the fact that the petitioners lived more than an hour away from the tribal court, and noting the powers of the tribal court to obtain and

review evidence sufficient to render a reasonable judgment). Pursuant to federal guidelines, good cause not to transfer a hearing to a tribal court may be shown if:

(I) The proceeding was at an advanced stage and the petitioner failed to promptly file for removal;

(ii) The Indian child is over twelve years old and objects to the transfer;

(iii) Evidence cannot be adequately presented in the tribal court;

(iv) The parents of a child over five years old object to removal and the child has had little or no contact with the tribe, Department of the Interior, Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings.

Furthermore, these guidelines suggest that the burden of showing good cause is on the party opposing removal.

In this case, Betty Fox promptly filed for removal. Consequently, the Loden's cannot argue that the proceeding is at an advanced stage of litigation. Consequently, the first factor of good cause analysis weighs in favor of removal. Will Fox is under ten years old and appears to enjoy tribal life and customs. Consequently, there is no good cause to prohibit removal to tribal court on the grounds that he is over twelve and opposes removal. Although the Lodens do not live at the Blackhawk reservation, there is no evidence to suggest that removal from the District Court of Oak County, only 250 miles from the reservation, will be unduly burdensome. See In Re Custody of R.M. Furthermore, there is no evidence to suggest that the Tribal Court will be unable to adequately conduct the proceedings and render judgment. Id. Finally, all evidence indicates that Will Fox has embraced his tribal heritage since he was six years old and enjoys living with his grandmother. Consequently, there is no reasonable ground for the Loden's to argue that removal to the Blackhawk Tribal Court is Improper.

Conclusion

For the reasons stated above, the District Court of Oak County should order removal of the Petition For Guardianship and Temporary Custody of Will Fox to the Blackhawk Tribal Court as proper pursuant to ICWA requirements.

MPT 2 - Sample Answer # 2

State of Franklin
District Court of Oak County

IN THE MATTER OF THE PETITION OF
Don and Frances Loden, Husband and Wife,
FOR GUARDIANSHIP AND TEMPORARY CUSTODY OF
Will Fox, a minor (DOB 1/3/03)

BRIEF REGARDING MOTION TO TRANSFER TO BLACKHAWK TRIBAL COURT

I. Statement of the Case

Petitioners Don and Frances Loden, the grandparents of ten-year-old Will Fox ("Will"), have filed a petition for guardianship and temporary custody in this court. Will's mother is deceased, and his father, Joseph Fox ("Joseph") is in a coma due to a car accident. Betty Fox ("Betty"), Joseph's mother and Will's current primary care giver, objects and has filed a motion for guardianship in Blackhawk Tribal Court. In addition, Betty has moved this court to transfer the proceeding to Blackhawk Tribal Court. This brief addresses solely Betty's motion for transfer of this proceeding.

II. Argument

A. The Lodens' petition for guardianship and temporary custody is a "foster care placement" under the Indian Child Welfare Act ("ICWA")

Pursuant to ICWA, state courts must transfer any proceeding regarding the foster care placement of an Indian child to the tribal court with jurisdiction over such child. ICWA sec. 1911(b). A foster care placement is defined as "any action" removing an Indian child from his parent or Indian custodian and placing such child temporarily in the home of a guardian, provided that the parent or Indian custodian cannot have the child returned upon demand and parental rights have not been terminated. *Id.*

In determining if a proceeding is within the scope of ICWA, the Franklin courts look beyond the caption of the case to what the proceeding seeks to accomplish. *See In re Custody of R.M.*, Franklin Sup. Ct. 2009. Regardless of how a petition is styled, therefore, if the effect of that petition is to place the child in the care of another, such that the Indian custodian or parent cannot demand return of the child, the proceeding is subject to ICWA.

Specifically with regard to petitions for guardianship, the courts have noted that Franklin law provides a guardian with the "powers and responsibilities of a parent with sole legal and physical custody to the exclusion of all others." Fr. Rev. State. sec 72.04, *cited in Custody of R.M.* Among those rights, the court noted, is the ability to remove the child from the home of the parents, albeit temporarily, rendering a guardianship proceeding within the scope of ICWA. *Custody of R.M.* In such case, the parents would not be able to demand the return

of the child, which is definitive of a foster care placement under ICWA.

