February 2017 Bar Examination Sample Answers

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QUESTION 1 - Sample Answer # 1

At the outset, Georgia tort law provides for certain types of damages which might be claimed by both the plaintiffs at issue. The following rules are applicable to both Driver 3 and Passenger.

In a tort action, the plaintiff may seek compensatory damages meant to make the plaintiff whole again after the damages caused. The court will allow such a plaintiff to recover both general and special compensatory damages. General damages are non pecuniary damages and are to be determined by the enlightened heart of an impartial jury. They includes but are not limited too pain and suffering and/or damages for loss of capacity. They need not be pleaded with particularity. Special damages on the other hand are pecuniary damages. They are usually the result of property damages, medical bills, or other identifiable expenses which can and must be pleaded with particularity. Lastly, tort action also make available punitive damages. Punitive damages are meant to punish a defendant who has acted with wilful or wanton misconduct or intent to harm. Punitive damages are must be asked for in the pleading or they cannot be awarded. Juries determine punitive damages, and damages will usually be capped at $250,000.00 absent a products liability suit or specific intent.

First I will address the damages that Driver 3 might seek before addressing the damages that Passenger might seek.

Driver 3.

Driver 3 will be entitled to general damages for her pain and suffering. These damages will be determined by the enlightened heart of an impartial jury. The jury may consider pain and suffering that occurred immediately after the accident until now, and it may consider pain and suffering that might occur in the future. Driver three should present evidence of her pain and suffering in the past. She can do this through her own testimony, through the testimony of her doctors, and by introducing pictures of her injuries, medical bills, or any other probative and relevant material on the issues of damages. She may also present evidence of what her pain and suffering will be in the future. To do this she must present evidence that will prove beyond a preponderance of the evidence that the damages are not too remote or speculative. She may use similar evidence as already mentioned.

Driver 3 may also claim general damages for her loss of capacity. These damages will be considered by the jury in light of her catastrophic and permanently disabling injuries. The jury may consider evidence that she may no longer be able to play with her children, have intimate

relations with her husband, or do other things she once enjoyed. She may use similar evidence as already described above to prove up these damages.

Driver 3 can recover special damages by pleading with particularity the cost of her medical bills and any decrease in future earning. She may also plead property damage to her car. (Noteably, under GA law, she can plead personal injuries and property damages in separate suits under the Motor vehicle Tort Act, which is an exception to the general Collateral Estoppel rule.) To do this she should show evidence of her medical bills. She may introduce those bills into evidence by properly authenticating them. She must also show that her lost future earnings are not too remote or speculative, and she can show the repair cost to her car, or if it is totaled she may recover the full market value. Driver 3 may be able to recover punitive damages if she can show that the defendant's conduct was willful and wanton. Here she might do so by showing that the defendant was grossly negligent or reckless far beyond reasonable behavior. She may do this by showing that he loaded the truck well over the weight limit, and more importantly that he drove while intoxicated. If the court finds that this conduct is willful or wanton, then punitive damages may be assessed by the jury.

Driver 3's husband may bring a loss of consortium claim for the loss of his wife's marital services.

Passenger may claim similar damages using similar evidence with regard to her pain and suffering and loss of capacity. The damages will be determined exactly like they were determined in Driver 3's case, but may be valued differently. In contract, Driver 3's damages must be asserted by the executor of her estate in a survival action.

Additionally, Passenger's parents may bring a wrongful death claim. They may claim damages for Driver 3's future earnings, funeral expenses, and probate expenses. Wrongful death claims are usually brought by the spouse or children, but because Passenger 3 has none, the parents are next in line.

Question 2.

Driver 1 and Driver 2 are the likely defendant's in this suit.

Driver 1 may argue that Passenger assumed the risk. Assumption of risk is an affirmative defense by which a plaintiff cannot recover even when the defendant was negligent. The burden is on the defendant to prove that the plaintiff had knowledge of the risk and assumed it voluntarily. Here, the facts do not indicate that Passenger assumed the risk. While passenger may have known that driver was drunk, she did not voluntarily assume the harm that occurred. Further, passenger did not know that the trailer was overloaded, nor did she know that the truck's towing capacity was maxed out. Therefore, she could not have knowledge and voluntarily assume risk of the truck's inability to stop.

Driver 2 may argue that the harm that occurred was not the proximate cause of his actions. A harm is not proximately caused by the defendant if the harm is unforeseeable. Driver two's best argument is that it was unforeseeable that a truck would be so overloaded as to prevent stopping when Driver 2 backed out of his driveway. However, this will fail because it is too narrow an argument. It was foreseeable that a driver may swerve upon Driver 2 backing out in front of another. That swerve may cause damage to the another. Here, the foreseeable result

happened.

Both defendant's may also affirmatively assert that the other defendant was at fault. Under Georgia law, this argument may be used to lower apportioned fault, but will not negate liability. Georgia does not follow joint and several liability. The jury may determine the relative fault among both defendants here by weighing the evidence and each defendant will only pay for his apportioned amount under Georgia contribution laws.

Both defendant's might assert that the other way the cause of the accident. This argument will fail. In a negligence action the elements will be duty, breach, causation, and damages. Disproving one element will eliminate liability. The cause element here can be established using the but for test. Best defendants were but for causes. This defense will fail.

Question 3.

Under Georgia law an attorney must keep two separate accounts: a trust account for client awards (an other money) and his own operating account. Here, the money is likely in the trust account and the lawyer is treated as the trustee for that money. He owes the fiduciary duty to his client to make sure the money is distributed accordingly. Here, where these is a dispute based on a contract to pay the medical bills. The lawyer should immediately distribute the funds to the client that are not in dispute, and should have the court make a determination as to what to do with the remainder of the funds.

QUESTION 1 - Sample Answer # 2

Driver 3

Driver 3 may sue Driver 1, Driver 2, Passenger, Employees of the Auction Company, the Auction Company

Driver 3 may sue driver 1 for negligence and negligence per se. To be liable for negligence, duty, breach, causation (both actual and proximate), and damages must all be present. Driver 1 owed a duty of care to all other motorists on the road. Therefore, he owed a duty of care to driver 1. Driver 1 breached that duty. To determine breach, a person is compared to a reasonable person standard. In other words, what would a reasonable person in Driver 1's situation do. Driver 1 breached the duty of care in a couple of ways. First, he loaded up his small Toyota pickup truck and trailer over the weight limits, which directly led to the crash. Secondly, Driver 1 could be found liable under a theory of negligence per se if he was under the influence of alcohol to the extent that his normal faculties were impaired. Negligence per se is when somebody violates a statute, and they can be found negligent on that basis. To have negligence per se, the plaintiff must be in the class of people protected by the statute, and the harm suffered must be of the kind the statute seeks to protect against. Here, driver 1 has likely violated the DUI statute by driving drunk. Plaintiff is a motorist, which would be included in the class sought to be protected by the DUI statute, and the harm came from a crash, which is exactly the type of harm the statute seeks to prevent. There is proximate causation on the negligence count, because it is foreseeable that overloading the trailer and drinking could cause a crash. Furthermore, driver 1's failure to act properly was the but for cause of the accident. Damages will be available to pay for medical costs, loss of enjoyment in her life from being disabled, lost wages, possible loss of consortium with her family, and pain and suffering. Driver 3 may be entitled to punitive damages from Driver 1 if his conduct is found to be malicious and wanton, but will be limited to $250,000.

Driver 3 may sue the loaders and the auction for negligence. Here, the loaders had a duty to act reasonably in not overloading the trailer which was a small trailer on a small truck. They breached the duty by overloading the trailer and truck. Furthermore, it is foreseeable that the overloading would cause or contribute to a crash which may injure another motorist, and the overloading was the but for cause of the wreck. Without the trailer being overloaded and causing the wheels of the truck to come off of the ground, Driver 1 may have been able to avoid the crash. The auction company will be liable under a theory of respondent superior (vicarious liability). Employers are held responsible for the acts of their employees that are within the scope of their employment. Here, the facts say that the loaders were employees of the auction company. It seems most likely that assisting Driver 1 in loading his trailer with the equipment was part of their duties as loaders for the auction company. Therefore, the company will be liable to the extent that the employees are.

Driver 3 may sue Driver 2 for negligence. Driver 2 had a duty to drive carefully and avoid causing any accidents. Whether or not Driver 2 breached that duty is not completely clear. It could be argued that backing out into the road was in some way a breach of that duty. It was foreseeable that backing into the road could cause and accident, so proximate causation is met. It is a question as to whether or not Driver 2 was the but for cause, but her actions were at least a contributing cause in the accident. In cases where a but for cause is difficult to apply due to the negligence of various actors contributing to the injury, the courts apply a different test, being

whether the defendant's actions were a substantial contributing factor in causing the injury.

Driver 3 may bring the suit herself if she is able, or a guardian who is appointed may bring the suit on her behalf. The damages discusses will be able to be apportioned to the various parties if the jury finds them at fault. Georgia has comparative fault, so the jury can apportion fault as a percentage against each defendant.

Passenger is dead, so he may not sue on his own behalf obviously. Passengers parents may bring a wrongful death suit against driver 1, driver 2, the loaders and the auction company as discussed previously with the elements above. Normally a spouse and children will have the right to bring a wrongful death suit, in which they will share the proceeds equally. In a case where the decedent is survived by neither children nor spouse, the parents have the right to bring the action. In addition, his estate may bring a survival suit for negligence if it can be proven that he survived the crash for a time and experienced pain and suffering, though that does not seem clear from the facts presented. The wrongful death suit is exactly what it sounds like; a suit that alleges that the decedents death was brought about by the tortious act of another. The wrongful death suit damages will be determined by the value of passenger's life, including enjoyment of life, future earnings, any loss of consortium, and any other relevant factors, as considered by the conscience of an englightened jury.

2. Driver 1 may assert several defenses in the suit by Driver 3:

a. He may seek to have more of the fault apportioned to the various other parties. Georgia has done away with joint and several liability, so the amount of fault apportioned to Driver 1 by the jury will be all he has to pay. The law of comparative fault allows the jury to apportion fault as a percentage to all parties who are found at fault. He will probably argue that Driver 2 was at fault by backing into the road, and that the loaders were more at fault for overloading his truck than he was as they are employed in such a business as to know better.

3. Lawyers have a duty not to help their client commit any act that would constitute fraud or wrongfully harm a third party. At the same time, an attorney generally must honor his client's wishes in regard to the end result of litigation. The lawyer may not make a disbursement of the settlement proceeds without the permission of Driver 3, since Driver 3 is the client. At the same time, there was an agreement entered into that the doctor would be paid out of the proceeds of litigation, which the lawyer now has. In this situation, the lawyer should do everything in his power to persuade his client to pay the doctor. If the client persists in refusing to do so, the lawyer must disburse the funds of the settlement to the client, absent any due for fees and costs, and must put the amount in dispute into a trust account pending the result of any litigation regarding those funds. Failure to properly account for clients' funds is an easy way to get into big trouble very quickly with the Georgia Bar, so lawyer should be extremely careful in how he handles this.

QUESTION 1 - Sample Answer # 3

1. Driver 3 could bring a negligence claim against Driver 1, possibly against Driver 2, and possibly the Auction Company. Driver 3 may also be able to bring strict products liability claims against the Trailer Manufacturer and Truck manufacturer, if she can show the truck and trailer were defective. The damages she could obtain against each are described below.

Driver 3 can clearly bring a negligence claim against Driver 1. Negligence requires the existence of a duty, breach of that duty, actual and proximate causation, and damages. Driver 3 was a foreseeable victim of Driver 1's conduct, and thus Driver 1 owed a duty to her to drive reasonably. Driver 1 breached that duty by driving drunk. Indeed, by driving over the legal limit, Driver 1 likely committed negligence per se (assuming the DUI statute was not enacted after 2010), as Driver 3 was harmed by the type of danger sought to be protected by criminalizing drunk driving. Actual causation is clear. Driver 1 could argue that overloading the trailer was an intervening cause, but this would not succeed, and, regardless, Driver 1 assisted in loading the trailer with the heavy farm equipment.

