February 2018 Bar Examination Sample Answers

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QUESTION 1 - Sample Answer # 1

1. Yes, Charlie does have the right to make the election to live with Ann. In Georgia, whether or not a child can make an election in regards to which parent he would like to live with in a divorce is dependent on his age. If a child is under age 11, the child's wishes are not considered. If the child is age 11-13, the child's wishes are taken into consideration but are not controlling. If the child IS aged 14 or over, the child may advise the court which parent he would like to live with, and the child's request will be controlling on the court unless it is not in the child's best interests.

1a. The court will follow the best interests of the child standard in determining whether Charlie's election should be honored. The child's best interests are determined by a variety of factors including the parent's wishes, the child's wishes, the relationship between the child and the parents, the relationship between the other siblings and the child at issue if relevant, the physical and mental well being of the parents, the effect of the child on a potential change in community, school, and place of residence, connection to the community, and the time a given parent has spent with the child. The court may also consider any additional factors that may be informative in determining the child's best interests.

Here, there are many factors that would weigh in favor of Rob retaining sole legal custody of Charlie. Charlie has been living with Rob in a stable environment since the divorce, he has an established home and community with Rob and Marie, he has theoretically been attending the same private school and has a stable environment of friends, he is living in a home with his brother, and Ann has only just recently began to have Charlie for extended stays. Prior to this time, she has just kept Charlie for alternating weekends. Furthermore, she has been failing to make her child custody payments even though they are minimal, and Charlie has begun to act out since spending more time with her.

However, there are a few factors that weigh in Ann and Charlie's favor. Most importantly, Charlie wants to live with Ann, Ann has been going to counseling and has not abused her current husband, and Ann has spent a more substantial amount of time with Charlie. She also has a more stable environment given that she is also remarried. Despite these few factors in Ann's favor, there are many more in favor of Rob. On balance, it seems as

though the court would find that the best interests of Charlie would be served by staying with Rob.

1b. No, Charlie'S election by itself cannot constitute a basis for the court to award the requested modification. In Georgia, a divorce decree may be modified. However, to be modified, there must be a material change in circumstance. Charlie's desire to live with Ann is likely insufficient to constitute a material change in circumstance on its own.

However, the additional facts of the case may be enough to equal a material change in circumstance. When Ann and Rob got divorced, it was as a result of Ann's abuse towards Rob. After the divorce, she remarried but then got divorced again after pushing her second husband down the stairs. Currently, Ann is married to Mitch and seems to have stopped showing outbursts of anger and violence. She has elected to go to anger management classes and has not abused Mitch. As a result, Charlie and Brian stay at Ann and Mitch's home for extended periods of time. Ann's choice to go to counseling, her lack of abuse towards Brian, and the current stability of her living situation and relationship with Charlie may constitute a material change in circumstance given the substantial improvements she has made. However, Charlie's behavioral problems could be a negative given that they seem to result from his stays at her home. The fact that she has not been paying child support is also a negative. Despite that, the changes that Ann has made to her life in addition to Charlie's desire to live with her would likely be sufficient to convince the court to modify the divorce decree. The court would be even more likely to modify the decree if Ann now wants physical custody of the boys given that previously, it was a joint decision to allow Rob to have sole physical custody.

2. Yes, the court would be likely to consider Brian's wishes. As noted above, the deference that a Georgia court gives to a child's wishes is dependent on age. For a child age 11-13, the court will consider the child's wishes, but the wishes of the child will not be controlling on the court. Here, Brian is 12. Consequently, hIS wishes will be taken into consideration, but they will not be controlling on the court. It is important to note that Georgia courts have a preference for keeping siblings together. Therefore, if Charlie is allowed to live with Ann, then it is more likely that the court would allow Brian to live with her too, especially if Charlie and Brian have a strong relationship. However, the facts state that Charlie began bullying Brian. This fact suggests that the boys do not have a strong relationship, and would make it less likely that the court would honor Brian's wishes since subjecting him to bullying at the hands of Charlie would not be in his best interests.

3. Unlike child custody and visitation, which allows for a flexible consideration of best interest factors, the child support award is based on a strict statutory scheme. In awarding child support, the court will combine the income of the parents and then divide that income by the number of children. Age will also be considered in this sliding scale. The number given by the statutory scheme is the basic child support obligation. That obligation will then be divided between the two parents on a pro rata basis. To make that determination, the court will consider each parent's income, each parent's other financial resources, the age of the child, other health needs that the child may have, and any additional special needs or costs associated with the care of the child. After taking into consideration each of these factors, the court will calculate the pro rata child support obligation for each parent.

4. No, Rob's custody rights would not be different for Charlie than for Brian because he is the biological father of both boys. The facts state that Ann became pregnant and gave birth to Charlie while she was living with Rob. They subsequently got married and had another son, Brian. Although they were not married at the time Ann gave birth to Charlie, the subsequent marriage is sufficient to give Rob the same paternity rights over Charlie as he enjoys with Brian. The marriage creates a rebuttable presumption that the child is his. Furthermore, in the divorce proceedings, a determination of custody would be in part dependent on the amount of time Rob has spent with the boys. Because they have been living with him and he has raised them as his own since birth, the court would give him similar rights over both boys. However, if Rob is not the biological father of Charlie, then he would not be able to win custody from the biological parent Ann unless he was able to show that she was unfit by clear and convincing evidence.

QUESTION 1 - Sample Answer # 2

Does Charlie have the right to make the election to live with Ann?

Charles does not have an absolute right to elect living with Ann. Under Georgia law generally, a court must consider the best interests of the child in determining custody issues. There is no presumption in favor of either spouse based solely on the gender of the spouse. Also under Georgia law, a presumption applies in favor of the child's election of custodial parent once the child reaches the age of fourteen. This presumption can be rebutted where it can be shown that the child's election is not in his best interests. Here, Charlie is now fourteen years old. Therefore, he is entitled to make an election as to his custodial parent. That election will create a rebuttable presumption that Charlie's best interest is to be with Ann. If Rob can successfully rebut that presumption then Charlie's election will not be followed. The evidence will show that Ann has a history of violence, having twice attempted murder of her previous ex-husbands. Although not towards her children directly, it is unlikely the court will look fondly on awarding custody to a parent with a history of violence and who requires ongoing anger management counseling. The evidence will also show that extended time with Ann and her new spouse, Mitch, increased Charlie's bad behavior and resulted in increased bullying of his younger siblings. Finally, the evidence will show that with Rob, Charlie is able to attend special private school that accommodates his learning difficulties. While Rob has the means to support the child and pay for private school, Ann cannot even keep up with simple child support payments and it will be doubtful she can support Charlie appropriately if he is living with her. With Rob, Charlie also gains the benefit of an education professional in the home, in the form of Rob's new spouse. The court can consider all of this since it speaks to Charlie's best interests. This will probably be enough evidence to rebut the presumption and keep custody with Rob.

What standard will the court use and what factors will the court consider?

As mentioned above, the Court will consider the best interests of Charlie as its standard. Under Georgia law, in awarding custody, the court will always consider the best interests of the child. The court can consider any evidence which speaks to that standard. This can include the relative abilities of each parent to provide the needs of the child, financially,

emotionally and physically. It can include any tendencies towards criminal behavior as well as any other people living in the home. The court should also consider the wishes of the child, since the child who is forced to stay with a parent he does not prefer can have more emotional difficulty. If after weighing all relevant considerations, the Court decides being with Ann is in Charlie's best interests, it may modify the custody award.

Can Charlie's election by itself constitute a basis for the court to award the requested modification?

The election, by itself, can constitute a basis for the Court to modify the custody award if it is considered a "changed circumstance." In Georgia, a Court will only modify prior custodial awards upon a showing of changed circumstances that warrants a change. In the prior award, the court awarded custody in accordance with the above consideration of best interests of the child. In that award, the Court could not consider a presumption in favor of Charlie's election as part of the best interests of Charlie. The court could have considered Charlie's preference in determining his best interests, but it did not have to do so. Rob did not have to rebut a presumption in the prior award. The facts do not tell us if the court considered Charlie's preference beforehand. If Charlie preferred Rob in the original award and now changed his mind to Ann, that may be sufficient evidence in conjunction with the now applicable presumption, of a change in circumstances. If the Court determines a change in circumstances exists, it can modify the award. The catch will be that the Court should only modify the award to the extent it fits the best interests of the child. As mentioned above, if Rob can still show that the best interests of Charlie lie with him, the court probably will not modify the award, even in then face of changed circumstances.

Would the court be likely to respect Brian's wish to live with Ann and Charlie?