Here, the Lodens seek both guardianship and temporary custody. Although Will has spent time with the Lodens since his father's accident, his grandmother is his primary care giver and his father is living. As noted by the *R.M.* court, guardianship gives the guardian the right the remove the child from the case of the Indian custodian and to refuse to return him to it. Therefore, a guardianship proceeding is, by definition, a foster care proceeding within the scope of ICWA.

The Lodens will likely argue that this petition is outside the scope of ICWA because the relief sought is merely temporary. However, as the *Custody of R.M.* court noted, even the temporary right to remove the child from the care of his parents or Indian custodian is sufficient to bring the proceeding within ICWA's scope, provided that right would permit the guardian to refuse to return the child to his home. Therefore, the Lodens' petition, regardless of how styled, is a foster care placement under ICWA, and must be transferred to Blackhawk Tribal Court.

B. Betty is an "Indian custodian" within the meaning of ICWA and has the right to seek transfer

ICWA, in granting rights to a child's Indian custodian, reflects cultural norms of extended family member care in the Indian community. As the legislative history of the law reflects, the intent of Congress was to preserve the Indian identity of children by keeping them in Indian homes. ICWA Sec. 1902. Congress recognized that Indian families often vested the care of children in the extended family, and created the concept of an "Indian custodian" to reflect that such care givers have rights under Indian custom. H.R. Rep. No. 95-1386, *cited in Custody of R.M.* ICWA defines an "Indian custodian" as an "Indian person who has legal custody of an Indian child under tribal law or custom...or to whom temporary physical care, custody, and control has been transferred by the parent of such child." ICWA sec. 1903(6). An Indian custodian is empowered to seek transfer of a custody proceeding to tribal court. ICWA sec. 1911.

Betty does not have legal custody of Will under the law of Franklin, but she does have custody of him under the custom of the Blackhawk Tribe. In the Blackhawk Tribe, there is a cultural expectation that the grandparents (paternal or maternal) of a child will become custodians if the parents die or cannot care for the child. *Journal of Native American Law*, Vol. 8 (2003). In addition, although Joseph, due to his accident, did not explicitly transfer temporary care of Will to Betty, given the underlying cultural expectation, it may be deemed that he transferred such care to her.

The Lodens will likely argue that under the governing expectation of the Blackhawk Tribe, they have as much of a right to become Will's custodians as does Betty. While that may be true, that is a matter best suited for resolution by the Blackhawk Tribal Court. Betty, as Will's Indian custodian, has the right to petition for transfer.

C. THE Lodens are not Will's parents, and therefore cannot object to the transfer to Blackhawk Tribal Court

ICWA provides that a qualifying custody proceeding shall be transferred to tribal court on the petition of either parent or the child's Indian custodian, unless the child's parents - and only the child's parents - object. ICWA sec. 1911(b); *see also Custody of R.M.* (finding that an Indian custodian has no right to object to the transfer of proceedings to tribal court). Will's mother is deceased and his father is incapacitated. Therefore, there is no party with a right to object to the transfer of this proceeding to Blackhawk Tribal Court.

D. Good cause to decline the transfer motion does not exist

ICWA provides that the state court may decline to transfer the proceeding on a showing of good cause. ICWA sec. 1911(b). the Bureau of Indian Affairs has issued guidelines which state that good cause may exist if, inter alia, (I) necessary evidence could not be adequately presented without undue hardship to the parties or the witnesses or (ii) the parents are unavailable and the child has had little or no contact with the child's tribe or members of the child's tribe. *BIA Guidelines*. While the BIA Guidelines are not official administrative regulations, the courts of Franklin have found them to be binding in ICWA cases. *Custody of R.M.*

The Lodens will likely argue that presenting evidence in Blackhawk Tribal Court will pose an undue burden on them. The reservation is approximately 250 miles from Melville, the child's current residence, which is a three- to four-hour drive. In *Custody of R.M.*, The court found that a one- to two-hour drive was not sufficiently long enough to constitute undue hardship. In that case, however, none of the parties were residents on the reservation. While the distance here is greater, Betty is a resident of the reservation. While the Lodens do bear a greater travel burden, and the reservation is further from witnesses who might testify, the strong public policy interest in providing for tribal jurisdiction must outweigh this burden.