With respect to damages, Driver 3 can obtain general, special, and likely punitive damages from Driver 1. General damages include the pain and suffering experienced by Driver 3, and are measured by the enlightened conscience of an impartial jury. Special damages, which Driver 3 must plead with specificity, include lost wages (reduced to present value) from Driver 3's employment at the hospital, reasonable medical costs, and other out-of-pocket expenses. If Driver 3 can show by clear and convincing evidence that Driver 1 acted maliciously or with a willful and wanton disregard for others, she can recover punitive damages. Driver 1's conduct likely reaches this standard; because Driver 1 was driving under the influence of alcohol, the normal $250,000 cap for punitive damages does not apply.

Driver 3 may be able to bring a negligence claim against Driver 2, if Driver 3 can show that Driver 2 was negligent. Little in the facts suggest that Driver 2 breached a duty of reasonable care, so this claim would likely not succeed. If Driver 3 could make out a negligence claim against Driver 2, she would recover the same damages (likely minus punitive damages), apportioned to Driver 2's share of fault.

Driver 3 should be able to bring a negligence claim against the Auction Company and its employees for negligently loading Driver 1's flatbed with farm equipment that was too heavy for the flatbed. The success of this claim will likely depend on whether Driver 1's own negligence cuts off proximate causation, as Driver 1 and Passenger began to drink beer after the trailer was loaded. The shifting of the farm equipment was likely foreseeable, however, meaning that proximate causation exists. Because the auction employees were acting in their scope of employment, Auction Company will be vicariously liable for any tort damages. Since Driver 1 and Passenger drank their own beer, Auction Company should not be subject to any dramshop liability. The Auction Company and its employees would be liable for the same damages as Driver 2, apportioned to their share of fault.

Driver 3 may also be able bring strict product liability claims against Trailer Manufacturer and Truck Manufacturer, if she can show that the trailer and truck were defective and those defects contributed to her injury. Trailer Manufacturer and Truck Manufacturer would be liable for the same damages as Driver 2, apportioned to their share of fault. Punitive damages are not available if the Manufacturers have previously paid punitive damages on these same defects.

Driver 3's spouse could also seek loss of consortium from all the above defendants due to Driver 3's permanent disability. This will compensate the spouse for the loss of Driver 3's companionship, affection and services. Driver 3's children cannot seek loss of consortium damages.

Passenger's parents could seek a wrongful death claim, using the same theories of liability against the same parties as Driver 3 (though Passenger may be subject to different defenses than Driver 3 -- see Answer 2). Because Passenger has no spouse or children, his Parents would be the statutory plaintiffs for a wrongful death claim. They may seek the full value of Passenger's life, but they may not seek punitive damages. Full value of Passenger's life includes lost future wages reduced to present value, but because Passenger was unemployed, future earnings will be difficult to prove.

Any survival claim for the pain and suffering experienced by Passenger before his death will belong to the personal representative of Passenger's estate. This claim could be brought under the same substantive theories of liability and against the same defendants as Driver 3's claim (though, again, subject to different defenses). Punitive damages would be available.

2. No party likely has a good affirmative defense against Driver 3. Driver 3 was exercising reasonable care at all times during the accident. She would thus not be subject to a comparative negligence or assumption of the risk defense.

Passenger, by contrast, is subject to both comparative negligence and implied assumption of the risk defenses. In Georgia, if a plaintiff is found to be 50% or more at fault, he will not be able to recover any damages in negligence. Comparative negligence less than 50% will reduce the plaintiff's damages in proportion to his percentage fault. Here, Passenger's decision to get in a truck with Driver 1, who Passenger knew was drinking, as well as the decision to get in a truck towing a trailer that Passenger likely knew was overloaded, was certainly negligent. Whether it constitutes 50% or more of the fault causing the accident is unlikely, given Driver 1's extremely reckless conduct.

However, Passenger's decision to ride with Driver 1 would also be implied assumption of the risk, and thus a total bar to liability, at least with respect to Driver 1. In Georgia, if plaintiff voluntarily undertakes to confront a known risk, this will be a defense to liability. Here, Passenger knew he was getting in a car with a driver who was drinking. This should be a total defense to liability, at least for Driver 1.

To the extent the accident was caused in part by a defect in the trailer or truck, or by the negligent overloading of the trailer, implied assumption of the risk may not be available to the extent that Passenger was not aware of those particular risks. Passenger may or may not have been aware that the trailer was overloaded. While assumption of risk is a defense to strict product liability actions, we do not have enough information to know if Passenger was aware of any known defect in the trailer or truck.

3. Driver 3's lawyer cannot disobey her client's demand to not pay the doctor. At issue here is the Lawyer's ethical obligation with respect to settlement proceeds belonging to the client but over which a third party may have a valid claim. If the lawyer has the settlement proceeds, the lawyer holds them in trust for the client and cannot pay them out to the doctor without the client's consent. If the lawyer thinks that the client is undertaking a fraudulent course of

conduct, the lawyer may withdraw from representation. But the lawyer cannot pay the doctor over the objections of the lawyer's client, at least with the client's own money.

Driver 1 may assert several defenses in the wrongful death and survival suits:

a. Assumption of risk: driver 1 may argue that passenger assumed the risk of riding with him. Assumption of risk requires that the plaintiff with full knowledge and understanding of the risks associated with the activity, chooses to participate in the activity anyway. In that case, the plaintiff will be said to have assumed the risk and will not recover. Here, passenger was riding in a truck with Driver 1 knowing that Driver 1 had consumed a great deal of alcohol as passenger was drinking with Driver 1 prior to the trip. It may be pointed out that passenger was not fully capable of understanding the risks if he himself was inebriated at the time the risks were presented, which seems likely.

The employees and the auction company will assert that it was up to Driver 1 to know the capabilities of his truck and trailer, and that they were not negligent for complying with his wishes in overloading the truck and trailer.

Driver 2 will argue that he was not negligent. It is questionable as to whether Driver 2 was negligent in backing into the road. It may be that Driver 2 was not negligent at all in backing into the road as he did. Furthermore, we know that Driver 2 saw the truck coming over the hill after he had backed out, and that he went back into his driveway and got out of the way. Therefore, Driver 2 may argue that he was not a cause of the accident, and that the only cause was Driver 1's overreaction.

QUESTION 2 - Sample Answer # 1

Question 1

Mr. Cash should form a corporation. Given the large number of investors he will have, the corporate equity structure will satisfy his needs the best. Corporations acquire investments by selling stock to shareholders. In this case, the shareholders will be the investors. The investors will be able to buy and sell their stock, perhaps for a profit. Furthermore, his will be able to retain profits as he sees fit with careful drafting of the corporate bylaws and the articles of incorporation. He should simply make sure that the investors are not entitled to dividends. I will first discuss how the corporation should be formed, then I will lay out how Mr. Case can achieve his objectives.

To form a corporation in Georgia, broadly speaking, there must be an incorporator, articles of incorporation, and filing with the secretary of state. The incorporator is the person who promotes the incorporation of the contract. The incorporator can be a person or an entity. He is responsible for filing the articles of incorporation with the Secretary of State. Here the incorporator is Mr. Cash.

The articles of incorporation represent the relationship between the corporation and the state. The articles must contain the name of the corporation and meet the naming limitation designating the name with the terms Co. Corp. Corporation, or the like. The articles must contain the name and the address of the incorporator, the name and the address of the registered agent on whom process may be served, the address of the registered office, and it must define the amount of stock that is authorized. Additionally, the articles can contain whether there will be different classes of stock and how those classes of stock may vote. The articles must then be filed and the corporation will be formed when the secretary records the filing.

Then Mr. Cash should have an initial meeting of the shareholders, if there are any, and he should draft the corporate bylaws and any shareholders agreements. By careful drafting and negotiating of the bylaws, the articles of incorporation, and the shareholders agreement, Mr. Cash can organize the corporation so that it can receive investment without paying out profits. One way he can do this will be to have different classes of stock in the articles or incorporation. He can create a class of stock whereby it may be bought and sold publicly, but it will not be entitled to receive dividends (the corporations profits.) The international stock market will suit his needs because the facts tell me that his opportunities are both domestic and foreign. He should also be careful regarding the voting rights he gives certain classes of stock as it appears he is already considering mergers and acquiring other bushiness.

Mr. Cash will want to organize the board of directors so that he is in control of the management and has a majority vote on any proposed changes to the strategies I listed above.

Seeing as that investment and retention of profits are his only goals, organizing a corporation in this fashion would achieve his objectives.

(As a side note, Mr. Cash could permit dividends if he wished, but he may still retain the profits. As long as Mr. Cash maintains control of the board and acts with reasonable business judgment, the corporation does not HAVE to distribute dividends. This is an application of the business judgment rule.)

Question 2

Mr. Cash should form a Limited Liability Company (LLC). An LLC is a very flexible organization that receives flow through taxation status. The corporate formalities such as bylaws and voting are not necessary, and can be arranged as Mr. Cash and his friends prefer. LLCs are made up or members and sometimes managers. The LLC can be member-managed or manager-managed per Mr. Cash's desire. Profits may be distributed as the members see fit, and the members will be taxed on those distributions as personal profits. Best of all, LLCs provide limited liability for the members. Members may be liable only for their own torts and will not be liable for the torts of the LLC or any other liabilities of the LLC. This allows the members to protect their personal assets while only risking the LLC assets. The members should be careful not to commingle funds or abuse the limited liability so as to avoid piercing the veil of limited liability.

Creating an LLC is very simple. Mr. Cash may draft articles of organization. He should name the LLC appropriately here. He must include in designation LLC or Limited Liability Company in the name. He must also do a name search as to avoid copying another company's name. He must then file and pay the appropriate fee with the Secretary of State and the Secretary will file the articles. Mr. Cash will also draft an operating agreement where he may set forth how the LLC will be operated. He and his friends may and should negotiate the terms of the operating agreement. As mentioned in the rules above, he and his two friends should negotiate as to the distribution of profits, the management scheme, and how initiation investments are to be repaid. Under these rules, this will allow all three friends to have ownership, distribute profits as they desire, and receive limited liability. Seeing as that fits all three of Mr. Cash's goals, the LLC is a perfect entity for this business.

Question 3

Here, it sounds like Mr. Cash would like to create a nonprofit closely held corporation in the name of his grandmother. The same rules and incorporation requirements apply under Georgia law. I have listed them in my answer to question 1. After he incorporates, he will need to file for tax exempt status.

Mr. Cash will need to apply for tax exempt status with the federal and state government. To do this, he must identify the purpose of the organization, how profits are to be used, and whether donations can be accepted. The filing guidelines may be found online and can be filled out accordingly. Under these facts, he can list that the corporation will be used to promote humanitarian causes and provide education, healthcare and other social services to impoverished communities. He can list that the organization will receive both donations and other funds from his business ventures and friends. Assuming that his application for tax exempt status is accepted, the non-profit corporation will fit his needs.

If Mr. Cash's application is denied, I would recommend he form an S-corp. While an S-corp is not tax exempt it will receive the benefit of flow through taxation that the typical C-corp would not. S-corps may be formed if there are less than 100 shareholders, there is one class of voting stock, and the stock is not publicly traded.

QUESTION 2 - Sample Answer # 2

1. The issue here is which entity Mr. Cash should create in order to allow investors to invest and retain profits and how he may properly do so in Georgia. In Georgia, corporate law is governed by the Georgia Business Corporation Code, and the Code allows for corporations to be formed in which people may invest (a.k.a. become stockholders) with limited or no liability and the corporation may retain profits within itself for future business endeavors. In fact, a corporation would be best in this scenario because they are permitted to retain stores of profits from year-to-year and there is actually a disincentive for corporations to distribute profits. Dividends (profit distributions) to shareholders are double-taxed, first as profits for the corporation and secondly as investment income in the hands of the shareholders. In that way, a corporation would suit Mr. Cash's needs well and give him the freedom to use the profits as his Board of Directors and officers see fit. It is relatively difficult to authorize a dividend in a corporation; the Board must vote on it at a regular meeting or a special meeting with notice to Board members (2 days in Georgia) with quorum requirements met and a majority of those present must agree to it. The Board also may not legally delegate that responsibility to a committee. Therefore, it would be absolutely no problem that Mr. Cash plans to keep the profits within the corporation.

As to Mr. Cash's goal of limited liability, investors in a corporation will not be held liable unless a Court were to pierce the corporate veil, which would be decided pursuant to Georgia's "sham standard," applicable when the incorporation was a mere "sham," the incorporators abuse the privilege of incorporating and fairness requires the Court to pierce it. Because Mr. Cash's entity seeks to give shareholders limited liability, a corporation would be a great option for him.