The court would not be likely to respect Brian's wish to live with Ann and Charlie. Where a child is between the age of ten and thirteen, the Court will consider their preference. However, no presumption in favor of the election applies. The court will still look for the child's best interests. If it is not in Brian's interest to be with Ann and Charlie, then the Court will not order that. Since Brian is two years younger than Charlie, i.e. twelve years old, the Court will consider his preference but will ultimately rule in his best interests. One factor the court will consider is whether it is in the best interests of the child to lose the companionship and support of a sibling who elects to live with the other spouse. Here, that factor will not weigh in support of moving Brian to Ann. The facts tell us that Charlie bullies Brian the more he spends time with Ann and Mitch. If Charlie's behavior went unchecked even more by living with Ann instead of Rob, Brian would be bullied more by living with Charlie and Ann. That would not be in his best interests. Additionally, he would lose the benefit of Rob's wife and private schooling which Rob pays for. Finally, Ann's history of violence will again be considered as it was with respect to Charlie. Because it is not in Brian's best interests to be with Ann, the court would likely award custody to Rob even if Charlie moved in with Ann.

What factors will the court consider in making the child support award with respect to Rob?

In making a child support determination, the Court will apply the child support guidelines used in the State of Georgia. The court must first determine the gross income of each parent. The court will then determine the contribution each parent is capable of making. The custodial parent normally supplies their contributions in the form of in kind contributions. The non-custodial parent is normally required to pay support in a monetary amount set as a percentage of their income with respect to each child. These guidelines must be used in all child custody cases unless the Court determines that they should not be for some extenuating circumstance.

Would Rob's custody rights with regard to Charlie be different than his custody rights with regard to Brian (and why or why not?)

If the parties had not agreed on custody in the prior action, Rob's rights probably would not have been any different with respect to Brian or Charlie. In Georgia, a child is definitively the child of his or her birth mother. Fatherhood is presumed so long as the child is born during the marriage to the mother or the father can meet one of the other requirements to show fatherhood. Such requirements include holding himself out as the father and supporting the child, marrying the mother of the child after the birth of the child, and other things which establish paternity by clear and convincing evidence. Here, Charlie was born outside the marriage. Charlie will be presumed the child of both Ann and Rob, however, because of Rob's marriage to Ann after Charlie's birth. The facts also tell us that Rob acted as a proud and adoring father to boys. His paternity can be established by clear and convincing evidence. Brian was born during the marriage therefore Rob will be the presumed father of both Charlie and Brian. Since he is the presumptive father and the facts do not tell us any reason why that presumption can be rebutted, his custodial rights with respect to either boy are the same.

QUESTION 1 - Sample Answer # 3

1. Charlie has the right to elect where he lives, given that he is over the age of 14. However, the court will consider other factors when deciding to make the modification.

a. In child custody disputes, the court will always look toward the best interest of the child in placing the child within a home. The court considers many factors in this determination, including where the child elects to live, the economic support available to the child in each home, the discipline measures taken, the location of the home, and the suitability of the parents as guardians. If a child is over the age of 14, then the child's election will be given weight, but is not necessarily determinative of his placement in the dispute. If the court finds that Ann's home is not the best place for the child, even if Charlie elects to live there, then the court will not place Charlie in Ann's physical custody.

In this specific case, the court will likely measure Charlie's desire to live with his mother against her influence over the boys, and whether it is positive or negative. Ann has a history of domestic abuse and anger management issues, but she has never directed the abuse toward her children, only two of her previous husbands. She is also receiving counseling for the anger management issues, and has not directed any violence toward her current husband. In support of Ann's case, the court can also consider that Rob and Marie allow

the children to have extended visits with Ann and Mitch on holidays and during the summer, out -of-state. On the other hand, the court will also look to the fact that Charlie has a learning disability and attends a private/special school that he does well at. Ann does not help with any of the costs associated with the private schooling. Also, Charlie has attitude and behavior problems that Rob and Marie claim are associated with visits to Ann and her husband. These problems include anger management issues and bullying, which Ann has a history of.

b. Charlie's election, alone, cannot constitute a basis for the court to award the requested modification. As stated above, a request by a child over the age of 14 will be given deference in child custody placement, but will be measured against the best interests of the child, as presented to the court. The court must consider a variety of factors before granting a modification in child custody.

When weighing the factors discussed above, with Charlie's modification request, the court will determine if moving the child is in his best interest. In this case, given the behaviors that Ann has demonstrated in the past, Charlie's current behavioral issues (including the bullying of his brother), and the support needed for his learning disability, it is unlikely that the court will determine that placing Charlie with his mother is in his best interest.

2. The court would consider Brian's wishes about where he wants to live, but it would be unlikely that the court would follow them in this case. Children between the ages of 12-14 can express which parent they would rather live with, and the court may consider their wishes in placing them in a particular parent's custody. However, the court will weigh this preference against the best interests of the child and the need for a custody modification. Here, Charlie and Brian currently lived with their father and step-mother, and it appears that they receive the proper support and discipline for children with learning disabilities. Charlie's request to move in with Ann stemmed from behavior problems, some of which were directed at Brian. The court will want to consider whether keeping the siblings together is better for both children, or if Brian would benefit from being removed from his brother and the bullying directed toward him. Given the weight of all these factors, the court is unlikely to find that Brian's best interest is served in living with his mother and Charlie.

3. Child support is based on a number of economic factors considered by the court. The court usually has a form that the different values are plugged into, and will use that form to come up with a child support number, unless there is reason for variance. The child support calculations include how much both parents make, the needs of the children for special programs and education support, what type of custody each parent has (sole, joint, legal, physical), how often visitation happens, and the needs of the ex-spouse to maintain a proper domicile. The court will look at what jobs Rob and Ann have, and their basic salaries. If Rob makes more than Ann, his share of the custody load would be greater. The calculations would also look at whether or not Ann would keep the children in a private, specialized school for their learning disabilities, and the costs associated with that decision. The court would also take into consideration how much of Ann's current marital abode is covered by Mitch's finances and how much she must chip in to provide a roof for the children. In looking at variances for child support, the court may take into consideration the fact that Ann did not pay support to Rob during his period of custody, and they may modify the award accordingly, though child support is a right of the child, not the parent, so it can

not be taken from the child, simply because one parent did not seek enforcement of an order against the other.

4. Rob's custody rights regarding both boys would be the same, even absent an agreement by the parents. A child born outside of marriage has all the same rights toward the parents as one born within wedlock. There is a presumption, that when a child is born to parents out of wedlock, and those parents then marry, the child is automatically considered legitimate and the child of the father. Unless Rob or Ann produces evidence that Charlie has a different father, Rob's rights and responsibilities regarding Charlie are exactly the same as his rights in regard to Brian. Even if Rob's paternity is called into question, given that Rob claimed the child as his own and raised him in his home, with his other child, there would be a presumption that Rob is Charlie's father, and he would be able to request rights in regards to custody and visitation.

QUESTION 2

- No Sample Answers Available for Question 2

QUESTION 3 - Sample Answer # 1

I. Can Jonathan, Alexander, Nathan or Barbara, in their capacity as shareholders of JAN, be held personally liable for the damages to the house in which the Jan blinds were installed? If so, under what theories?

As a general matter, a properly incorporated entity provides its owners limited liability. Indeed, avoiding personal liability for actions of the corporation, or other owners, is one of the most attractive aspects of the corporate form. As a general matter, then, owners of a corporation will not be held liable for torts or wrongs committed by the corporation. However, individual owners can be held personally liable under piercing of the corporate veil theories. Piercing of the corporate veil looks for a unity of interest between the owner and the corporation, such that the corporate form, as separate entity, is disregarded -- in reality, the corporation and shareholder are really the same entity. In the instant case, Nathan failed to create a distinct JAN bank account, and used his own SSN (further, no TIN was applied for or issued for JAN). Additionally, Jonathan operated the business out of his garage, which also served as his corporate and home address. Finally, Georgia law requires that a corporation call a meeting of the directors, if directors are named in the articles of incorporation, to formally draft bylaws and fill officer positions. JAN did none of these things, they simply said they would draft and adopt bylaws "at a later date." Finally, regarding the specific claim from the house burning down, an action for negligence should be available for the homeowner. Based on the facts given, Jonathan ignored a known risk, which subjected others to unreasonable risks of harm, chose to sell the blinds anyway, which caused injury and resulting damages. In addition, the homeowner could sue JAN based on an implied warranty theory in contract, provided that such warranty was not

waived.

Despite the unwise actions of the JAN shareholders, it is unlikely that they would be personally liable under a piercing of the corporate veil theory. Barbara was a minority shareholder, who was not in a position of leadership with JAN, so there would be no unity of interest for her that would necessitate holding her personally liable for the negligence of JAN. Further, while Jonathan and Nathan certainly did not follow the corporate form closely, it seems unlikely that either of them would be held personally liable. Nathan was not using the corporate account as his personal piggybank -- which would necessitate a piercing of the corporate veil -- he was merely careless in setting up the account. Further, operating a corporation out of one of the directors homes is not something which would necessitate a piercing of the corporate veil. While such conduct may be unwise, and maybe egregious, the actions are more appropriately addressed by a breach of fiduciary duty theory, brought by a shareholder, than by a piercing of the corporate veil theory.