In addition, the Lodens will likely argue that the case should not be transferred because Will's contact with the tribe is minimal. Although Will's visits to the reservation were limited, he lived with his father, a member of the Blackhawk Tribe and one whose communications with his family evidence a strong sense of tribal identity. In addition, Will made annual visits to the Blackhawk pow-wow, and spent time with Betty on the reservation at other holidays during the year. Therefore, it cannot be argued that Will's contact with the Blackhawk Tribe has been minimal. Good cause for declining the transfer does not exist.

III. Conclusion

As the Franklin courts have recognized, Congress has clearly stated that tribal jurisdiction over child custody proceedings is necessary to ensure the survival of Indian communities and the welfare of their children. *Custody of R.M.* Will Fox is an Indian child currently living

with an Indian custodian, who seeks, as is her legal right, the transfer of this proceeding to Blackhawk Tribal Court. There is no party that has the right to object to the transfer that has the capacity to do so, and no good cause exists for this court to decline to transfer the proceeding. While Will's paternal grandparents may, in the end, be found to be the best legal custodians for him, that decision must be made by the tribal court.

MPT 2 - Sample Answer # 3

STATEMENT OF THE CASE

The Movant, Betty Fox, is the paternal grandmother of the "Minor," Will Fox. Respondents, Don Loden and Frances Loden, are the maternal grandparents of the Minor. This case seeks to appoint a guardian and custodian of the Minor following the incapacitation of the Minor's father, Joseph Fox ("Father"). The Minor's mother, Sally Loden Fox ("Mother"), died in childbirth. Movant seeks to transfer this case from this Court, the Oak County District Court in the state of Franklin, to the Blackhawk Tribal Court, pursuant to the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. § 1911(b).

STATEMENT OF FACTS

[Omitted]

BODY OF THE ARGUMENT

Movant is entitled to transfer of this case to the Blackhawk Tribal Court pursuant to ICWA § 1911(b). There are six elements presented in the statute regarding transfer from a state court to an Indian tribal court: (1) the proceeding in the state court is "for the foster care placement of," (2) an Indian child, (3) not domiciled or residing within the reservation, (4) in the absence of good cause to the contrary, (5) absent the objection by either parent, and (6) upon the petition of the Indian custodian. ICWA, 25 U.S.C. § 1911(b).

I. Respondents seek the foster care placement of the Minor.

The Franklin Supreme Court has determined that foster care placement has four elements: "(1) the Indian child is removed from the child's parent of Indian custodian, (2) the child is temporarily placed in a 'foster home or institution or the home of a guardian or conservator,' (3) the parent or Indian custodian cannot have the child returned upon demand, and (4) parental rights have not been terminated. *In re Custody of R.M.* (2009) (quoting ICWA, 25 U.S.C. § 1903(1)).

Respondents seek to be named "guardians and temporary custodians" of the Minor. Petition for Guardianship and Temporary Custody. Respondents are seeking sole legal custody of the Minor. *See In re Custody of R.M.*; Fr. Re. Stat. § 72.04 (defining a guardian as one with "the power and responsibilities of a parent with sole legal and physical custody to the exclusion of all others"). Respondents seek to remove THE Minor from Movant, THE Minor's Indian custodian. *See* Petition for Guardianship and Temporary Custody; *Native American Customs Regarding Care of Children*, 8 Journal of Native American Law (2003) (stating that the Blackhawk tribe expects that the Native American grandparents will become custodians).

Respondents seek to place the Minor in their home as guardians and temporary custodians. *See* Petition for Guardianship and Temporary Custody. If Respondents are named guardians and temporary custodians, Movant, as the Indian custodian, would be

unable to demand the return of the minor. *See In re Custody of R.M.* Respondents do not seek to terminate the parental rights. *See* Petition for Guardianship and Temporary Custody.

Therefore, the remedy sought by Respondents is a "foster care placement," as defined under ICWA.