In Georgia, for a valid corporation, there must be (a) 1 or more incorporators, (b) written Articles of Incorporation and © the Articles must be filed with the Secretary of State. Georgia requires the Articles of Incorporation to include the name of the corporation (which must include "Inc.," "Corp.," or some other indicia that it is a corporation), the names of the incorporators, the name of the registered agent of the corporation, the address of the registered agent for process of service, the names of the initial Board members, and the principal place of business of the corporation. Georgia does not recognize the doctrine of de facto incorporation wherein a mere good-faith attempt to comply with an incorporation statute would give rise to a valid corporation, so Mr. Cash should be sure to comply with the Georgia Business Corporation Code. However, if he holds his new business out to be a corporation before the Articles are properly filed, then Georgia law may find that he is stopped from asserting that his business was not a corporation in a later lawsuit. Georgia calls this doctrine "corporation by estoppel," but I would nonetheless tell Mr. Cash to just file the valid Articles.

Once the Articles are filed, Mr. Cash may hold his first annual Board meeting, elect the Officers, draft his bylaws (which are subordinate to any information in the Articles of Incorporation but would still govern central business practices) and enjoy his new entity that allows for limited shareholder liability and for retention of profits for future use without negative tax implications.

2. The issue here is which legal entity would allow Mr. Cash to manufacture solar panels with a few people providing capital and also regularly distribute the profits. Although Mr. Cash could potentially create a Limited Liability Partnership in Georgia in which no partners would have liability for the torts and debts of the partnership, LLCs require a statement of qualification and annual financial reports to be filed with the State, so I would recommend that Mr. Cash instead

create a manager-managed Limited Liability Corporation or an LLC.

LLCs are legal entities which provide for limited liability of its members, who may then opt to vote for managers to manage the business itself (there is a distinction between a member-managed LLC and a manager-managed LLC). A manager-managed LLC will probably be best for Mr. Cash here because his friends merely want to provide capital, but Mr. Cash is the real expert in solar panels and should probably run the business. There are several benefits to an LLC: it has limited liability for the people involved, it may exist for a limited amount of time if the Articles of Organization specify a limited time frame, it enjoys limited tax liability as though it were a partnership instead of a corporation, and it requires unanimous consent amongst the members in order to liquidate it.

Members will not be held personally liable for torts and debts of the LLC unless a Court decides to pierce the veil of the LLC, which in Georgia would occur pursuant to 1 of 2 tests: the "unity of ownership and interest test" (wherein there is no discernible difference between the LLC and its members, so equity would allow the members to be personally liable) or the "mere instrumentality" test (in which it would be found that the members overpowered the LLC to such an extent that the LLC had no legal will of its own and that fairness required the veil to be pierced).

To create the LLC, Mr. Cash (a natural person, age 18+) must draft Articles of Organization and file them with the Secretary of State. The Articles must include the name of the entity (which must include the letters LLC and is also limited to 80 characters, inclusive of spaces in Georgia), the registered agent for service's name and address, the names of the original members, and the LLC's principal business address. The Articles may include information like the inherent business of the LLC, etc. Once the LLC is created, Mr. Cash may run the LLC with his passive members, but he also should draft bylaws that would govern how profits are distributed to the members. In the absence of a writing to that effect, his members would receive no salary (although Mr. Cash could still distribute profits which haven't been touched by corporate taxes).

3. The issue here is which entity would be the most beneficial to Mr. Cash in his goal of running a charitable organization in which his donors may provide capital without being taxed. It appears that Mr. Cash would benefit most from creating a non-profit entity. Non-profit entities must be created for a charitable, educational or other social purpose, meaning that it must benefit a reasonably large sector of society. The entity may retain money for expenses or expansion, but may not keep profits for itself or its donors. The entity, by consequence, need not pay certain taxes on its income or its expenditures (and most importantly, donors may write their donations off of their taxes).

Here, Mr. Cash seeks to create a charitable entity which would benefit a reasonably large sector of society. Creating a non-profit organization would allow his friends and family to donate with positive tax consequences, and he can run his charity tax-free. In order to create it, he must prepare a 501(c)(3) report and submit it to the federal IRS for certification. The report must contain the purposes of the organization and Mr. Cash must prepare it in good faith with no material misrepresentations. His non-profit entity must also register with the State of Georgia so that it may also be exempt from state taxes.

QUESTION 2 - Sample Answer # 3

1. Mr. Cash should create a corporation which will allow investors to invest and the entity could retain profits for future investment and business opportunities. Investors could purchase shares in the company and either receive a dividend or hold on to the shares until sold. Capital gains or losses would be calculated at that time for tax purposes.

In Georgia, to create a corporation, Articles of Incorporation must be filed with the Secretary of State. A $100.00 fee is required at the time of filing along with a $25.00 name reservation fee, if applicable. A $40.00 notice of intent to incorporate must be filed with the legal organ/newspaper in the county where the corporation is located or has its principal office. The newspaper ad will be ran for 2 weeks. The Articles of Incorporation must include (a) the corporations principal place of business**,** (b) the name and address of the registered agent, and © the number of shares being issued. Once approved, the Secretary of State will issue a Certification of Incorporation along with a control number. A $30-$50 annual registration fee is required each year.

2. I would recommend either an S corporation or an LLC (Limited Liability Company). Each are flow through entities that would allow distribution of the profits from sales to investors in the business. My preference, however, would be an LLC due to the relative east of formation. To create an LLC in Georgia the process is similar to forming a corporation with fewer steps. (A) Name reservation would be the first step which costs $25.00. This step is needed to assure the availability of the name to be used for your business. (B) Next the Articles of Organization must be filed at the cost of $100.00. The Articles must contain the principal place of business, registered agent, and organizer. Unlike corporation, no shares are issued and not notice is required for publication. Once approved, the Secretary of State will issue a Certificate of Organization. Annual registration fees are required.

3. I would recommend formation of a non-profit corporation. The process is similar to forming a regular corporation with the Secretary of State. However, no shares are required to be issued. Once formation is complete under Georgia law there is one final step to obtain tax-exempt status. You must file Form 1023 “Application for Exemption from Taxes” with the Internal Revenue Service (IRS). This process costs from $400 to $850 depending on whether contributions are expected to be over/under $10,000. Approval by the IRS can take up to six months. Until then contributions can not be deducted on your taxes.

QUESTION 3 - Sample Answer # 1

1. Does the school voucher program violate the First Amendment because people use the vouchers to attend catholic school?

Under the Establishment Clause of the first Amendment, the government is not allowed to establish a government religion nor is it allowed to pass laws that create excessive government entanglement with religion. Establishment clause issues are analyzed under strict scrutiny, meaning the statute in question must be necessary to further a compelling government interest and must be the least restrictive means for doing so. Further, the Lemon test determines whether the statute in question violates the Establishment Clause. The Lemon test looks at whether a statute has a secular purpose, whether it promotes excessive government entanglement, and whether there is a significant nexus between the government purpose and the statute in question.

In this case, the voucher program seeks to allow any student in kindergarten through 8th grade switch from a failing school to another, presumably non-failing, school. It is a compelling government interest to promote higher education standards and the voucher program is one way to do so. The vouchers don't force parents to choose a private school. The program appears to be neutral on its face and without discriminatory intent because it allows people to choose the school they want, public or private. Providing vouchers gives parents a choice and since it increases the options available, it appears to be the least restrictive means for promoting higher education standards. The statute does not say anything about religious schools, although parents are free to choose to use their vouchers there, so it satisfies the first element of the Lemon test in that it is secular in nature. As stated before, the government has a compelling interest in increasing education standards so here, there appears to be a significant nexus between the voucher program and it intended results. Since the government is not choosing the school, under Lemon, there is no excessive government entanglement. The Supreme Court has held that similar voucher programs are constitutional under Lemon when the vouchers are given to parents and the choice of school is left up to them.

In conclusion, the school voucher program is constitutional and does not violate the Establishment Clause of the First Amendment.

2. Is the Savannah ordinance constitutional?

Under the Free Exercise Clause of the First Amendment, government cannot pass any laws that prohibit the free exercise of religion. When a statute appears neutral on its face and when it is a general applicability law that does not single out a group, but it appears to have an incidental impact on a religious entity, rational basis will apply. If the statute is neutral on its face and has a disparate impact on a religious group or affects a fundamental right, strict scrutiny will apply. Since the Savannah ordinance bans alcohol consumption within city limits and applies to everyone within the city limits, rational basis will apply. Under rational basis, the party claiming a violation must prove that the law has a discriminatory intent and that it is not rationally related to a legitimate government purpose.

Savannah enacted the ordinance banning alcohol consumption within city limits because of an increase in drunk driving accidents. Drinking alcohol is not a fundamental right. Savannah Church needs to prove that the law has a discriminatory intent in order to be able to file suit

against the city. Although the law prevents alcohol consumption at communion, the church is only incidentally affected by the ordinance because the law is one of general applicability. As such, the church would be unable to prove that the statute is not rationally related to a legitimate government purpose. The government has the right to pass laws for the health and wellness of its people; preventing drunk driving accidents is a legitimate government purpose so the law is rationally related to its purpose.

In conclusion, the Savannah statute is constitutional.

3. Is the City of Tybee ordinance constitutional?

Under the Free Exercise Clause of the First Amendment, government cannot pass any laws that prohibit the free exercise of religion. When a statute appears neutral on its face and when it is a general applicability law that does not single out a group, but it appears to have an incidental impact on a religious entity, rational basis will apply. If the statute is neutral on its face and has a disparate impact on a religious group or affects a fundamental right, strict scrutiny will apply. Strict scrutiny was defined above. Since the law only affects Tybee church and no one else, strict scrutiny will apply.

In this case, the ordinance is neutral on its face but has a significant impact only on Tybee church. Under strict scrutiny, the state will have to prove that the ordinance is necessary to further a compelling government interest and the means to achieve it must be the least restrictive. Strict scrutiny is a really high standard to meet and here, the city of Tybee will not likely pass it. While the city has a compelling government interest in reducing the number of drunk driving accidents, the ordinance has a disparate impact on a single entity and prevents the entity from practicing its religious ceremonies. The ordinance is not the least restrictive means for reducing the number of drunk driving accidents since it only affects Tybee church. Therefore, the ordinance is unconstitutional.

QUESTION 3 - Sample Answer # 2

1. School Voucher Program

The issue here is whether the school voucher program violates the Establishment Clause.

The Establishment Clause of the First Amendment of the United States Constitution prevents a state from favoring one religious sect over or another or favoring religion over non-religion. Laws that intentionally favor a religious sect will be subjected to strict scrutiny: they must be necessary and narrowly tailored for a compelling state interest.

Although the school voucher program appears to be benefitting Catholic schools, which are receiving 90% of the eligible students who have used vouchers, there is no evidence that the school voucher program was intentionally created to benefit their religious sect or religion over non-religion. Rather, it appears that the program was created to address the problem of "failing public schools" by helping students go to private schools. Accordingly, there is no basis for invoking strict scrutiny.

Laws that do not intentionally favor a religious sect, but do so incidentally are subjected to the Lemon test under which a regulation will be valid if (1) it has a secular purpose, (2) its primary purpose is neither to advance nor inhibit religion, and (3) it does not create excessive government entanglement with religion.

The school voucher program is valid under the Lemon test. It has a secular purpose, viz., to help solve the problem of failing public schools.

It's primary effect has been to shift a small proportion of students to private schools, not to advance a religious sect: although 90% of eligible students who have taken advantage of the program have gone to Catholic schools, only 20% of eligible students have used vouchers; and, presumably, other students who have taken advantage of the program have gone to non-religious private schools.

This program does not create excessive government entanglement: the government merely provides a voucher and the students choose where to use them.

Accordingly, the program passes the Lemon test and will be upheld.

2. City of Savannah's Ordinance

The issue here is whether the Savannah ordinance inhibits the free exercise of Savannah Church's religion.

The Free Exercise Clause of the First Amendment of the United States Constitution provides that a state many not inhibit the free exercise of religion. Regulations specifically targeting religious practice will be subjected to strict scrutiny: they must be necessary to advance a compelling state purpose.

Here, there is no evidence that the alcohol-consumption-ban was enacted to intentionally target religious practice. Rather, it was created to address the problem of increased drunk driving

accidents. In addition, the regulation affects the entire city, not just the Church, so it's difficult to see how it could have been created to intentionally inhibit the Church's activities.