Finally, the fact that the parties were both directors and officers of the corporation is not determinative -- closely held corporations frequently have a small amount of shareholders who also serve as directors and officers. As such, it is unlikely that any shareholder of JAN will be personally liable for the damages resulting from JAN's potential negligence in selling the blinds and causing the damage. However, JAN would be held liable.

II. Does Barbara, as a JAN shareholder, have a claim against Jonathan, Alexander, and/or Nathan in the event that JAN becomes liable to the homeowner whose house suffered the fire damage? If so, would she be permitted to bring a derivative claim or, in the alternative, a direct claim?

If the corporation becomes liable to the homeowner, Barbara would only have a cause of action arising from a potential breach of fiduciary duty on the part of Jonathan, Nathan, and/or Alexander. Further, a shareholder can only bring a claim for direct harm inflicted upon her by the corporation. On the other hand, a derivative claim is a suit brought by the shareholder on behalf of the corporation (and in the corporation's name). Here, Barbara, if she could recover, would have to bring a derivative claim. She has suffered no direct and personal injury, instead this is an injury to the JAN corporation (the potential lowering in value of her stock resulting from the liability would not qualify as a direct injury to Barbara). Under Georgia law, to bring a derivative claim, Barbara must provide notice or show good cause for failing to do so.

Majority shareholders, directors, and officers owe the corporation fiduciary duties. Among the fiduciary duties owed is the duty of care. The duty of care requires a director to act with the care and prudence of a reasonable person, under the same circumstances, and the business judgment rule protects directors from being punished for merely making unwise business decisions. Here, Jonathan, as the designer of the blinds, made a seemingly negligent decision in choosing to go forward and sell the blinds despite a significant combustion risk. However, the business judgment rule is a very high hurdle to clear. Barbara would have to show that Jonathan's actions were so egregious under the circumstances that he breached his duty of care owed to the corporation. Because Jonathan continued to manufacture, and sold, the blinds despite a significant risk of harm, it is possible that Jonathan could be held liable in a derivative suit brought by Barbara, but such liability would run to the corporation, not Barbara. Nathan and Alexander helped

market the items, but nothing in the facts suggest that they knew of a significant risk of combustibility. As such, the business judgment rule would most likely protect Nathan and Alexander from a potential suit based on a breach of fiduciary duty unless their actions were so egregious to not warrant protection.

III. Will the law firm have a conflict of interest if it is asked to give legal advice to Alexander and Nathan, who were not aware of the combustible nature of the blinds, under any potential legal theories identified above?

First, our client is the JAN corporation. Georgia Rule 1.7 prohibits a lawyer from representing a client whose interests are materially adverse to those of another client. If Barbara brings a derivative suit against Nathan and Alexander, then because our client is the JAN corporation, a conflict of interest would arise if we were to give advice to Nathan and Alexander. In essence, we would be giving advice to directly adverse parties to our client (the litigation would be the Jan corporation (derivatively) v. Nathan and Alexander). Such a blatant conflict of interest is clearly prohibited by the rules governing the professional conduct of lawyers. The law firm will have a conflict of interest in a derivative claim by Barbara for a breach of fiduciary duty on the part of Alexander and Nathan.

QUESTION 3 - Sample Answer # 2

1. The issue is whether the individual shareholders of JAN can be held personally liable for the damages to the house in which the JAN blinds were installed.

Corporations are separate legal entities which are formed with the Department of State. They are considered separate legal persons which insulate their individual shareholders from personal liability. Unless certain particular circumstances are present. This separation of legal liability is what makes a corporation so attractive. In order to form a corporation, articles of incorporation need to be completed, signed by incorporators and filed with the Georgia Secretary of State. The articles state the number of authorized shares, the corporate purposes, the incorporators along with their names and addresses, the name and address of the registered agent, and the company's principle place of business. The company must then hold an organizational meeting to appoint the Board of Directors, any officers and establish bylaws. The bylaws are the governing document of the corporation and set forth the rights of shareholders, the time and place of meetings, the requirements of the BOD, indemnification responsibilities and the share classes.

These are all corporate formalities that need to be observed by the shareholders. The BOD are in charge of governing the corporation and the shareholders have rights to both appoint the board and certain economic rights.

As mentioned above, corporations generally insulate their shareholders from personal liability. This is the benefit of the corporate form. Unless the shareholders or BOD are committing intentional torts or failing to observe corporate formalities, then they should not be personally liable for their actions. One theory through which a shareholder can be liable personally is upon piercing of the corporate veil. It is very difficult to establish such a claim and the court looks at the totality of the circumstances. This is a very fact-driven inquiry

which looks into whether the corporation was serving improperly as the shareholder's alter ego. The court will consider such factors as failure to abide by corporate formalities, undercapitalization of the corporation, use of the corporation to skirt debts owed by shareholders to creditors, commingling of funds and no separation between shareholder and corporate assets, and siphoning of corporate funds. To pierce the corporate veil means to penetrate the liability protection provided by the corporation and to hold the shareholders personally liable.

Based on these facts, it appears as though a potential claimant would have a colorable claim to piercing the corporate veil. Based on the totality of the circumstances, it appears as though the shareholders have disregarded corporate formalities. The facts indicate that they failed to hold an initial organizational meeting, and they also failed to approve the members of the BOD or shareholders at a meeting or by unanimous written consent.

While they must have filed the articles of incorporation to form the de jure corporation, the facts state that they did not institute the bylaws which happen to be the governing document. All of their actions lacked the formality required under Georgia corporate law. Furthermore, a key fact suggesting alter-ego is that Nathan set up the bank account with the capital in his name. This represents a blatant disregard for the necessary separation between the assets of the corporation and the shareholder. The corporation did not receive a separate tax identification number which is required to conduct business. Such actions blur the distinction between corporation and shareholder.

However, it is not clear whether there was any commingling of funds present and it certainly does not appear that the shareholders were attempting to use the corporation to avoid their own personal obligations. As stated earlier, this is a fact intensive inquiry by the courts.

Based on the facts above, I believe that corporate formalities were not appropriately recognized and at times blatantly disregarded. Therefore, the shareholders will likely be held personally liable.

2. The issue is whether Barbara, as a JAN shareholder, has a claim against the other shareholders, as directors or officers. And if so, whether a direct or derivative claim.

There are a host of fiduciary duties required of the Board of Directors to shareholders, officers to shareholders and shareholders to other shareholders. The main fiduciary duties are those of care and of loyalty. A BOD/officer/shareholder has a duty of care to the shareholders and the corporation at large to act in a reasonably prudent manner under the circumstances. The duty of loyalty involves conflicts of interest, competition with the corporation, and usurping corporate opportunities. The duty of care appears to be more applicable to this particular set of facts.

If a shareholder's economic or voting rights are affected or certain fiduciary duties are violated by other shareholders or BODs, then they can either bring direct suits or derivative suits. A direct suit is where a shareholder suffers personal and particularized injury due usually to limitation on voting or economic rights. They must be a shareholder at the time of the action and can bring this suit to recover damages for themselves. They can also likely recover reasonable costs associated with pursuing such action. On the other hand derivative suits, are harms suffered by the corporation at large. In order for an individual

shareholder to bring a derivative suit on behalf of the corporation, they must be a shareholder at the time of injury, during and throughout the commencement of the action. Before bringing suit on behalf of the corporation, they must make a demand of the corporation to correct such actions. The corporation must then be given 90 days to respond. If there is no reply by the corporation, then the shareholder can file a failure of demand notice and pursue remedies on behalf of the corporation. Any damages go directly to the corporation. The corporation's actions under such a claim are given business judgment rule deference. This provides wide latitude for the BOD and shareholders to act reasonably and in a manner that they believe is best for the corporation.

In this case, the facts suggest Barbara likely has a claim against Jonathan, Alexander and Nathan because of their individualized failure with respect to their fiduciary duties. Jonathan as president and CEO and the three shareholders as board members had duties of care to Barbara. Jonathan breached his duty of care by not informing the other shareholders of the propensity for the inventory to combust. A reasonable director and President would make sure to inform the other corporate constituents of such a likelihood. The other BODS (Alex and Nathan) did not act with reasonable care in investigating these issues. Nathan also failed to observe corporate formalities with respect to commingling assets of the corporation and this leads to personal liability for the shareholders.

Barbara would likely bring a direct claim in this instance since she would be alleging personal harm and be seeking her own personal damages. Based on the above, she would likely be entitled to indemnification from the corporation for her liability if she was a non-controlling shareholder and did not participate in such activity. A derivative suit could be brought if she was claiming damage and injustice on behalf of the corporation at large.