II. THE Minor is an Indian Child under ICWA as THE Minor is a member of THE Blackhawk Tribe.

An Indian child is defined as "any unmarried person who is under age eighteen and is . . . a member of an Indian tribe . . . ." ICWA, 25 U.S.C. § 1903(4).

The Minor is ten years old and is unmarried. *See* Petition for Guardianship and Temporary Custody. The Minor is a member of the Blackhawk Tribe. Letter from Sam Waters (Feb. 10, 2013).

Therefore, the Minor is an Indian child.

III. The Minor is not domiciled or residing within the Blackhawk Reservation.

The Minor is currently residing at the Father's home in Melville, Oak County, Franklin. This is approximately 250 miles from the Blackhawk Reservation, approximately a three- to four-hour drive.

IV. There is no good cause to the contrary.

The Department of the Interior, Bureau for Indian Affairs has defined "good cause to the contrary" for the purpose of barring a transfer to a tribal court. One sufficient element for good cause would be the lack of a tribal court. Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings* ("Guidelines"). The Franklin Supreme Court has followed these guidelines. *In re Custody of R.M.* Additionally, the Department of the Interior has identified four other sufficient elements for barring transfer: "(I) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing. (ii) The Indian child is over 12 years of age and objects to the transfer. (iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses. (iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe." *Guidelines.* The burden of proving good cause against a transfer is on the party opposing the transfer. *Id.*

This proceeding was not at an advanced stage when Movant filed the Motion to Transfer Case to Tribal Court. Respondents had filed their Petition for Guardianship and Temporary Custody on February 1, 2013. Movant filed the Motion to Transfer Case to Tribal Court on February 11, 2013. This Court had not yet ruled on the Petition for Guardianship and

Temporary Custody.

The Minor is only 10 years of age. Therefore the second factor is irrelevant in this case. Transfer to the Blackhawk Tribal Court would not present an undue hardship on the parties or the witnesses. Previously the Franklin Supreme Court has found that an approximately two hour driving time for parties and witnesses was not an undue hardship. *In re Custody of R.M.* Although the travel time here is between three and four hours, this should not constitute an undue burden. The Father and the Minor had previously made the trip on numerous occasions. Movant has been the primary care giver since the Father became incapacitated. See Petition for Guardianship, filed with the Tribal Court of the Blackhawk Tribe.

The Minor has had significant contact with the Blackhawk Tribe and its members. The Minor has attended at least four powwows on THE Blackhawk Reservation. Email from Joseph Fox to Betty Fox (Aug. 23, 2011); Petition for Guardianship, filed with the Tribal Court of the Blackhawk Tribe. He has spent entire weeks on the reservation and enjoys the time spent there. *Id.* The Father intended to continue bringing the Minor to events on the Blackhawk Reservation and hoped that the Minor would continue to remember the family's Blackhawk roots.

Therefore, there is no good cause against transferring this case to the Blackhawk Tribal Court.

V. The parents have not objected to the transfer of jurisdiction.

The Mother is deceased and the Father is currently in a coma. Currently, neither parent has objected or is capable of objecting to the transfer of jurisdiction to the Blackhawk Tribal Court.

VI. Movant is the Indian Custodian of the Minor.

As shown above, the Blackhawk tradition is that the Native American grandparents, either paternal or maternal, become the Indian custodian of an Indian child. *Native American Customs Regarding Care of Children*, 8 Journal of Native American Law (2003). Here, Movant is a member of the Blackhawk Tribe. Letter from Sam Waters (Feb. 10, 2013). Movant is the paternal grandmother of the Minor. Petition for Guardianship, filed with the Tribal Court of the Blackhawk Tribe. Neither of the respondents is a member of any Indian tribe. *Id.* Therefore, the Blackhawk Tribe considers Movant to be the Indian custodian of the Minor.

Therefore, Movant has met each of the elements required for transfer of a child custody case from a state court to an Indian tribal court. Additionally, Respondents cannot show that there is good cause to deny the transfer. Pursuant to ICWA, 25 U.S.C. § 1911(b), this Court must transfer this action to the Blackhawk Tribal Court.