Regulations that do not intentionally target religious practice, but incidentally burden religion are subjected to the rational basis test: they are upheld if rationally related to a legitimate government purpose. The government is generally not obligated to make exceptions for religious activity.

Here, Savannah Church's activities (communion service) is incidentally burdened by the regulation. However, the regulation passes the rational basis test. The state has general police powers and can act for the public good: decreasing drunk driving incidents is a legitimate government purpose within the scope of the state's police powers. The ordinance is also rationally related to that purpose because drunk driving cannot occur without consumption, and banning consumption is therefore one way to limit drunk driving. Although the city could have passed a more narrowly tailored ordinance, it is not obligated to do so under the rational basis test. Accordingly, the ordinance is constitutional and will be upheld.

3. City of Tybee's Ordinance

The issue here is whether the ordinance violates the Free Exercise Clause (see above for elements).

The Tybee Church has a much better chance of proving intentional discrimination against their religious practice than the Savannah Church: Tybee Church is the only building in the affected area, so they are disproportionately affected by the ordinance. For this reason, Tybee Church will argue that the ordinance intentionally targets their religious practices involving alcohol (communion service and wedding receptions). If the court finds intentional discrimination, strict scrutiny will apply.

The ordinance cannot pass the strict scrutiny test. Although preventing drunk driving incidents is likely a compelling government purpose, the regulation is not narrowly tailored to achieve that purpose. Specifically, there is no evidence that drinking within the designated area is causing the drunken driving incidents in the area: because drunk driving is a transitory crime by nature, the city has not established a link between the prohibited conduct and the incidents it seeks to prevent. There may be also other, more restrictive, options for achieving the purpose, e.g., setting up road blocks to check for drunk driving. Accordingly, the ordinance will be invalid under the strict scrutiny test.

However, it is unlikely that Tybee Church will be able to establish intentional targeting of their religious activities. Although the law is poorly crafted, it seems apparent that it was created to help with a drunk driving problem, rather than to target anything Tybee Church is doing. Accordingly, the law will be subjected to rational basis review, which it can pass: the city could reasonably believe that limiting consumption of alcohol in the area where drunk driving occurs would reduce drunk driving in that area. The city need not make exceptions for Tybee Church's activities.

For the reasons stated above, the Court is likely to find the Tybee ordinance constitutional under the First Amendment.

QUESTION 3 - Sample Answer # 3

1. More likely than not, the school voucher program will be constitutionally valid.

The issue is whether the government funding, which is going to public schools and private religious schools, violates the establishment clause of the constitution.

The lemon test is the standard used to determine whether a government initiative violates the establishment clause. There are 3 inquiries: (1) Is the local or federal law for a secular purpose? (2) Does the law engender exclusive religious entanglement? (3) Does the law come too close to the establishment of religion?

The law is certainly facially neutral. The entire purpose of the government initiative and education. The right to education is not a fundamental right, so the standard is rational basis. The analysis turns on whether the voucher program is rationally related to a legitimate government purpose. So because the law is neutral on its face, and is rationally related to a legitimate government purpose (i.e. education), the voucher program passes the first part of the lemon test.

The program avoids excessive entanglement with religion because it applies to all students and students get to choose what participating public or private school they will attend.

Finally the voucher program legislation does not establish any religion. Because the law as written is neutral, everyone has an opportunity to take advantage of the program and the constituents may choose whatever school they wish, the government is likely to win in court and have the law upheld.

2. Answer: More likely than not, the court will uphold the city ordinance banning alcohol within Savannah city limit.

Issue: The issue is whether the law is violative of the 1st amendment right to the free exercise of religion.

Rule: Where the law is facially neutral and of general applicability, the standard is rational basis. The law must be rationally related to a legitimate government interest to be valid. The other levels of scrutiny are intermediate and strict. Intermediate is necessary to achieve an important government interest and strict requires that a law or ordinance be narrowly tailored to achieve a compelling government interest. Under rational basis, the burden is on the plaintiff; it is the lowest standard.

Application: The law in Savannah applies to ALL citizens, not only the citizens that are members of the Savannah Church. The law makes no reference to religion and its purpose is a legitimate public interest: lessening the number of drunken driving incidents.

Conclusion: If the law specifically targeted Savannah church members, or only affected the part of the population that attended church where alcohol was an integral aspect of religious practice, the analysis would be different. But here, the government has issued an ordinance that applies to all its citizens, for the purpose of protecting the public. Therefore, the rational basis test is satisfied and the court should uphold the ordinance.

3. The ordinance passed by Tybee is more suspect than that of Savannah because it applies only to one small area while the law may be facially neutral. Its purpose/intent may be actually discriminatory. The issue is whether the Tybee city ordinance banning the alcohol consumption in one area where the only building is a church violates the constitution because it is discriminatory in purpose and infringes the 1st amendment right to free exercise of religion.

Rules: A law may be facially neutral but discriminatory in intent. Where a group of people is singled out for treatment by the government based on religion, the standard is strict scrutiny. Free exercise of religion is a fundamental right. As such, the government has the burden to show that the law is narrowly tailored to achieve a compelling government interest. This is a very high burden.

Application: The ordinance bans alcohol essentially only for the members of Tybee Church, and the geographical boundary where the church has only been the site of "several" drunken driving incidents. Only "several" incidents of drunken driving is unlikely to rise to the level of justifying the singling out of a suspect class. Further, there are probably alternatives that would not single out a suspect class of citizens. So, the government will not be able to show that it had no viable alternatives. Also, there is no evidence that suggests that the drunken driving incidents were even on church property or related to the activities therein.

In conclusion, the Tybee city ordinance banning alcohol in a small area housing the only church in Tybee will likely not pass constitutional muster and be found to be discriminatory in purpose and effect.

QUESTION 4 - Sample Answer # 1

1. In Georgia a trustee owes a fiduciary duty to the beneficiaries of the trust. In our factual scenario, Bill and Hank are the trustees, and Rob and Justine are the beneficiaries. As a fiduciary, a trustee must make the best use of the trust res (the property) in order to provide the benefit for the beneficiaries and in accordance with the settlor's intent and the trust documents. While a trustee is allowed to dispose of trust property in order to create an income or dispersement to the beneficiaries of a trust, the trustee is required to act in the beneficiaries' best interest at all times, and this includes a fiduciary duty against self dealing. While a trustee need not always invest the entirety of the res in the highest earning potential investments under the portfolio modern view, he must avoid self-dealing and any actions that are not in the best interests of the beneficiaries. Here, it appears that Bill certainly has breached his fiduciary duty to Rob and Justine as beneficiaries. Were it not for the suspicious timing of the transactions, it may not be so clearly a breach. Here, the settler, Grandpa, knew that the property would appreciate in value over time, and therefore holding onto the property until it reached its maximum useful value was what needed to be done. Instead, Bill bought the property for $100K and sold it a year later for $500K, a massive profit. While the market price seemed fair at the time, and while Rob needed money for college, Bill's self-dealing deprived him of a lot of money. Furthermore, Hank may have breached a fiduciary duty by failing to stop Bill from self dealing. He knew what Bill was doing, felt uneasy about it, but let it go on anyway, when he could and should have stopped it. A defense that may be raised is that Martha, as the guardian for Justine (not Rob if he was already 18), consented to the sale. Rob, it appears, was not consulted and did not consent.

2. Both co-trustees are liable for a breach of fiduciary duty in these circumstances. However, Bill likely is more liable as the party who initiated and participated in the self dealing than Hank, whose only fault is that he stood idly by as it happened. In Georgia, each co-trustee is liable for his own breach of fiduciary duty. In our case, Bill's breach is much more egregious than Hank's, because Hank only allowed it to happen while Bill was the primary actor. Furthermore, Hank did not profit from the breach, but Bill did. Therefore, Bill is the fiduciary against whom the easiest and most clear violation and recovery lies.

3. Because Rob is 19 years of age, he has reached and passed the age of majority under Georgia law. Therefore, Rob may sue for a breach of fiduciary duty now, and he is capable of doing so on his own behalf. The Statute of Limitations on most tort claims in Georgia is two years, and it begins running at the time of the discovery of the tort. In this case, that would most likely be when Bill resold the property a year later for $500K. Until that point, Rob had no reason to think that anything involving a breach had happened. Therefore, Rob has two years from the date he discovered the breach to file a suit. Justine, being only 16, may not have the statute of limitations running yet. In Georgia, the statute of limitations does not begin to run when the plaintiff is a minor until the minor reaches the age of majority, 18. Therefore, Justine will have two years from the time she reaches 18 to file suit. As a practical matter, Justine is likely a necessary party to litigation and should be joined even though she is a minor. The court could either allow her guardian to sue on her behalf or appoint a guardian ad litem to see that her interests are preserved in any suit.

4. Rob and Justine should seek to have the $500K that Bill sold the land for held in an equitable trust since that is the amount that the trust should have received if not for Bill's breach. An equitable trust most often results when there has been a breach of fiduciary duty that causes

the defendant to come into possession of something that should rightfully belong to the plaintiff. Legal title to the property belongs to the defendant, but the court transfers equitable title to the property to the plaintiffs to be held in trust. Here, since the plaintiffs already had a trust, Bill may be required to transfer the $500K into the trust for them. They should also petition the court to have Bill and Hank (if they so desire) removed as trustees and another trustee appointed. The court will likely remove them as trustees if it finds that they breached their fiduciary duties to the

5. Yes there was a judicial remedy available to Bill and Hank as trustees that would have allowed them to sell the tract to Bill without creating the potential for the above-discussed claims. Bill and Hank should have petitioned the court to have a guardian appointed for Justine to represent her interests and they could have gained the consent of both beneficiaries and sought court approval in the superior court of the county where the land is located. Had both beneficiaries consented to the sale to Bill after full disclosure and at arms length, Bill could have ethically and legally bought the land. Another option would have been if Bill had decided that he no longer wished to be trustee. He could have petitioned the court to have a different trustee appointed in his stead and withdrawn as trustee. Upon either a court order or the consent of all beneficiaries, in this case a guardian for Justine since she was a minor, Bill could have been removed as a trustee. If he were removed as trustee, he could attempt to get the new trustee to get him to sell the land, as he would owe no fiduciary duty to the beneficiaries anymore.

QUESTION 4 - Sample Answer # 2

1. Breach of fiduciary duties

The issue here is whether Bill or Hank breached any fiduciary duties owed to Rob and Justine under Georgia law. Trustees owe a number of fiduciary duties to the beneficiaries of a trust. They have a duty to act with care, in good faith, and to prudently invest the proceeds of the trust. They must also act impartially and owe a duty of loyalty to beneficiaries. These duties are given much weight by courts.

The duty of loyalty prohibits a trustee from self-dealing or benefitting from his position as trustee (other than agreed-upon, reasonable compensation). The trustee may not purchase trust assets for himself, take opportunities that could otherwise benefit the trust, or deal between several trusts of which he is trustee.

Here, Bill breached his duty of Loyalty to the beneficiaries, Rob and Justine, by purchasing the property for himself. Even if he honestly believed he was offering a fair deal, he has violated his duty of loyalty by self dealing with trust assets. Indeed, even to the extent that the deal "benefitted" the beneficiaries, it is still a breach of the duty of loyalty.

Hank has breached his duty of care by allowing Bill to make the purchase, which Hank should have known would be a breach of Bill's duty of loyalty. Hank had a duty to manage the property in the best interests of the beneficiaries, and to make decisions to the best of his ability. Here, the facts indicate that Hank wondered if the sell was a good idea, but did not object to the transaction. In failing to object, he breached his duty of care. He should rather have instructed Bill against violating the duty of loyalty, and together they should have made greater effort to find another buyer for the property.

There might be some rare circumstances when it would be appropriate for a trustee to purchase or sell property in the res of the trust. However, it would require an extensive amount of written disclosure and the consent and approval of a majority of the disinterested trustees. Here, though Bill "disclosed" his plan to Hank, there were not sufficient disinterested trustees to approve the transaction. The fact that Martha gave her consent is irrelevant, as she was not a trustee.