3. The issue is whether there is a potential conflict of interest in providing legal advice to Alexander and Nathan. Georgia ethics require that when representing a corporation, the attorney makes clear that he represents the interests of the corporation and not its individual constituents. While the UpJohn case has allowed for the attorney to listen to statements from corporate officers and higher-ups, when in consultation with individual members of the corporation, the attorney has to make clear that he does not represent their interests and should advise them to seek separate legal counsel. Furthermore, generally an attorney cannot represent or provide legal advice to a party when doing so would violate his fiduciary duties to another client. The attorney can often seek a waiver of the conflict in writing by presenting the material risks to a client and offering them the opportunity to consult with other legal counsel. However, certain conflicts cannot be consented to. Those include representation of a client which would be materially adverse to a current or former client.

Our law firm would have a direct conflict in this case by representing the interests of the shareholders in conjunction with those of Alex and Nathan. They have performed individual actions which are adverse to the interests of the corporation at large. The duty to the corporation comes first. There would be a breach of loyalty to the corporation and the conflict is not consentable.

QUESTION 3 - Sample Answer # 3

1. As a default rule, the shareholders ("SHs") of a corporation are immune from liability resulting from the corporate acts. While the corporation itself may be vicariously liable for the acts of its employees or agents acting during the scope of their employment on behalf of the corporation, the shareholders themselves are not subject to liability. The SHs, here Jonathan, Alexander, Nathan, and Barbara, may be subject to liability, however, if a court determines that the corporate form was abused and therefore the corporate veil should be pierced. If the corporate veil is pierced, then SHs may be directly liable. A court may pierce the corporate veil where there is evidence SHs abused the corporate form or the business was undercapitalized such that the owners were not really trying to establish a business, but were instead attempting to use the corporate form to shield themselves from liability. The SHs abuse the corporate form where they not treat it as a separate entity and there is essentially no separation between the owners of the corporation and the corporation itself The key questions for the court would be whether the SHs are basic alter-egos of the corporation and whether it would be unjust or unfair to allow the shareholders to escape liability under the guise that there was a corporation. The shareholders are viewed as basically alter egos of the corporation (and thus justify piercing the corporate veil if necessary to avoid some injustice) where there is evidence that the shareholders treated the assets of the corporation as their own; it is not sufficient that the shareholders ignored corporate formalities, but there is very little (if anything) to distinguish the shareholders assets from the corporation's. It should be noted that undercapitalization (i.e., the corporation has insufficient assets/insurance for the type of business it is engaged in) is generally an insufficient reason to pierce the corporate veil in contract cases. Such under capitalization may justify piercing the corporate veil in tort cases, however, especially where there are personal injuries.

In this case, there are some factors that favor piercing the corporate veil, and some that tilt away from it. First, JAN Enterprises, Inc. (JAN) was a properly incorporated entity with a legitimate purpose. JAN was not formed to shield the shareholders from potential liability or as a sham, but as a legitimate entity that was going to manufacture, market and sell Jonathan's retractable window blinds. Second, it appears that all the shareholders contributed a not insubstantial amount of money to start the business. Barbara invested $75,000 (for 40% of the entity), and each of the remaining shareholders, Jonathan, Nathan, and Alexander, put in combined $100,000 into the company (they purchased the remaining 60% of the equity). Third, JAN was trying (or is trying) to develop a legitimate product. Fourth, they were selling the product on a limited basis in order to test its viability. That they were moving slowly suggests they were trying to bring a marketable product they could actually sell. Fifth, there is no evidence that any of the shareholders treated the company's assets as their own (e.g., spending the corporation's money on personal items). There is also no evidence that any of the shareholders abused the corporate form, but entering into deals or engaging in behavior to personally shield themselves from liability where they were in fact the beneficiary (rather than the company).

On the other hand, some facts weigh in favor of piercing the corporate veil. The company did not have a separate bank account (albeit there is a reasonable, even if not defensible reason for why Nathan setup the account in his name rather than acquiring a TIN for the corporation). The corporation had no separate address. The corporation did not observe many of the standard corporate formalities, i.e., there were no corporate bylaws, the Board of Directors did not meet formally or memorialize their meetings). Nor is there any evidence that the JAN secured the necessary or appropriate insurance considering the nature of the

product they were developing and selling. On balance, it is not likely that a court would pierce the corporate veil under these facts.

2. As a SH, Barbara is entitled to bring either a direct action or a derivative action. A direct action is one in which she brings a suit because she has been damaged in her capacity as a shareholder. A derivative action is one where Barbara would bring an action on behalf of the corporation because of some harm caused to it. In order to bring a derivative action, a SH must ordinarily make a demand on the board (in this case Jonathan, Alexander and Nathan) and give it an opportunity to bring suit. In Georgia, a SH cannot claim that it would be futile to ask the board to intervene and file a derivative suit, but the SH (here it would be Barbara) must give the Board 90 days to investigate the claim before the shareholder can bring her derivative suit. If the board finds, after an independent investigation, that the suit is without merit this provides a basis to dismiss the shareholder's derivative suit. There are thus several procedural hurdles Barbara would have to overcome to bring a derivative suit.

A SH might bring a direct action where there is securities fraud or the company has engaged in some other wrongdoing, which has caused the value of her shares to drop. Because this is effectively a closed corporation, and there is likely no market for her shares, it would be difficult to know what or how her shares reduced in value. But in order for this action to be viable, there has to be a direct harm to the shareholder. Under a direct action or derivative action, her theory of liability would be the same - that Jonathan as an officer and director of the company breached his duty of care to the corporation by moving forward with a prototype of the JAN blinds without disclosing to the corporation the potentially significant risks that it could catch on fire. Directors and officers owe a duty of care to the corporation to act reasonably under the circumstances. Given that Jonathan was aware of the fire risks associated with the JAN blinds, and given that this was the company's first foray into the market, Jonathan breached his duty of care by not disclosing those risks to the board and other officers (Alexander/Nathan). Jonathan likely did not breach the duty of loyalty because he was, in his mind, acting in the corporation's best interest. This isn't a situation, for example, where he engaged in self-dealing or usurped a corporate opportunity. Therefore, the most likely theory of liability on which Barbara could proceed is that Jonathan breached his duty of care to JAN. Jonathan could attempt to defend against the suit on the basis of the business judgment rule, i.e, that a director or officer should not be liable for what was, under the circumstances, a reasonable business judgment when the decision was made, but later turned out to be not a good decision. Because Jonathan appeared to act recklessly here by not disclosing a significant problem with JAN's only product, it is unlikely that he could avoid liability by invoking the business judgment rule.

With respect to Alexander and Nathan, it may be possible to bring a breach of the duty care suit premised on a nonfeasance theory . Because the board failed to meet, and because Alexander and Nathan did not appear to take any active steps to see what Jonathan was up to, but simply deferred to him (despite their roles as officers and directors in the corporation), they could be liable. Proceeding on such a theory would be much more challenging for Barbara.

3. Depending on the litigation, there could be a conflict of interest here. The firm is

representing the corporate entity - JAN - and usually when a law firm represents the corporate entity, it does not also represent the underlying directors and officers, unless their interests are aligned. Here, JAN's interests may not perfectly align with Nathan's and Alexander's in the event of a shareholder or derivative lawsuit. In both of those cases, the plaintiff (Barbara) is seeking to hold the directors liable - potentially on behalf of the corporation. The law firm in that case could not represent both the corporation and the directors and officers of the corporation. With respect to a suit against JAN under a veil piercing theory, there the interests of JAN and the SHs (Nathan and Alexander) align. In this suit, the corporate entity, as well as the SHs are all raising the same defense - that the veil should not be pierced. Nonetheless, even though I believe they are unrepresented, I would advise them both to get their own legal counsel. I am not permitted to give legal advice to unrepresented 3d parties where the interests of my client, JAN, and theirs could be in conflict.

QUESTION 4 - Sample Answer # 1

1a. Kate Brown may assert negligence claims against Al Rivers, the builder, and Greg Holmes, the landlord.

1b. In any negligence action, the plaintiff must prove by a preponderance of the evidence, that the defendant owed a duty to the plaintiff, that the defendant breached that duty, that the defendant's breach caused the plaintiff's damages, and that the plaintiff suffered damages. Also relevant to each claim would be any contributory negligence on the part of the plaintiff.

As to Al Rivers, Kate would have to show that Al owed her a duty of reasonable care to build the deck as a reasonably prudent builder would under same or similar circumstances. Here, Rivers owed a duty under the contract to build the deck to Greg Holmes for sure. However, Rivers also owed to all those who would use the deck as they would be foreseeably injured by Rivers' negligence. The defendant breached this duty by not following applicable state and local building codes and connecting the deck to the house with the use of long wood screws rather than toggle bolts.

Causation may be the most difficult for Kate to prove in this case. To prove causation, the plaintiff must show that the defendant's breach was both the cause in fact and the proximate cause of the plaintiff's injuries. To prove cause in fact, the plaintiff must show that but for the defendant's breach, the plaintiff's injury would not have occurred. To prove proximate cause, one must show that the injury to the plaintiff was reasonably foreseeable and not so attenuated so that liability to the defendant should be cut off. Here, using wood screws rather than toggle bolts could cause the deck to become unattached from the building. But for Rivers using wood screws, the deck would not have fallen and Kate would not have been injured. She can also prove proximate cause. If a large deck 16 feet in the air becomes unattached, severe injuries from those standing on the deck is definitely foreseeable. Using the wrong bolt or screw to attach the deck to the house also makes the deck falling foreseeable. The violation of the applicable state and local building code could also be argued negligence per se. An ordinance violation is negligence per se when it protects against the manner and type of harm in the case. A deck becoming unattached

from the house and people being injured therefrom is the type of harm and manner of harm meant to be protected by requiring the use of toggle bolts to attach a deck to a building rather than long wood screws.

In this case, however, there are many arguments against but for causation and for contributory fault by the plaintiff. The deck was crowded with many people and those many people were dancing and bouncing up and down to the music. Depending on how many people there were and how strongly they were bouncing, it could be argued that the deck would have fallen regardless of if toggle bolts had been used rather than long wood screws. It could also be argued that both the number of people exceeding the limit for the deck while dancing and using the wrong bolts/screws caused the plaintiff's injuries together. Finally, it could be argued that plans given by the plaintiff's husband and Holmes were insufficient for the deck to hold the number of people they anticipated having at the party.

Georgia is a modified comparative fault jurisdiction. This means that all parties and even non-parties' fault in causing the accident will be assigned a percentage for their negligence in contributing to the plaintiff's injuries, including the plaintiff. If the plaintiff's fault is greater than the defendant's, the plaintiff cannot recover. If the plaintiff's fault is less than the defendant's, the plaintiff's recovery will be reduced by his or her percentage of fault.

Damages will also have to be proven. However, this will not be difficult as Kate suffered a broken leg and collarbone, was hospitalized for three days, and missed six weeks of work.

In Kate's claim of negligence against Holmes, she would have to show that Holmes owed her a duty. As the landlord, if Holmes decided to repair the deck or make it larger, he had a duty to do so in a reasonably prudent manner. The Browns were long-term tenants in a tenancy for years. They had lived there since Sarah's birth and it could be argued Holmes had no duty to build the deck. However, he agreed to construct the larger deck out of appreciation for their dependability as long-term tenants. In doing so, he must act as a reasonably prudent person under same or similar circumstances. If it was shown that he knew that Rivers was not a reputable builder, he could be responsible for his own negligence in hiring Rivers who negligently constructed the deck. He could also be liable as the owner of the property in the premises not being safe. Moreover, he could have breached his duty if the specifications he provided to Rivers were not sufficient to hold enough people for a party and he knew how many people the Browns intended to have at the party. The Browns specifically approached him to build a bigger deck specifically for the party. Kate would have the same issues with causation and contributory negligence as with Rivers and damages would be apportioned in the same way.

1c. Kate could recover compensatory damages, which are damages to compensate the victim for injuries, for her broken leg and collarbone, as well as for her medical bills for her hospitalization. Kate could also recover lost wages for the missed six weeks of work. She could also recover special damages for pain and suffering as a result of her injuries. She could not recover punitive damages unless she could show willful or malicious conduct beyond negligence which does not appear in these facts.

2. If Molly Dorsey's parents filed a negligence claim against the Browns on Molly's behalf, the same factors would have to be shown as in any negligence claim, including duty,

breach, causation and damages. Under common law, the duty owed by the Browns to Molly would be that of a possessor of land to a licensee. Molly was a licensee because she was not there for any commercial advantage or profit to the Browns, but rather as an invited guest to her daughter's party. The Browns would owe her a duty to warn of known, hidden dangers on the property as a licensee. Because it appears that the Browns were not aware of the danger of the deck being negligently constructed, it does not appear that they breached this duty.

However, they may still owe Molly a duty of reasonable care in hosting the party. In that case, they may have breached this duty by having too many people on the deck for over an hour, having a DJ play music and allowing all of those people to bounce on the deck. If it can be shown that they owed a duty and breached that duty, the Dorseys must show cause in fact and proximate cause. If it can be shown that having that many people on the deck dancing caused the deck to collapse, this would be the cause in fact of Molly's injuries. As for damages, it simply states that Molly Dorsey was injured.

Again, however, fault would be apportioned between all parties at fault. Even if Al Rivers or Holmes was not a party to the lawsuit, the jury could apportion some fault to them which would reduce the recovery against the Browns. The Browns may also argue that Molly was contributorily at fault by being on the deck and dancing herself, but this argument is not likely to win.

3. The final issue is whether Molly's claims against the Browns would be more likely to succeed than Josh's claims. The only way that Josh's claims would be less likely to succeed is if the court determined that Josh was a trespasser. A trespasser is someone who is not invited onto the land, but intentionally enters the land without permission. No duty is owed to trespassers. The Browns may argue that Sarah specifically told Josh not to come to the party and he had shown up anyway and therefore, he was a trespasser and owed no duty. If there is no duty owed, then there can be no claim for negligence and Molly's claims would be more likely to succeed than Josh's claims.

However, in the case of a Sweet 16 birthday party where it seems as if the property was held open to the public and there was a crowd of teenagers, it is likely that the court would not determine that Josh was a trespasser, but rather another party guest and the Browns owed him the same duty of reasonable care as was owed to Molly.

QUESTION 4 - Sample Answer # 2

(1) Kate Brown files a negligence action from deck collapse:

(1)(a) Against whom may she assert her claims?

Kate may bring suit against the builder, Al Rivers. She may also bring a claim against Greg Holmes, her landlord.

Kate may not bring a claim against her husband, Rick Brown, because Georgia law provides for intra-family immunity, which bars tort claims against family members.

(1)(b) What factors will be relevant to each defendant's liability for her injuries?

(1)(b)(i) Al Rivers

With respect to Al Rivers, the first question is the duty of care that he owed, and whether he is liable for negligence per se. To prevail in a negligence action, a plaintiff must establish (1) defendant owed plaintiff a duty, (2) defendant breached that duty, (3) such breach was the actual and proximate cause of plaintiff's injuries, and (4) that plaintiff suffered damages. Generally, individuals owe foreseeable plaintiffs the duty to behave as a reasonably prudent person would. Professionals owe a heightened duty to act as a reasonable professional in good standing in that profession would act. Moreover, negligence per se is potentially at issue. Pursuant to negligence per se, a court will presume a defendant is negligent where a defendant acted in violation of the law, which caused the type of damage that the statute was enacted to avoid against a plaintiff who is within the class of people the statute was designed to protect.

Here, it is likely that Rivers will be found liable pursuant to negligence per se, as well as ordinary negligence. Rivers had a duty to act as a reasonably prudent builder would in constructing the deck, and apparently breached that duty by failing to build a deck that could withstand the teenage party that Rivers knew would take place. Moreover, his construction was in violation of state and local building codes, as he used wood screws rather than toggle bolts. Therefore, Kate will probably prevail on a negligence per se theory. Rivers would counter that negligence per se does not apply, because the statute was not designed to protect people from decks collapsing under the weight of teenagers dancing and jumping up and down.

For Kate's ordinary negligence claim, Kate would argue that Rivers' failure to use the right bolts is a but for, and proximate cause, of her damages. But for cause refers to factual causation, and proximate cause is generally satisfied where the injuries are a foreseeable consequence of the defendant's negligent conduct. Rivers might argue that it was not foreseeable that the deck would be subject to jumping teenagers, thus proximate causation is absent. Kate would respond that it was foreseeable that teenagers would dance on the deck because Rivers was specifically apprised of the upcoming party, which was the entire reason for expanding the deck. Rivers would probably be liable on either theory: ordinary negligence or negligence per se.

(1)(b)(ii) Greg Holmes

With respect to Greg Holmes, his liability is contingent on his degree of involvement in preparing the specifications that were given to Rivers, the builder, and overseeing the project. If Holmes was insistent on Rivers using the type of screws that were used in the deck, that would probably be a basis for Holmes' liability on a negligence theory. Further, the more involved Holmes was in the development of the plans and the construction of the deck, the more likely he may be liable in negligence.

Moreover, Holmes may be liable for negligent selection of an independent contractor if he negligently selected Rivers to construct the deck. In Georgia, a principal may be found liable for the negligent selection of a contractor where the work the contractor is engaged

to perform is involves an inherent risk of harm, and the damage suffered by the plaintiff was within the risks inherent to the activity. This cause of action is an exception to the rule that principals are not liable for the actions of independent contractors. Here, Kate would have a valid argument that building a deck inherently involves risk, because of the sixteen foot drop an individual would experience if the deck failed. However, based on the facts presented, it is unclear whether Holmes' selection of Rivers was negligent.

If more than one party is found negligent, a jury may apportion liability among the liable joint tortfeasors.

(1)(c) What categories of damages would she be authorized to recover?

Kate Brown would be authorized to recover damages for pain and suffering, medical bills, and lost wages. These can be separated into general and special damages. General damages need not be pleaded with particularity, and include non-pecuniary damages such as pain and suffering. General damages are decided by the "enlightened heart of the jury." Brown's pain and suffering for her broken leg and collarbone may be recoverable as general damages.