2. To what extent are Bill and Hank individually liable for any breach of fiduciary duties?

Both Bill and Hank can be found individually liable for their breach of duties. However, there is a difference in the amount that can be recovered from each. When a trustee violates his duty of loyalty, he may be disgorged of all profits. Here, Bill profited $400,000 - he purchased the trust property for $100,000 and sold it approximately one year later for $500,000. Therefore, Rob and Justine can seek to have him disgorge his profits.

Hank might be liable for a breach of duty of care, but he did not profit from this breach directly. If Rob and Justine can show any damages caused by Hank's breach, they could recover those damages, and they may be entitled to nominal damages due to the breach itself. However, despite the breach, there is not much in the way of recovery that can be had from Hank.

3. How long do Rob and Justine have to file a lawsuit?

Generally, the statute of limitations for damage to property is 4 years. This includes any damages arising from lost profits. Legal malpractice is treated as damage to property interests, so I imagine breach of fiduciary duties that lead to pecuniary loss would be as well. Therefore, the statute of limitations would be 4 years from the date of the breach, which was sometime in 2015.

However, the statute of limitations can be tolled for a number of reasons, including infancy of the plaintiff. When several plaintiffs have a joint claim, the statute of limitations is tolled until all impediments have been removed for each of them. Here, although Rob is 19, Justine is only 16. Therefore, the statute of limitations will be tolled until Justine reaches majority at age 18. They could certainly go ahead and file the lawsuit now, though, with Rob as the representative of both beneficiaries.

4. What legal remedy should Rob and Justine seek?

There are several remedies available to Rob and Justine. First, as mentioned above, they can bring an action at law seeking to disgorge Bill of his profits in the transaction. That would be $400,000 as established above. They may also be entitled to attorneys fees since Bill was a trustee who violated his duty of loyalty, and the attorney's fees are consequential damages arising from that breach.

They may want to rescind the contract and get the original piece of land back but there is a complication, in that Bill already sold the property to Moxie. The problem is that if Moxie bought the property without being aware of any claims or disputes, and acted in good faith, then it may be a good faith purchaser entitled to keep the property. However, there may be some avenue by which Rob and Justine can seek to establish that Moxie, through a deed search, should have had notice that there was something fishy about the property - i.e. that a trustee had recently purchased the property from his beneficiaries and that there was a breach of duty. However, it is unlikely that these kinds of details could be found from researching the deed or looking at the County's deed filings. If they can establish that Moxie had constructive notice of the breach, then they could seek to rescind the contract between Bill and Moxie, and then between Bill and themselves, and have the property returned to them whole.

They cannot seek an injunction, as the sale to Moxie is final.

They may also able to seek damages from Hank as a result of the breach of his duty of care, although the amount of those damages is speculative.

5. What remedy would have been available to Bill and Hank to allow them to sell the tract?

Bill and Hank could have sought a judicial sale of the property (replevin?). If the court ordered a sale, and there was adequate notice to all parties (including the beneficiaries) and advertisement of the sale, then there could have been an open sale under which the purchase price would have been deemed the fair market value of the property. Notice would have given Rob and Justine opportunity to object, and enough publicity and advertisement would have increased the likelihood of other buyers, thereby creating a market for the property. If the sale was handled appropriately and by the court, then Bill and/or Hank could have been a bidder at the sale and could have purchased the property at fair market value and would not have been subject to a claim by the grandchildren.

In the alternative, if they gave full written disclosure to the beneficiaries (and possibly to the settler, if he is still alive), and gave them opportunity to meet with their own counsel on the issue, then its possible they could have gotten the beneficiaries informed permission to sell the property. However, it's not certain this would be sufficient, given that this is a support trust. If there were additional trustees, Bill could have made a full disclosure and the remaining, disinterested trustees could have evaluated the fairness of the sale and if they believed it was in good faith, and the beneficiaries did not object, then perhaps Bill could have bought it. But as mentioned above, there were not enough independent trustees to make this decision, nor were the beneficiaries consulted.

Finally, Bill and Hank could perhaps have asked for judicial modification of the trust. The trust property is no longer able to serve its needs - that is, the property is not providing the income necessary to maintain the beneficiaries. In addition, both children are close to the age of majority (one is over) so the trust is not needed for much longer. If they asked the court for judicial modification and sought to eliminate this trust, the property would then have belonged to Justine and Rob outright. Had they decided to sell the property, Bill could have bought it as he would no longer be a trustee or have a fiduciary relationship with Justine and Rob.

QUESTION 4 - Sample Answer # 3

1. Both Bill and Hank breached their fiduciary duties of loyalty and care that they owed to Rob and Justine as trustees of the trust established for Rob and Justine's benefit.

In Georgia, a trustee owes to its beneficiaries fiduciary duties of loyalty and care. A trustee must manage trust property in the best interests of the beneficiaries exercising due care and cannot personally benefit off a transaction involving the trust in breach of his duty of loyalty. As trustees, Bill and Hank owed Rob and Justine the duty of care that they would manage the trust property as a reasonably prudent person would do for the Rob and Justine's benefit. They also owed to Rob and Justine a duty of loyalty, that they would not use or misuse assets of the trust for their own benefit. In Georgia the law is strict, and a trustee's breach of either duty, even in good faith, is still a breach and the trustee is subject to personal liability for such breach, which includes repaying or refunding the trust of any misapplied trust assets unless the act is ratified by the beneficiaries.

In this case, Bill breached both his duty of care and his duty of loyalty to Rob and Justine. Bill breached his duty of care as trustee when he failed to investigate the trust assets to determine whether there were any other buyers available in the area for the land. The fact that Martha consented to the sale is inconsequential because Martha is not a beneficiary and Bill owes Martha no fiduciary duties. Bill's responsibility is to operate and manage the trust assets for the benefit of Rob and Justine. Thus, the fact that he then purchased the property himself amounted to self-dealing and breached his duty of loyalty because he personally profited off the trust and was consequently enriched at the expense of the trust beneficiaries. The fact that he initially purchased the land in good faith does not take away or mitigate from the fact that he breached his fiduciary duties.

Hank breached his duty of care to Rob and Justine as trustee. Hank owed a duty to the beneficiaries of the trust to care and manage trust property in their best interests. Hank breached that duty when he allowed Bill to personally take title and purchase the trust assets from the trust in violation of Bill's duty of loyalty. In order to manage the trust, it takes both trustees to sign off on a trust action. Thus, in order for Bill to have acquired the trust property, Hank had to have signed off on the transfer. Thus, Hank breached his duty of care by transferring trust assets to another trustee and when he failed to investigate whether other buyers existed to take the trust property or whether a sale of the trust property was in the best interests of the beneficiaries.

2. Both Hank and Bill are equally liable under Georgia law for breaches of their fiduciary duties.

In Georgia, a trustee is personally liable for any breach of his or her fiduciary duties even if he or she purported to act in good faith when he or she breached a fiduciary duty. In this case, Bill and Hank both breached their duties, which resulted in the misappropriation of trust property to Bill personally. Both Bill and Hank are equally personally liable for the full amount of the squandered trust property and any damages resulting for their breach. Since Georgia eliminated joint and several liability, fault will be apportioned between the two of them, and if Bill still had the trust property he would be required to transfer it back to the trust along with any profits he received.

3. Rob will have 10 years from the date he discovered or should have discovered the breach to file a lawsuit against Bill and Hank; and Justine will have ten years starting when she turns 18. The statute of limitations is tolled until Justine's incapacity is removed.

In Georgia, transactions involving real estate have statute of limitations of 10 years. In Georgia, statute of limitations are tolled due to a plaintiff's incapacity no matter when the incapacity arose. In this case, Justine was a minor when the breach occurred and thus the statute of limitations is tolled until she reaches the age of majority and is able to sue on her own. Rob, however, was already 18 years old (the age of majority) when the breach occurred. Therefore, the statute of limitations will not be tolled for Rob.

4. Rob and Justine should sue for specific performance to retransfer the land back to the trust; however if Moxie was a bona fide purchaser Rob and Justine should seek a constructive trust on the profits and rents that Bill received from his sale to Moxie.

Specific performance is an equitable remedy, which will not be awarded unless a remedy at law is inadequate. Generally, a plaintiff asserting specific performance as a remedy must also assert that a valid contract exists, that the party is ready and willing to perform, and that mutuality of remedy exists, the subject matter is unique, and a remedy at law is inadequate for a court to render specific performance. However, in certain situations involving fraud a court may grant specific performance as an equitable remedy where property was fraudulently transferred.

In this case, Rob and Justine can argue that a remedy at law is inadequate because land is unique and money damages will not suffice. The land was fraudulently transferred in breach of the trustee's fiduciary duties to Bill. However, if Moxie is a bona fide purchaser who purchase the land without notice and for value, then a court will not be able to grant specific performance due to Moxie's superior equities. In that case, Rob and Justine should assert that the would like a constructive trust placed upon the $500,000 in profits and rents that Bill receives from Moxie for the land. A constructive trust is an equitable remedy that a court will award to prevent one party from being unjustly enriched at the expense of another. The only requirement of the trustee of a constructive trust is to transfer title back to beneficiary. In this case, Bill has been unjustly enriched at the expense of Rob and Justine. Therefore, the court should apply a constructive trust on the profits Bill received from his sale to Moxie and require Bill to transfer the profits he received back to the Rob and Justine, to the trust for their benefit.

5. Bill and Hank could have petitioned the court to allow them to sell the land or they could have sold the land to a third party and if challenged proven to the court that the sale was conducted in a commercially reasonable manner.

Trustees generally have broad latitude to manage trust property so long as it is done in the best interest of the beneficiaries. Jeff as settler of the trust did not prohibit Bill and Hank from ever selling the land. The land tract was the initial assets used to fund the trust. If Bill and Hank in good faith investigated and researched that selling the tract was in the best option of the trust for the beneficiaries, then they could have sold the tract. However, in order to avoid a claim made against them by Rob and Justine, Bill and Hank must be able to show that the sale was done a commercially reasonable value and that the sale retrieved the fair market value for the property. If they did not know how to assess land values then they had a duty as trustees to associate or retain someone who was familiar and who had knowledge. Alternatively, as

trustees Bill and Hank could have petitioned the court to allow them to sell the tract of land and provided the court with evidence showing that the land was not producing income and that the purpose of the trust was to support Rob and Justine, which was becoming difficult due to the low income generation. If the court granted the petition, the trustees would not face liability for misuse of trust property by the beneficiaries because there would be a court order granting the sale of the tract.

MPT-1 - Sample Answer # 1

From: Applicant
To: Lauren Scott, Managing Partner
Date: February 20th, 2017
Re: ACE Chemical: Potential Conflicts of Interest

Our law firm, Montagne & Parks ("MP") was approached by Ace Chemical Inc. (ACE) to represent them in suing Roadsprinters Inc ("Roadsprinters) for breach of a shipping contract. You have asked me to analyze three potential conflicts of interest related to our representation of ACE against Roadsprinters. It is clear that Roadsprinters will not waive any conflicts of interest.

1. Whether our representation of Columbia Chamber of Commerce ("CCC") ethically prohibits our representation of ACE

It is unlikely that our representation of CCC will ethically prohibit us from representing ACE against Roadster, despite Roadster's membership in CCC of 15 years and Jim Pickens' previous position of CCC board chair. According to Franklin Rules of Professional Conduct ("FRPC") 1.7, a lawyer shall not represent a client if it involves a current conflict of interest if representation to another client or former client would be materially limited. One issue here is whether, by representing CCC in lobbying activities, MP also represented Roadsprinters, a CCC member since its inception. According to Hooper Manufacturing Inc v. Carlisle Flooring, Inc, whether MP is considered to have represented Roadsprinters depends on whether Roadsprinters provided confidential information to MP for MP's representation of the trade association. Lobbying for a trade association is considered representation. Id. MP did not represent Roadsprinters, as MP did not receive any confidential information from or about any of the Chamber's members. Further, the Hooper v. Carlisle also instructs that if a law firm specifically tells the trade association members that any information it receives is treated as confidential, the law firm may be considered to represent the member. The opposite is true in our case because MP specifically told CCC members that their information was explicitly not confidential. Therefore, I conclude that we are not considered to have represented Roadsprinters itself through our representation of CCC because we did not receive confidential member information and we did not tell any members that the information they provided would be considered confidential. Further, members also clarified in writing that we represented CCC, not the members.

Another method by which a firm could represent trade members through its lobbying representation of the trade association is if the member's directors/officers worked closely with the firm. Hooper v. Carlisle. This is not true for our situation, as our Columbia office primarily worked with the Chamber's executive director and not with board officers, such as Jim Pickens--the president of Roadsters.

It is also important to note that the imputation rule of 1.10 applies to all members of the law firm, regardless of the office in which they work. Franklin Ethics Opinion 2015-212. This is not an issue here because our Columbus would likely not be considered to have represented Roadster, so it does not affect the Franklin office's representation of ACE.

2. Whether Samuel Dawes' previous representation of Roadster ethically prohibits our firm from representing ACE

It is unlikely that SD's previous representation of Roadsprinters, during his solo practice, would ethically prohibit us from representing ACE. The issue is whether his representation of Roadster breaches his duty of confidentiality to his former client. It is unlikely that his representation of Roadster in patent issues will constitute a current conflict of interest in his representation of ACE because such previous representation must be substantially related to our representation of ACE, according to FRPC1.9. Two subject matters are "substantially related" if the lawyer could have obtained confidential information in the first representation that would be relevant in the second representation. Franklin Ethics Opinion 2015-212. We have concluded that no information that he learned, or could have learned, could be relevant to the current contract breach litigation against Roadsprinters. Therefore, we will likely not be ethically prohibited from representing ACE based SOLELY on SD's former representation of Roadsprinters.

Another potential conflict in this situation is SD's personal relationship with Roadster's president, Jim Pickens. FRPC rule 1.10 states that a lawyer's conflict of interest may be imputed to the entire firm if that lawyer were prohibited from representing the client if practicing alone-- unless, the prohibition is based on personal interest of the disqualified lawyer. It is clear that SD has a personal relationship with Pickens, judging from the Franklin Daily News article that specifically details their personal relationship and mutual respect. This rule only solidifies the point that we can represent ACE because even if SD were to be disqualified from representing ACE on the basis of his personal relationship to Jim Pickens, the firm would still be able to represent ACE according to Rule 1.10(a)(1). Either way, we can represent ACE because his personal relationship is not imputed to the firm and no additional actions are needed from the firm to represent ACE under the issue of SD's personal relationship.

3. Whether Ashley Kaplan's hiring will ethically prohibit our representation of ACE

AK will likely create a conflict of interest that will be imputed to the entire firm--thus prohibiting our representation of ACE-- unless appropriate screening measures are taken. Therefore, we can hire AK as long as we scrupulously adhere to certain protocol. AK, a recent interviewee, has admitted that she has worked with Roadsprinters through the course of her previous employment at Adams Bailey. This raises the conflict of 1.9 Duties to Former Clients. This rule states that she cannot represent ACE against Roadster because ACE's position is materially adverse to Roadsprinters's and because she acquired information about Roadster that is material to the matter-- thus violating her duty to a former client. It is clear from the facts (which state that she worked on Roadster files) that she could have received information about Roadster that is substantially related to this breach of contracts case. Therefore, she is disqualified from any matters relating to ACE. According to FRCP rule 1.10, this disqualification is imputed to our entire firm, unless we take certain measures, such as: 1) screening AK in timely screened from any participation in the matter, receiving no fee therefrom; 2) written notice of screening procedures are given to Roadster with our agreement to promptly respond to related inquiries; and 3) providing certifications of compliance at reasonable intervals upon Roadster's written request and upon termination of the screening procedures.

Please let me know if you have any additional questions.

MPT-1 - Sample Answer # 2

I. Potential Conflict: Columbia Chamber of Commerce

The issue here is whether M&P may now represent a client who has adverse interests to a member of the Columbia Chamber of Commerce (Chamber). Mr. Pickens, who has been a member of the Chamber for 15 years, is the president of Roadsprinters, which has interests that are adverse to a potential client of M&P. The Franklin Rules of Professional Conduct as well as case law from the Franklin Supreme Court control our inquiry here. The Court has stated that it "take[s] for granted that lobbying constitutes representation by an attorney." (Hooper Manufacturing, Inc. v. Carlisle Flooring, Inc.) However, the more searching issue here is directly analogous to that in Hooper--whether M&P's representation of the Chamber is "tantamount to representation" of a member of the Chamber. This inquiry involves two parts: (1) whether the representation of the Chamber to which Mr. Pickens, current Chamber member and former president and chair of the board for the Chamber, is equivalent to the representation of Mr. Pickens himself; (2) whether M&P lawyers who represent the Chamber advised the member (here Mr. Pickens) that information communicated to the M&P attorneys representing the Chamber would be treated as confidential; and (3) whether representation of both Ace Chemical, Inc. and the Chamber will materially limit M&P's ability to represent either client. (Hooper) We will take each issue in turn below.

A. Is the representation of the Columbia Chamber of Commerce equivalent to the representation of Mr. Pickens himself?

This initial inquiry is a fact-based one, and the facts presented here lead us to conclude that the representation of the Chamber is not equivalent to the representation of Mr. Pickens himself. The first question we must ask is whether Mr. Pickens provided confidential information to the M&P attorneys that was necessary for the attorneys' representation of the Chamber. (Hooper) Here, the M&P attorneys "received no confidential business information from Chamber members." (Memorandum) It should be noted that M&P attorneys received "confidential information from the Chamber about legislative strategies and tactics related solely to tax issues," however it is unclear what the source of the information actually is--whether it is from members of the Chamber or from Chamber staff who would be able to provide logistical information to the attorneys about the inner-workings of the legislature, or something entirely different. (Memorandum) Nonetheless, Mr. Pickens is not implicated under that prong as working as the president or chair of the board, as the memorandum states M&P attorneys primarily worked with the Chamber's executive director and not officers of the board.

Even if the answer is "no" to the above question, the Court has stated that the representation "might still be deemed equivalent if the lawyer advised" the Chamber member that "any and all information provided to the lawyer would be treated as confidential." (Hooper) Franklin Rule of Professional Conduct 1.6 provides a broad definition of "confidential": "Confidential information is any information related to the representation of the client and learned through the course of the representation." (FRPC 1.6) It includes "all information, even publicly available information, that the lawyer discovers or gleans while representing the client." (Hooper) Here, M&P attorneys expressly notified the Chamber members that members' conversations with M&P attorneys are not confidential. However, under FRCP, if M&P attorneys received information from the Chamber members that assists them in their representation of the Chamber, it falls under the definition of "confidential." As noted above, M&P attorneys received confidential information from the Chamber about strategies related to tax issues, the attorneys did not receive any confidential information "from or about any of the Chamber's members." (Memorandum) Specifically related to Mr. Pickens, M&P attorneys did not work closely with him,

rather they worked with the Chamber's executive director.

B. Did M&P attorneys advise Chamber members that information provided to them would be treated as confidential?

The information provided states that the M&P attorneys communicated to all Chamber members that they represented the Chamber, not the individual members, and that members' conversations with M&P attorneys are not confidential. Based on this fact and the analysis above, a court would likely find that the information provided to the Chamber and its attorneys was not confidential and that the representation of the Chamber is not equivalent to the representation of Mr. Pickens. However, the problem is not resolved here. We must now examine whether concurrent representation of both Ace Chemical, Inc. and the Chamber will hinder M&P's representation of both clients, as discussed below.

C. Will the representation of both Ace Chemical, Inc. and the Columbia Chamber of Commerce will materially limit M&P's ability to represent either client?

To answer this question we must determine whether Mr. Pickens had an "important position" with the Chamber, and through that position, "worked closely" with the Chamber's attorneys. The answer here is no. We know that Mr. Pickens served as chair of the board for the Chamber, however, throughout his service in both positions he did not "work closely" with M&P attorneys. FRCP 1.7(a)(2) guides us "to focus on the nature and extent of the relationship between the attorneys and [Mr. Pickens]. The closer and more frequent contact and the more active the role of the member representative in directing the lawyer, the greater the risk that the lawyer's ability to engage in concurrent representation is 'materially limited'." (Hooper) Here, Mr. Pickens did not "work closely" with M&P attorneys as M&P attorneys worked primarily with the Chamber's executive director, a position which Mr. Pickens did not hold.

Because M&P's representation of the Chamber is not equivalent to Mr. Pickens and because the representation of both Ace Chemical, Inc. and the Columbia Chamber of Commerce will not materially limit M&P's ability to represent either client, there is no potential conflict on interest with respect to the Columbia Chamber of Commerce.

II. Potential Conflict: Samuel Dawes

The potential issues M&P faces with respect to Mr. Dawes are governed by the Franklin Rules of Professional Conduct and will be discussed individually below.
A. Rule 1.7 Conflict of Interest: Current Clients

A lawyer shall not represent a client if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer. (FRCP 1.7) Mr. Dawes has potential issues with two parts of this rule: (1) Mr. Dawes has formerly represented Roadsprinters, which has adverse interests to a potential client of M&P; and (2) Mr. Dawes, at one time at least, had a personal relationship with Mr. Pickens, who is the president of Roadsprinters.

First, Mr. Dawes' relationship to Roadsprinters as his former client is governed by FRCP 1.9, which states a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which the person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. Here, Mr. Dawes would not run afoul of this rule

because he represented Roadsprinters in an uncontested trademark registration. The litigation matter Ace Chemical, Inc. would like Mr. Dawes to represent them in involves breach of a shipping contract. These two issues--trademark registration and breach of contract--are not the same matters or even "substantially related." The Franklin Ethics Opinion 2015-212 states that "[a] substantial relationship exists when the lawyer could have obtained confidential information in the first representation that would be relevant in the second representation." Here, there would be no reason for Mr. Dawes to have information regarding Roadsprinters' shipping contracts with third parties during his representation of Roadsprinters to file a trademark registration, and the interview with Mr. Dawes confirmed the he neither learned nor could have learned information that could possibly be relevant to the litigation against Roadsprinters (Memorandum). Therefore, there is no conflict with respect to Roadsprinters being a former client of Mr. Dawes, and he would not need to seek a written waiver from Roadsprinters to represent Ace Chemical, Inc. as required under FRCP 1.7.

Second, Mr. Dawes' relationship with Mr. Pickens is also governed under FRCP 1.7. If there is a "significant risk" that the representation of one or more clients will be materially limited by the lawyer's's responsibilities by a personal interest of the lawyer, the lawyer should take the steps outlined in FRCP 1.7(b) (discussed below) before engaging in representation of that client. Here, Mr. Daws had a close personal relationship with Mr. Pickens. Mr. Pickens took an interest in Mr. Daws throughout his representation in the trademark matter, and Mr. Pickens introduced him to members of the business community and taught Mr. Daws how to develop relationships with potential clients. (Franklin Daily News report) However, we could argue that there is not a "significant risk" of being unable to represent Ace Chemical, Inc. because Mr. Daws does not appear to have a personal interest or any ties with Mr. Pickens any longer. Mr. Daws stated that he has not had any contact with Mr. Pickens for the last five years. Therefore, Mr. Daws does not pose a potential conflict of interest with respect to Mr. Pickens as a personal relationship either.

If, however, you determine that Mr. Daws' lack of communication with Mr. Pickens for five years is insufficient, Mr. Daws will need to seek informed, written consent from Mr. Pickens before representing Ace Chemical, Inc.

III. Potential Conflict: Ashley Kaplan

Franklin Ethics Committee acknowledges lawyers change firms and Rule 1.9 removes "some of the harshness" of the professional rules regarding former clients and confidential information. Ms. Kaplan would like to move from a firm that represents Roadsprinters to a firm that could potentially have a client whose interests are adverse to Roadsprinters. Franklin Ethics Opinion 2015-212 states that a "new firm may represent a client with materially adverse interests to the client of the moving lawyer's old firm so long as the lawyer did not actually acquire confidential information." Ms. Kaplan provided a list of clients she worked with at her old firm, and Roadsprinters is on that list. While the memorandum doesn't explicitly state she received confidential information, it is safe to assume she did through her representation of Roadsprinters. M&P may still hire Ms. Kaplan, however, as long as M&P properly screens Ms. Kaplan according to the procedure below.

The Franklin Ethics Opinion 2015-212 provides guidance on Ms. Kaplan's situation: "Even if the lawyer acquired confidential information, Rule 1.10 allows the law firm to continue representation of the client so long as the moving lawyer is screened from all contact with the matter." Ms. Kaplan must be denied all access to files relating to the conflicting representation--in any format, she may not speak with attorneys working on this matter regarding their work, and she may not receive any portion of the fee received from the

representation of Ace. Roadsprinters must also receive written notice of the adverse representation detailing its options, but it does not have to assent to the representation by M&P.