Special damages must be pleaded with particularity, and include pecuniary damages, such as medical bills, lost wages, property damage, and so on. Because Kate Brown was hospitalized for three days and missed six weeks of work, she is entitled to special damages for the lost wages and medical bills incurred as a result of the defendant's (or defendants') negligence.

(2) If Molly Dorsey's parents, on her behalf, file a negligence action against the Browns, what factors will be relevant to the Browns' liability?

If Molly Dorsey's parents sue the Browns on Molly's behalf, the first issue is what duty the Browns owed to Molly. The duty may be derived by referring to Georgia's premises liability law. In Georgia, long-term tenants may be liable for injuries occurring on their rented property. The duty of care owed to the visitor varies based on the visitor's designation. The duty of care varies for invitees, licensees, and trespassers. Invitees are persons on the property to benefit the owner or holder of the land. Invitees are owed a duty of reasonable care; the owners or holder of land must warn invitees of known dangers and also inspect the premises and make safe for invitees. Licensees are individuals on the premises for their own benefit. Social guests are included in the licensee category.

Holders or owners of land must warn licensees of known dangers on the land. Trespassers are individuals on land without authorization from the landowner or holder. Holders or owners of land merely owe trespassers a duty to refrain from wanton or willful misconduct.

A holder or owner of land may raise the defenses of assumption of the risk or comparative negligence in a premises liability suit. An assumption of the risk defense is available where the plaintiff is aware of a specific risk and voluntarily assumes it, leading to injury. A comparative negligence defense is available where the plaintiff was negligent, and such negligence contributed to the plaintiff's injuries (Georgia is a mixed comparative/contributory negligence state--plaintiffs more than 50% liable recover nothing;

while plaintiffs than 50% liable get their recoveries reduced by their proportionate liability). The Browns might argue that Molly assumed the risk by jumping on the deck, or was negligent by jumping on the deck. The comparative negligence defense may have a slight chance of success, but the assumption of the risk defense will likely fail.

Here, Molly Dorsey was a welcome social guest, and was therefore a licensee. The Browns owed her a duty to warn her of known dangers on the land. Relevant factors include: whether the Browns knew of the deck's susceptibility to failing, whether Molly assumed the risk or was comparatively negligent.

(3) If both Molly Dorsey's and Josh Davis' parents sue the Browns on behalf of their respective children, will Molly's claims against the Browns be more likely to succeed than Josh's claims? Why or why not?

Molly's claims against the Browns are more likely to succeed because Josh was a trespasser. As noted above, trespassers are individuals on land without authorization from the landowner or holder. Holders or owners of land merely owe trespassers a duty to refrain from wanton or willful misconduct. Here, Josh was specifically told by Sara not to come to the party, but showed up nonetheless. He was on the premises without authorization, and was therefore a trespasser. The Browns merely owed Josh a duty to refrain from wanton or willful misconduct. Accordingly, Josh's claim is less likely to succeed than Molly's.

QUESTION 4 - Sample Answer # 3

Negligence is defined as the absence of an applicable standard of care that is owed foreseeable plaintiffs. The elements of negligence are duty, breach, actual and proximate causation, and damages.

(1)(a) Kate Brown will be most successful with a negligence claim against Rivers. Kate would utilize the theory of negligence per se.

Kate may be able to prove Holmes was contributorily negligent in planning out the design with Rivers and Mr. Brown. This is not likely to be a fruitful claim, so it will not be discussed at length.

Kate may also be able to prove that her father was contributorily negligent under the same theory as Holmes, but that claim would fail because Georgia employs parental tort immunity. So, this claim will not be discussed at length either.

(b) Rivers' Liability

Under Georgia law, the theory of negligence per se applies when the violation of a statute constitutes negligence in and of itself. If negligence per se applies, the plaintiff must prove that she was in the class of person the statute was designed to protect and that the class of harm/risk was the type contemplated by the drafters of the statute. Negligence per se supplies its own statutory duty and associated breach of that duty. However, the plaintiff

must still prove causation and damages.

Here, there was a state/local building code statute that Rivers violated. Assuming toggle bolts increase stability or safety of the deck, the class of harm the statute was designed to protect would be personal injuries resulting from deck collapse because of the use of these sub-par long wood screws. Clearly, the class of persons this statute was designed to protect would be those people gathered on the deck who might be injured if the long wood screws were used and the deck collapsed because of their use.

A plaintiff employing a theory of negligence per se must also prove causation and damages to recover in tort. But-for Rivers using long wood screws and not toggle bolts, the deck would have stayed attached to the house and not collapsed. His conduct was also a proximate cause of the plaintiff's injuries because it was the direct cause and no unforeseeable forces or acts cut off liability. Damages are clearly established, as discussed above.

Even if negligence per se does not apply, Rivers would be liable under an ordinary theory of negligence as well. Rivers' duty of care fell below what a reasonable, ordinary, and prudent person in good standing in his profession would have exercised in similar or the same circumstances. A deck builder clearly should be aware that the use of these sort of screws is not what others in his profession consider to be a safe course of action. Rivers' breached this duty he owed foreseeable plaintiffs by not acting as others in his profession would have under these circumstances. Rivers was the direct cause of this accident and but-for his breach, this catastrophe would not have occurred, assuming other types of screws would have held the weight of the dance party. There is no unforeseeable intervening force to cut off proximate liability. It was foreseeable that people would be dancing on the deck or a family would have a more than a few people on the deck at a time. The damages are personal injury damages to the injured partygoers and potentially property damage for the deck or house.

Rivers can claim that Holmes, Mr. Brown, or the party goers were contributorily negligent. Regardless, the lion's share of the fault lies with Rivers, so he will still have to return the plaintiff's to their status quo ante under Georgia's partial or modified contributory negligence scheme. Plaintiff Kate would only not recover if she was personally 50% or greater at fault, which is clearly not the case here.

Therefore, Rivers is liable under a theory of negligence per se and Kate can recover against him.

(c) The issue here is whether Kate will be able to recover tort damages and, if so, what type.

Under Georgia law, general damages are presumed to flow from the commission of a tort. General damages include physical and mental pain and suffering, as well as future lost wages. Special damages are any other money damages, such as specific damages for medical bills or funeral expenses. Punitive damages are designed to punish the wanton, reckless, willful, or intentional conduct of the defendant. Georgia sets a punitive damages cap at $250,000, with no cap for specific intent torts or med mal claims (75% to the state of Georgia).

Here, Kate should recover a reasonably calculated damages award from the enlightened conscience of an impartial jury. Kate will recover her medical expenses and her lost wages, as long as the damages do not exceed the $250,000 cap. Additionally, Kate could potentially recover punitive damages that would punish Rivers for his reckless disregard to a known risk. Maybe $25,000 in punitive damages would be awarded to Kate.

Therefore, she should recover all of the aforementioned damages from Rivers.

(2) Under Georgia law, landowner/premises owner or tenant owes a duty to licensees to make safe or warn of known dangerous artificial conditions on the land. Georgia has not followed suit of other states in abolishing the distinction between licensees (social guests) and invitees (business customers/patrons). A tenant also owes a duty to inspect the premises for dangerous conditions if the guest is a licensee. This duty is not required when the person is a mere licensee.

Here, the Browns as lessees/tenants of the premises owed a duty to all social guest licensees to make safe all known dangerous artificial conditions. Molly was a social guest under these facts, as she was invited to the party by the tenants. The Browns owed Molly a duty to make safe or warn of all known dangerous conditions such as exposed electrical wires or loose floorboards. However, in the instant case the Browns had no duty to inspect for dangerous conditions, as Molly was not a licensee. Even upon inspection, it is very unlikely Mr. Brown would have discovered the fatal flaw in the deck construction as it was latent.

Therefore, the Browns would not be liable under premises liability for Molly's injuries because the Brown's had no reason to know the deck's fatal, latent flaw and had no duty to inspect.

(3) The issue here is whether, in the realm of Georgia premises liability, a licensee is more likely to succeed in her negligence claim than an anticipated trespasser. Uninvited guests are anticipated trespassers and not licensees. Anticipated trespassers are only owed a duty of slight care on the part of premises owners or tenants. The premises owner or tenant warn of or make safe so-called "deathtraps" on the property. The Browns had no reason to anticipate this shoddily built deck becoming a death trap, and were under no duty to warn of it or make it safe. Molly would be more likely to succeed in her claim, though, because of the very slight duty owed to anticipated trespassers, such as Josh.

MPT 1 - Sample Answer # 1

Case No. 2017-CR-238

BRIEF IN SUPPORT OF MOTION TO INCLUDE VICTIM STATEMENTS AND AWARD RESTITUTION

I. Captions
[Omitted]

II. Statement of Facts
[Omitted]

III. Legal Argument

A. The Court should grant the request of Sarah Karth (acting on behalf of Valerie Karth and in her own capacity) to make victim-impact statements at Defendant's sentencing hearing because the Karths qualify as crime victims under the FCVRA.