MPT-1 - Sample Answer # 3

Montagne & Parks LLC
Attorneys at Law
760 Main Street, Suite 100
Essex, Franklin 33702

To: Lauren Scott, Managing Partner
From: Examinee
Date: February 21, 2017
Re: Ace Chemical: Potential conflicts of interest

MEMORANDUM

INTRODUCTION

I have been instructed via the lead attorney, to discussion the potential conflicts of interest that our firm in the Franklin office, we will not face on representing Ace Chemical in their breach of shipping contract against Roadsprinters Inc. The potential conflicts of interest reside in three points: the representation of our Columbia office with the Columbia Chamber of Commerce, where Mr. Jim Pickens (current President of Roadsprinters) was a one time chair of that board; the use of Mr. Samuel Dawes as our lead litigator against his former client Roadsprinters; and the hiring of Ms. Ashley Kaplan who currently works for Roadsprinters outside counsel into our Olympia office.

DISCUSSION

I. Whether the representation of Columbia Chamber of Commerce (a trade association), by our Columbia office is tantamount to representation of Mr. Jim Pickens (a member and one time President of that trade association). Under the Franklin Rules of Professional Conduct 1.7, (b) a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. Currently our firm has many locations one of which is in Columbia. In that office the course representation of the Columbia Chamber of Commerce is to lobby the Columbia legislature for tax reform. While this office is in Essex, the representation in Columbia is still on going. Though the Franklin Rules of Professional Conduct are towards disciplining attorneys, they are persuasive in their application. Under this single rule we would not be able to represent Ace Chemicals. However, we can look toward Hooper which applied similar facts and come to a different reasoning. In Hooper lobbying constitutes representation by an attorney, and if the representation is of a trade association is that considered a representation of a member of that trade. A test was created in which we must follow as this is a decision made via the Supreme Court of our Jurisdiction. (1) whether the trade association member provided confidential information to the lawyer that was necessary for the lawyer's representation of the trade association. (2) If the lawyer advised the member of the trade association that any and all information provided to the lawyer would be treated as confidential (3) whether the representation of both [Columbia Chamber of Commerce] and [Ace Chemicals] will materially limit the firm's ability to represent either client.

Utilizing the test in Hooper the test is very broad and includes all information that a lawyer gleans while representing the client, but it must be related to the representation. Extraneous information that is supplied to the lawyer is not protected as confidential and can not be used by the client to prevent the lawyer from representing a adverse party later. Our facts show that the firm in Columbia is used in the lobbying efforts on tax reform, while we would be

representing the adverse party (Ace) on breach of contract. A lawyer would not be gathering information on the clients of the Columbia Chamber of Commerce, because as a trade association it would represent many. A lawyer would gather information on how the tax currently impedes or helps the client and what efforts are needed to progress the Chamber and their activities. Any talk aside from tax reform and materials would be considered extraneous information by this standard. We know that the Memorandum via Ms. Lauren Scott, that all confidential information that was received from the Chamber was regarding legislative strategies and tactics relating solely to tax issues, and no confidential information from any or about any of the Chambers' members were provided. And as such the answer to the first portion of the test would be yes.

As in Hooper, that does not end the qualification, we next look to see if the lawyer advised the member of the trade association that any and all information would be treated as confidential. In Hooper, the lawyers advised the members and the individual that the information provided and used would not be confidential. So too in our case, where the Columbia office advised the Chamber that they represented the Chamber and not the members. And that the content of the communications with members was not confidential. Also that the Chamber and its members acknowledged in writing that the representation was limited to lobbying for the Chamber itself. Therefore, just like in Hooper, the court should find that representation of the trade association is not equivalent to representation of [Jim Pickens nor Roadsprinters].

The last prong of the test weighs heavily on the Franklin Rules of Professional Conduct 1.7(a)(2) on whether representation of both [Columbia Chamber of Commerce] and [Ace Chemicals] will materially limit the firm's ability to represent either client. The critical question in Hooper, was whether an employee had a important position in the trade association and in that position worked closely with the lawyers for the trade association. In that case the CEO of the plaintiff party was one of three members of the trade association's legislative and policy committee. Where she worked closely in developing tactics and strategies with their representation. It calls into question the limiting of the representation of adverse clients as to the personal interest of the lawyer. Because of the closer and more frequent contact and active role of the member representative in directing the lawyer. However, this is where that case and our issue splits greatly. In Hooper, the CEO was a long standing member of the committee and that committee was the main driving force of the relationship with their lobbying representatives. In our issue, Mr. Pickens was a one time President and was not mentioned on a committee that drove the actions of the lobbyist. We can infer by the omission that as a one time President, he would have focused on the whole picture of the trade association and was appraised of progress that the committee was doing. He would not have had the long time and frequent contact with active role that the CEO in Hooper, did. And as such we can argue that there was not a substantial risk that personal interest would materially limit the concurrent representation.

Under these rules and explanation, we are able to represent the Chamber of Commerce in Columbia and the Ace Lawsuit in Essex.

II. Whether our lead litigator Mr. Samuel Dawes is able to be part of this case, where he formerly represented Roadsprinters in a non-substantially related matter. Under the FRPC (Franklin Rules of Professional Conduct) 1.9, Duties to Former Clients. A Lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the client gives informed consent, confirmed in writing. Samuel Daws (SD) is a current partner in the Essex office, who came from a solo private practice seven years ago. during that time SD represented Roadsprinters in an uncontested

trademark registration. Since that one case, SD has not had any contact with Mr. Pickens for over five years. The duty to former clients is made to insure that substantial related materials that a lawyer could have obtained confidentially in the first representation can not be used against that client in a second representation summarized from the Franklin Ethics Opinion 2015-212 Rule 1.9(a). We want people to have confidence in their attorneys and to provide them as much information as needed to have a winning opinion. A substantial amount of information must be gleaned so that an attorney has a full picture of the issue they are raising and must present to the court. Here, SD was the attorney for Roadsprinters in a uncontested trademark registration. To register a trademark, one would need the item that is to be trademarked, a form filed out from the proposer of the trademark giving their basic identification (address, name, who it will belong to), a picture and detail of the item that is to be trademarked and the money to pay for the pending trademark patent. When there is representation on this, it is actually a simple matter of logging into the website, uploading the requested materials and submitting the payment. Then the wait begins as to any others who may contest the trademark as infringing on their rights. As the facts state that it was an uncontested trademark, we know that SD did not have to follow up with Roadsprinters on the matter, as in advising them of their rights and counseling them on the necessary actions to go forth to contest it or to change the mark. As such we understand that there was not a substantial amount of information that would merge into the breach of contract issue that we are currently attending. To further prove this, the article which quotes Mr. Pickens saying that " although it was not all necessary for the work on the trademark registration, I told him how to develop client relationships." This leads to show that his interaction with Pickens was not on substantial amount in which a breach of contract and trademark registration would merge to each other. Therefore, SD is able to be lead in our matter and does not need a waiver from Roadsprinters as the matter is NOT substantially related. However, in the best interests of our clients and we should inform both in writing of the matter and that representation to Ace will not be impeded by the previous uncontested matter.

III. Whether the hiring of Ms. Ashley Kaplan (a current attorney to opposing counsel) to the Olympia office would be allowed at this time.

Under the Franklin Ethics Opinion 2015-212 Rule 1.9 regarding lawyers who move from one firm to another firm, we see that we can hire Ms. Ashley Kaplan as long as we follow the rules to govern the actions.

Ashley Kaplan comes from our current adversarial party's representation of Adams Bailey, where she is a senior associate. A list of the former clients show that Roadsprinters is on it. When a lawyer has acquired information protected by Rule 1.6 that is material to the matter. It allows the new firm to represent a client with materially adverse interests to the client of the moving lawyer's old firm so long as the lawyer did not actually acquire confidential information. But may do so under Rule 1.10 if the new firm screens the moving lawyer from all contact on the matter. Thus Ashley will be denied all access to digital and physical files relating to the client and the matter. These files will be password protected an permission and access will not be given to Ms. Kaplan. All physical files will be under lock in which she will NOT have a key. All lawyers in the 14 offices will be admonished that they cannot speak with or communicate in any way with the Ms. Kaplan about the matter. And that she can not receive any compensation resulting from representation in the matter form which she is being screened. As she is currently being interviewed and an offer has not been extended, We are able to put these measures into place immediately. And to notify her that this is a term for her employment.

Additionally we must give written notice to any affected former clients (Roadsprinters) in order

to enable the former client to understand.

CONCLUSION

For the reasons stated above, we may represent Ace Chemicals, allow Samuel Daws to remain as lead litigator, and hire Ashley Kaplan.

MPT 2 - SAMPLE ANSWER # 1

Ruth King ("Ruth") respectively moves the court to override Henry King's ("Henry") nomination of Noah King ("Noah") as guardian and appoint Ruth as guardian instead. The following are proposed findings of fact and conclusions of law in support of this motion.

I. PROPOSED FINDINGS OF FACT

1. Henry is 74 years old and lives in Dry Creek, Franklin.
2. Henry's daughter is Ruth, and his son is Noah.
3. In 2013, Henry began to have trouble with his memory and lose his attention span.
4. That same year, his neurologist and psychiatrist diagnosed him with early dementia.
5. At the time, Ruth lived outside the state, and Noah lived in Dry Creek.
6. Henry arranged for his health care and finances if he became incompetent.
7. On May 20, 2013, Henry executed an advance health-care directive, naming Noah as his health-care agent.
8. That same day, Henry executed a durable power of attorney, giving Noah the power to make financial decisions for him.
9. These documents nominated Noah to become Henry's guardian if that became necessary.
10. In late 2015, Henry fell in the shower and bruised the entirety of one of his arms.
11. Noah knew about the fall but did not take Henry to the doctor.
12. Noah did not inform Ruth about the fall.
13. Noah only agreed to take Henry to the doctor after Ruth herself noticed the bruising while visiting her father.
14. On June 22, 2016, Henry tripped over a rug in his bedroom and broke a bone in his wrist.
15. Noah did not notice Henry's wrist was swollen.
16. He only learned that there was a problem after a neighbor pointed out the swelling to him.
17. When Noah learned of the swelling, he did not inform Ruth that her elderly father had broken a bone.
18. In August 2016, Ruth obtained a transfer from her company so she could move back to Dry Creek.
19. Since then, she has spent two or three evenings a week with her father.
20. Around August 2016, Ruth began to notice Noah was not buying any food for Henry. The refrigerator was almost always empty.
21. Ruth therefore began purchasing food and cooking for Henry.
22. She eventually hired and paid for someone to shop and cook for Henry.
23. Over the past several years, Noah has failed to pay numerous bills.
24. Specifically, Noah failed to pay the electric bills over several months, resulting in overdue notices.
25. Noah also failed to pay Henry's doctor, who almost sent the account to collection.
26. Noah also knew about and declined to stop Henry's excessive spending on gifts for friends.
27. Henry receives approximately $2,500 a month from Social Security.
28. Over the last 12 months, Henry has spent approximately $9,000 on gifts.
29. In some months, he has charged as much as $1,200--or approximately half of his income--on gifts for friends.

30. Noah knew about this spending.
31. Noah also knew this spending was preventing Henry from paying his electric, healthcare, and other bills.
32. Noah chose not to stop his father's spending on gifts. He "didn't think it was [his] place to keep him from spending his money the way he wanted." Dep. of Noah at 7.
33. Henry's health has declined. He is unable to care for himself or manage his health or finances.