(i) Sarah Karth can make a victim-impact statement on behalf Valerie Karth because (x) Valerie Karth was directly and proximately harmed as a result of the Defendant's commission of a crime and (y) Sarah Karth is a suitable representative of minor Valerie Karth.

First, the FCVRA defines a "victim" as one who has been "directly and proximately harmed" by a Franklin criminal offense. (FCVRA 55(b)(1)) The legislative history of the statute indicates that the term "crime victim" should be interpreted "broadly." (Citation omitted.) In applying this definition, Franklin courts have held that a purported "crime victim" under the FCVRA must demonstrate (1) that the defendant's conduct was a cause in fact of the victim's injuries and (2) that the purported victim was proximately harmed by that conduct. (See State v. Jones, 2006)

To prove the first prong of this two part test, the purported victim must demonstrate that but for the commission of the crime, the purported victim would not have been harmed, i.e. there was a direct causal connection between the criminal conduct and the purported injury. Here, defendant Clegane ("Defendant") was convicted of the felony crime of unlawful sale of fireworks to a minor. Said minor then used said fireworks illegally which sent exploding shells spraying through the yard, striking and injuring Valerie and setting Valerie's garage on fire. Although Defendant's counsel may argue that the direct victim of his criminal conduct was the minor and not Valerie, Franklin courts have imputed and transferred the status of victims to bystanders when the defendant had "knowledge and understanding of the scope of structure of the enterprise and of the activities" of others. (See Jones citing State v. Hackett, 2003) In addition, the Court in Hackett held that even though there were multiple links in the causal chain, a defendant's conduct could be the cause in fact of the resulting harm. Here, during the Defendant's trial, the arresting officer testified that the Defendant admitted selling the fireworks and the minor had told him, "I can't wait to show these to my friends - I'm going to give everyone a big surprise." Although the Defendant told the officer that the minor "[l]ooked like he was at least in his twenties," and that the boy's statements "didn't raise any red flags," the Defendant still had knowledge the minor boy was planning to "surprise" his friends by shooting off the fireworks in their presence, and therefore the Defendant's conduct was ultimately the first link in the chain of events that lead to Valerie's injuries, both personally and her property, when the minor boy set off the fireworks in Valerie's presence. Thus, the Court should find that Valerie's injuries and property damage was caused in fact by the Defendant's criminal conduct.

To satisfy the second prong of this two part test, the purported victim was proximately harmed by the conduct. As stated in Jones, The concept of foreseeability is at the heart of "proximate harm," i.e., the closer the relationship between the actions of the defendant and

the harm sustained, the more likely a court will find that proximate harm exists.

In State v. Berg (2012), the Court also looks to whether the resulting harm was within the zone of risks resulting from the defendant's conduct for which the defendant should be found liable. Here, although the Defendant thought the minor was actually "in his twenties," the Defendant knew the minor planned to "surprise his friends" with the fireworks. Thus, by selling the fireworks to someone who may improperly use such fireworks in order to "surprise" bystanders, it is reasonably foreseeable that such improper use may cause harm to those in the presence of the fireworks being used or damage to nearby property. Thus, any such injuries and property damage from the minor's improper use of the fireworks was within the zone of foreseeable risks resulting from the Defendant's criminal conduct. Accordingly, both prongs are satisfied for Valerie to be considered a crime victim under the FCVRA in relation to her personal injuries and property damage.

For Sarah to make a victim-impact statement on behalf of Valerie, Sarah must be a suitable representative of Valerie in the court's eyes. FCVRA 55(b)(2) states that in the case of an incapacitated crime victim, "family members or any other persons appointed as suitable by the court" may assume the crime victim's rights under the Act. As in State v. Humphrey (2008), it should be undisputed that Sarah, as Valerie's sister, should be a suitable representative for Valerie in light of Valerie being incapacitated by her injuries from the Defendant's criminal conduct. Thus, Sarah should make a victim-impact statement on Valerie's behalf.

(ii) Sarah Karth can make a victim-impact statement in her own capacity because she was directly and proximately harmed as a result of the Defendant's commission of a crime.

Using the two-prong test noted above in section (i), Sarah's emotional distress was caused in fact by the Defendant's criminal conduct, and a family member's emotional distress would be foreseeable. Although the Defendant will argue that Sarah herself was not present when the minor boy fired the fireworks, Sarah would not have suffered emotional distress if Valerie had not been injured by the minor boy's use of fireworks. The emotional distress of a victim's family member is the ultimate final link in the causal chain of a defendant's criminal behavior. In addition, it is foreseeable that a family member would suffer emotional distress by a victim's incapacitation and trauma from criminal conduct. Thus, Sarah meets the requirements of being a crime victim under the FCVRA.

Accordingly, the Court should grant the request of Sarah Karth (acting on behalf of Valerie Karth and in her own capacity) to make victim-impact statements at Defendant's sentencing hearing because the Karths qualify as crime victims under the FCVRA.

B. The Court should grant the Karths restitution because (i) the restitution that the Karth's seek is supported by the evidence and is not excessive, and (ii) the Defendant has not proven he does not have the resources to pay the amounts requested.

(i) The Karths can show through evidence that their request for restitution should be granted.

Section 56(b) of the FCVRA states that defendants should pay for the repair or

replacement cost of property if property is damaged, and that amounts equal to the cost of necessary medical and related professional services relating to physical and psychological care, plus an amount equal to the cost of necessary physical and occupational therapy, as well as an amount for income lost by such victim. Here Sarah can prove on Valerie's behalf through medical bills, payroll statements, and construction bills that Valerie has incurred (i) $22,000 in out-of pocket medical expenses, as evidenced by the bills and receipts, (ii) a reasonable estimation from medical providers of another $40,000 in out-of-pocket medical expenses, and (iii) $120,000 in lost salary. Sarah also can show that it cost $17,000 to rebuild the garage. As for Sarah's own expenses, Sarah has incurred $1,500 in out-of-pocket medical bills. Thus, the Karths can support their request for restitution through evidence.

(ii) The Defendant has not proven he is unable to pay for restitution.

Section 56(c) of the FCVRA creates a rebuttable presumption that the defendant is financially capable of paying restitution and places the burden of rebutting the presumption on the defendant. One of the factors the court must take into consideration of the amount of any restitution is the financial resources of the defendant. (See Humphrey). Here, the Defendant did not present any evidence in his motion to establish he was incapable of paying restitution. Although Humphrey also stated that before imposing restitution, the sentencing judge must make a serious inquiry into the factors that determine the amount of restitution, including the financial resources of the Defendant, the Defendant had the ability to prove his lack of resources in his motion to deny restitution, but he did not rebut the presumption in his motion, thereby waiving his right to do so. In addition, the Court here should consider the public policy of reimbursing victims and the overwhelming financial burden placed on the Karths and expressly provide justification for awarding restitution to the Karths.

Accordingly, the Court should grant the Karths restitution because (i) the restitution that the Karths seek is supported by the evidence and is not excessive, and (ii) the Defendant has not proven he does not have the resources to pay the amounts requested.

MPT 1 - Sample Answer # 2

MEMORANDUM

To: Anna Pierce
From: Examinee
Date: February 27, 2018
Re: State of Franklin v. Clegane

Brief in Opposition

ARGUMENT

I. Sarah and Valerie Karth's victim impact statements should not be excluded because each is a crime victim under the definition provided in the Franklin Crime Victims' Rights

Act (hereinafter FCVRA), each having been directly and proximately harmed by the Defendant's felony.

Under the FCRA, victims have the right to "be reasonably heard at any public proceeding in the district court involving . . . sentencing." FCVRA Section 55(a)(4). The right to be reasonably heard includes the right of victims to read victim statements. The Act defines a crime victim as "a person directly and proximately harmed as a result of the commission of a Franklin criminal offense." Id. To show one is a crime victim under this definition, the courts have held that the alleged victim must show "(1) that the defendant's conduct was a cause in fact of the victim's injuries and (2) that the purported victim was proximately harmed by that conduct." State v. Jones (Franklin Ct. App. 2006). Finally, the legislative history of the FCVRA states that the term crime victim should be broadly interpreted. State v. Berg (Franklin Ct. App. 2012).

A. Sarah and Valerie fall within the definition of victim under the FCVRA because they were each directly and proximately harmed as a result of Defendant's felony crime of unlawful sale of fireworks to a minor.

Both Sarah and Valerie's harm was directly caused by Defendant's felony crime of unlawful sale of fireworks to a minor, Franklin Code Section 305, which Defendant was convicted of on February 2, 2018. In determining whether there is a direct causation of harm, the court determines whether there is a "direct causal connection" between defendant's actions and the victim's injury. State v. Berg (Franklin Ct. App. 2012). In that case, the defendant provided alcohol to his minor girlfriend while she was driving, the girlfriend then crashed the vehicle into a tree, causing the victim's death. Id. The court determined that "but for the defendant's buying alcohol and furnishing it to Greene, the Appleton's daughter would still be alive." Id. Therefore, Appleton was a victim under the statute and her parents could make victim statements on her behalf.