II. PROPOSED CONCLUSIONS OF LAW

1. A guardian is an "individual appointed by a court to manage the income and assets and provide for the essential requirements for health and safety and personal needs of someone found incompetent." Frank. Guard. Code § 400.
2. A guardian has a fiduciary duty "to apply the income and principal of the ward's estate so far as necessary for the comfort and suitable support of the ward." In re Guardianship of Martinez (Frank. Ct. App. 2009) at 15 (internal quotation marks omitted).
3. A guardian can "breach this duty by action or neglect" and by "harm[ing] the ward through mismanagement of finances, neglect[ing] the ward's physical well-being, or similar actions." Id.
4. A court must appoint as guardian "that individual who will best serve the interest of the adult, considering the order of preferences set forth in this Code section." § 401(a).
5. The order of preferences is (1) "the individual last nominated by the adult," (2) "the spouse of the adult," and (3) an "adult child of the adult." §401(b).
6. "The court may disregard an individual who has preference and appoint an individual who has a lower preference or no preference" upon a demonstration of "good cause." §401(a).
7. Upon petition of a party to disregard the order of preferences for good cause, "the court shall investigate the allegations" and may "in the court's discretion, revoke or suspend the guardian, impose any other sanction or sanctions as the court deems appropriate, or issue any other order as in the court's judgment is appropriate under the circumstances of the case." §402.
8. A court "may refuse to appoint a proposed guardian when that person's previous actions would have constituted a breach of a fiduciary duty had the person been serving as a guardian. Such conduct is of special concern when that person has actually served as a fiduciary for the proposed ward under an advance directive or power of attorney." Matter of Selena (Frank. Ct. App. 2011) at 12.
9. The court must appoint Henry a guardian because he is now incompetent.
10. Henry previously nominated Noah to be his guardian.
11. The court has "good cause" to disregard this nomination because Noah's actions would have constituted a breach of fiduciary duty had he been serving as guardian. See Matter of Selena at 12.
12. Specifically, Noah has "neglect[ed] the ward's physical well-being." In re Guardianship of Martinez at 15. Specifically, he (I) failed to take Henry to the doctor although he knew he had fallen and bruised his entire arm until Ruth persuaded him to do so, (ii) failed to notice Henry's broken wrist until a neighbor pointed it out, and (iii) failed to provide adequate food for Henry.
13. Noah has also "harm[ed] the ward through mismanagement of finances" and failed "to apply the income and principal of the ward's estate so far as necessary for the comfort and suitable support of the ward." In re Guardianship of Martinez at 15. Specifically, he has

known about and failed to stop his father from spending almost half of his income on gifts for friends. Noah does not "think it is his place" to "keep [his father] from spending his money the way he wants," even though Henry's spending has rendered him unable to pay for basic necessaries, such as electricity and healthcare. Noah Dep.

14. Noah's actions are of special concern to the court because Noah is Henry's advance healthcare agent and has durable power of attorney. See Matter of Selena at 12 (citing advance healthcare agency and power of attorney as special factors in the consideration of whether there is good cause to disregard the statutory order of preferences).

15. The court accordingly finds Noah will not "serve the best interests" of his father and that good cause exists to nominate someone in his stead. §401(a).

16. The individual next on the statutory order of preferences is Henry's daughter Ruth, as Henry has no living spouse.

17. Ruth is fit to serve as her father's guardian.

18. Specifically, Ruth lives near her father. She visits him multiple times a week. She took her father to the doctor when he fell in the shower and bruised his arm. She provides for his food. And she recognizes his spending on friends' gifts as excessive and seeks to stop it.

19. For these reasons, the court finds good cause to override Henry's nomination of Noah as guardian and appoints Ruth as guardian in his stead.

CONCLUSION

Based on the proposed findings of facts and legal conclusions set forth above, Ruth respectfully requests that the court override Henry's nomination of Noah as guardian and appoints Ruth as guardian.

MPT 2 - SAMPLE ANSWER # 2

In the Matter of Guardianship of Henry King

Counsel for Ruth King Maxwell submit the following findings of fact and conclusions of law:

FINDINGS OF FACT:

1. Henry King ("Henry") is 74 years old and currently incompetent.
2. In 2013, Henry was diagnosed with early signs of dementia.
3. Around that time, Henry set up arrangements for his health care and finances if he became incompetent.
4. At that time, Henry's son, Noah King ("Noah"), lived near Henry.
5. At that time, Henry's daughter, Ruth King Maxwell ("Ruth"), lived in a different state.
6. Because Noah was closer, the family agreed that Henry would give Noah the authority to make health-care and financial decisions, and to nominate Noah as his prospective guardian.
7. The proper documents were executed on May 20, 2013.
8. In 2015, Henry fell in the shower and was bruised up and down the back of his arm.
9. Noah did not notice Henry's bruised arm and did not take Henry to the doctor.
10. When Ruth noticed Henry was favoring his right arm, Ruth discovered Henry's fall.
11. Ruth insisted on taking Henry to the doctor.
12. On June 22, 2016, Noah checked on Henry and did not notice his father in much pain.
13. The following day, a neighbor called Noah because Henry's wrist was swollen.
14. Noah took Henry to the emergency room, and Henry needed a cast for a broken wrist.
15. Henry would not tell Noah how he broke his wrist.
16. Noah did not tell Ruth about the broken wrist.
17. In August 2016, Ruth transferred to a nearby work office and started spending two or three evenings a week with Henry.
18. Around that time, Ruth observed that Henry's refrigerator was always nearly empty, with just skim milk, bread, and canned soup.
19. Because she suspected that Noah was not buying food for their father, Ruth began buying food and cooking for Henry.
20. Ruth eventually hired someone to shop and cook for Henry.
21. Also around August 2016, Ruth observed that Noah was past due in paying many of Henry's bills.
22. Henry is on a fixed income of $2,515 per month between social security and pension.
23. About a year ago, Henry began making online purchases from Amazon and eBay.
24. Henry said he made the purchases as gifts for friends.
25. In some months, Henry charged as much as $1,200 on his online spending.
26. When Noah became aware of these charges, but did not tell Henry to stop.
27. Eventually, Noah explained to Henry that he should stop the charges.
28. Henry did not appear to understand Noah's explanation.
29. Noah was delinquent in paying some of Henry's bills because of Henry's online spending.
30. Noah took no actions to stop his father from continuing to spend money online.
31. No guardian has been appointed by a court.

CONCLUSIONS OF LAW:

1. A "guardian" is an individual appointed by a court to manage the income and assets and provide for the essential requirements for health and safety and person needs of someone found incompetent. § 400
2. Generally, if an individual nominates a guardian for his own care in a signed writing, acknowledged by two witnesses, then the Court may only disregard the listed preference if good cause is shown. § 401.
3. Good cause exists when the designated guardian neglects the individual's financial affairs and neglects to arrange for needed medical care. Matter of Selena J.
4. When good cause may exist to revoke or suspend the guardian or impose sanctions, the Court shall investigate and may require an accounting. § 402.
5. The same good cause analysis applies to prospective appointments of a guardian. Matter of Selena J.
6. A health-care agent and holder of a durable financial power have a legal obligation to act in the principal's best interest and to avoid self-dealing. Matter of Selena J.; In re Guardianship of Martinez.
7. A fiduciary duty exists to preserve and manage the estate for the ward's needs. In re Guardianship of Martinez.
8. A court may refuse to appoint a proposed guardian when that person's previous actions would have constituted a breach of fiduciary duty has the person been serving as a guardian. In matter of Selena J.
10. As the power of attorney and health-care decision maker, Noah owes Henry a fiduciary duty.
11. Noah breached his fiduciary duty by failing to timely and adequately care for Henry when Henry twice fell.
12. Noah breached his fiduciary duty by failing to prevent Henry from falling, or providing Henry the around-the-clock care necessary.
13. Noah breached his fiduciary duty by failing to provide adequate food and nutrition for Henry.
14. Noah breached his duty as power of attorney by failing to pay Henry's bills on time.
15. Finally, Noah breached his duty as power of attorney by failing to protect Henry's assets from his own spending.
16. Good cause exists to disregard Henry's listed preference of Noah as his guardian.
17. Ruth is better able to carry out necessary functions as Henry's guardian.
18. Ruth already visits Henry several times a week.
19. Ruth already provides for Henry's nutrition and monitors his health.
20. Based on Ruth's representation in court, it appears that Ruth would be more diligent in preserving and protecting Henry's financial assets.
21. Ruth is best suited than Noah to act as Henry's guardian, to manage his income and assets, and to provide for his health, safety, and personal needs.
22. The Court appoints Ruth as Henry's guardian.

MPT 2 - SAMPLE ANSWER # 3

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

1. Henry King is currently 74 years old.
2. Henry's wife died in 2012, but has two adult children, Noah and Ruth.

3. In 2013, Henry began having trouble with his memory and attention span and was informed he had early signs of dementia.
4. After learning of his medical condition, and based upon Noah's proximity to Henry, agreed to provide Noah authority to make health-care and financial decisions.
5. On May 20, 2013, Henry validly executed an advance directive and a power of attorney, both which nominated Noah as his prospective guardian.
6. In the Fall of 2015, Henry sustained an injury to his arm as a result of falling in the shower.
7. Noah was aware of the fall in the Fall of 2015, but did not take Henry to seek care until prompted by Ruth.
8. On June 22, 2016, Henry broke his wrist after tripping over a rug in his bedroom.
9. After the accident, Noah saw the injured hand but did not immediately seek medical attention.
10. After being notified by a neighbor the next day that the wrist was swollen, Noah took Henry to the ER for treatment.
11. In August 2016, Ruth moved in close proximity to Henry.
12. In the Fall of 2016, Ruth noticed that her father's home was not properly stocked with food.
13. Ruth began providing food and cooking for her father as she could.
14. Ruth eventually hired someone to shop and cook for Henry.
15. Henry is on a fixed income, receiving $2,515 per month.
16. Noah is responsible for paying all of Henry's bills.
17. Henry has received numerous letters from the various companies indicating the delinquency and threatening to cut off services if not paid.
18. Noah was aware of the late payments and delinquency notices.
19. For the time period of February 2016 through February 2017, Henry spent approximately $9,000.00 on various items from eBay and Amazon.
20. All purchases were made by Henry and were intended to be gifts for his friends.
21. In certain months, the purchases were as high as $1,200.00.
22. Noah was aware of all purchases during this time period, but took no actions to prevent further purchases.

II. CONCLUSIONS OF LAW

1. A "guardian" is "an individual appointed by a court to manage the income and assets and provide for the essential requirements for health and safety and personal needs of someone found incompetent." FRANKLIN GUARDIANSHIP CODE § 400.

2. "At any time prior to the appointment of a guardian, an adult may nominate in writing an individual to serve as that adult's guardian" and "that nomination shall be given preference." § 401 ©.
3. A court is responsible for appointing a guardian who will serve the best interest of the adult. § 401 (a).
4. In appointing a guardian, the court, "may disregard an individual who has preference and appoint an individual who has a lower preference." § 401 (a).
5. Preference is first given to an individual nominated by the adult, followed by a spouse, and then finally given to an adult child. § 401 (b).
6. Although a court may disregard the order of preference, it may only do so upon a showing of good cause. § 401 (a).
7. In the instant case, Noah was selected by Henry to serve as his guardian and is given first preference to serve in that role. § 401 (b).
8. Because Henry does not have a wife, the next preference is given to adult children.
9. In this case, the only other adult child is Ruth.
10. Ruth may only be appointed as guardian upon a showing of good cause that it is in the best interest of Henry that his preferences not be followed.
11.In cases involving the refusal to appoint a guardian in accordance with the preferences of § 401, good cause may be show upon by presenting evidence that a person with a higher preference's "prior actions would have constituted a breach of fiduciary duty had the person been serving as a guardian" at the time they occurred. Matter of Selena J.
12. Further, "[s]uch conduct is of special concern when that person has actually served as a fiduciary . . . under an advance directive or power of attorney."
13. While serving as Henry's health-care agent, Noah neglected the needs of Henry by failing to properly monitor and seek treatment in a timely manner. In re Guardianship of Martinez.
14. Although not required, Ruth took steps to check on her father's health and pushed for treatment when necessary.
15. While serving as Henry's primary care-giver, Noah neglected the needs of Henry by failing to ensure adequate food was kept in the house and failed to provide assistance for cooking as needed.
16. Although under no obligation, Ruth provided food for Henry and found a cook during his time of need.
17. Under the direction of the power of attorney, Noah breached his duty to Henry by failing to ensure all bills were paid on time.
18. Under the direction of the power of attorney, Noah breached his duty to Henry by failing to put in place proper safe-guards to ensure Henry did not spend thousands of dollars per month given that he lives on a fixed income.
19. Based upon the above, the court finds that Ruth has presented good cause that Noah's prior actions would be a breach of fiduciary duty such that the court can ignore the preference of Noah to serve as guardian.
20. Therefore, the court expressly finds that it would be in the best interest of Henry if Ruth is appointed as guardian, and appoints her as such.