In contrast, in State v. Jones (Fr. Ct. App. 2006), the court found that the alleged victim had not proven direct harm in order to be a victim under the Act when her boyfriend bought drugs regularly from the defendant, who was convicted of conspiracy to possess cocaine with intent to distribute. The girlfriend claimed that when her boyfriend used those drugs, he physically and emotionally abused her causing her harm. Id. The court found she had not proven a direct causal connection in that case because she offered no expert testimony on the issue.

This case is very similar to State v. Berg in that Defendant provided fireworks to a minor who then injured Sarah and Valerie with those fireworks. Although Defendant may not have been present at the time the minor used the fireworks, had the Defendant not provided the fireworks to the 17 year old, the 17 year old would not have used those fireworks to injure Valerie and put her into a coma, Valerie's garage would not have burned down, and Valerie would not be depressed and distraught about taking care of her sister, requiring her to go to therapy. As in State v. Hackett, (Fr. Ct. App. 2003), there may be 'multiple links in the causal chain', however the Defendant's conduct "was a cause in fact of the resulting" injury and property damage.

Sarah and Valerie's harm was also proximately caused by the Defendant's unlawful sale of fireworks to a minor. "The concept of 'proximate harm' is a limitation that courts place

upon an actor's responsibility for the consequences of the actor's conduct." State v. Berg (Fr. Ct. App. 2012). The key to determining whether a Defendant proximately caused harm is whether the harm was foreseeable and whether the harm was "within the zone of risks resulting from the defendant's conduct for which the defendant should be found liable. Id. Unlike in State v. Jones, where the Court found the girlfriend's harm of emotional and physical abuse too attenuated from the Defendant's conviction of conspiracy to possess cocaine with intent to distribute, the harm in this case is clearly foreseeable.

There can be no doubt that harm to Valerie by Defendant's conduct was not just foreseeable, but to be expected. Defendant sold very powerful, illegal, professional-grade fireworks to a 17 year old. The reason such an action is illegal is because fireworks are inherently dangerous and minors will not know how to set off fireworks in a reasonable, safe, intelligent manner and the harm from such fireworks is great. The defendant has multiple retail operations where he sells fireworks and should be aware of the danger they can cause. The name of the fireworks are called Little Devil Shards and they cause a spray of sparks and exploding shells through the air like a war zone. It does not matter that Defendant did not check the identification of the minor as it was his responsibility when selling dangerous fireworks. The minor told the defendant he was going to show them to his friends and "give everyone a big surprise." This does not indicate intention to use them reasonably and safely. Moreover, the sale of the fireworks was illegal and Defendant was convicted.

The use of fireworks by a minor in an unreasonable manner is a likely outcome. Crimes like this exist with regard to minors because they are not responsible enough and unlikely to use products safely and in accordance with instruction. The use of these fireworks in an unsafe manner also makes great injury and harm very foreseeable. Valerie was seriously injured by the fireworks and was in a coma for several months and is still in the hospital. Moreover, the fireworks also burned down her garage. The destruction of property by fire is also foreseeable from the use of fireworks by a minor.

Although Sarah's injuries of depression caused by her having to take care of Valerie and worrying about Valerie's future are slightly more attenuated, it is not unforeseeable to have great emotional harm to loved ones of someone injured when the injuries can be as great as was caused by these fireworks. Again, there may be 'multiple links in the causal chain' (State v. Hackett), but this does not mean that this type of harm is not foreseeable and the Defendant should not be held liable.

Both Sarah and Valerie are victims under the FCVRA, having been injured directly and proximately by Defendant's conduct, and as such, they should be able to read their impact statements at the Defendant's sentencing hearing.

B. Sarah Karth may represent her sister under Section 55(b) of the FCVRA because her sister, Valerie Karth, is incapacitated due to her injuries and Sarah is a family member able to represent her.

There should be no bar to Sarah Karth reading an impact statement on Valerie's behalf as under FCVRA Section 55(b)(2) a crime victim who is incapacitated may be represented by family members under the Act as long as the defendant is not the family member. In this case, Valerie was in a coma for several months and although she is no longer in the coma,

she is still incapacitated and in the hospital, unable to come to court. Valerie's father has died and her mother is so traumatized, she cannot participate in the court proceedings. Therefore, Sarah who is a close sister of Valerie, and therefore a family member, may represent her under the Act for purposes of the victim impact statement as well as seeking restitution. In State v. Humphrey (Fr. Ct. App. 2008), the mother of two crime victims was allowed to represent them under this section for purposes of pursuing restitution as they were minors.

II. As crime victims under the FCVRA, Sarah and Valerie Karth should be awarded restitution as their harm is identifiable and the defendant has not rebutted the presumption that he is capable of paying.

A. Sarah and Valerie Karth's harm is identifiable and not excessive and must be awarded in restitution damages.

Under the FCVRA, the court in sentencing, "shall order that the defendant make restitution to any victim of such offense." FCVRA Section 56 (bold added for emphasis). The order may require that the defendant "pay an amount equal to the repair or replacement cost of the property" and in the case of an offense resulting in physical or psychiatric injury, "pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, or psychological care, including non-medical care and treatment." FCVRA Section 56(b)(1)(b) and (b)(2)(A).

Moreover, the Defendant should reimburse the victim for income lost by such victim as a result of such offense. Id.

Valerie's total out of pocket medical expenses so far total $22,000.00 with bills and receipts to prove such. Medical providers have concluded she will incur at least an additional $40,000 in out of pocket medical expenses. The cost to rebuild the garage is $17,000 as it cannot be returned or repaired. Finally, she has lost $120,000.00 in salary.

Sarah has incurred out of pocket medical expenses of $1,500.00 from therapy visits twice a week under psychological harm.

B. The defendant has not proven that he is unable to pay restitution and must prove more to avoid paying restitution.

Section 56© of the FCVRA creates "a rebuttable presumption that the defendant is financially capable of paying restitution and places the burden of rebutting the presumption on the defendant." The defendant has not presented any evidence establishing his inability to pay. The defendant must do more than simply assert his in ability to pay and the Court must make serious inquiry into the factors outlined in the statute including (1) public policy (2) the financial burden placed on the victim; and (3) the financial resources of the defendant."

MPT 1 - Sample Answer # 3

From: Bar Applicant
To: Anna Pierce
Date: February 27, 2018
Re: State of Franklin v. Clegane

This memorandum presents a draft of the argument section in response to Clegane's motion to exclude Sarah Karth's victim impact statement and claim of restitution.

Specifically, this brief will respond to Clegane's argument that Sarah Karth's victim impact statement should be excluded in the sentencing hearing because she does not qualify as a "crime victim" within the meaning of the Franklin Crime Victims' Rights Act (FCVRA) and that the court should deny Sarah's claim for restitution.

I. Sarah Karth qualifies as a "crime victim" under the FCVRA because Clegane's conduct was both the cause in fact and the proximate cause of her and her sister's injuries.

A. Sarah Karth has standing to assert her sister's right under the FCVRA. Section 55(b) of the FCVRA states that a family member can assume the crime victim's rights under the FCVRA when the crime victim is "incapacitated." Because of Defendant's conduct here, Sarah Karth's sister, Valerie Karth, sustained serious injuries, leaving her in a coma for months. While currently she is awake and in a stable condition, she still remains hospitalized. As such, she would be unable to attend the trial for risk of her health and would qualify as an "incapacitated" individual under the statute. Therefore, pursuant to FCVRA 55(b)(2), her sister, as a family member, can assume her rights under the statute.

B. Valerie Karth was a "crime victim" under the FCVRA because she sustained serious injuries as a result of Clegane's conduct and her injuries were foreseeable when Clegane sold fireworks.

Under the FCVRA, a "crime victim" has the "right to be reasonably heard at any public proceeding at the district court involving release, plea, or sentencing." The statute defines a "crime victim" as a person directly and proximately harmed as a result of the commission of a Franklin criminal offense." Courts have interpreted the meaning of "crime victim" under FCVRA as a two part test, and noted that the term should be "interpreted broadly." State v. Berg (Fr. Ct. App. 2012). To qualify as a crime victim, the injured individual must allege that (1) the defendant's conduct was the "cause in fact" of the victim's injuries; and (2) the victim was proximately harmed by the defendant's conduct.

State v. Jones (Franklin Ct. App. 2006). For conduct to be the "cause in fact" of a victim's injuries, the defendant's conduct must have directly led to the victim's injuries; however, "multiple links in the causal chain" do not necessarily break the direct causal relationship. State v. Hackett (Fr. Ct. App. 2003). In State v. Hackett, the court held that the defendant provided methamphetamine ("meth") supplies to his co-defendants so that they could create meth for sale. As his co-defendant, but not himself, were manufacturing the meth, they started a fire, which led to significant amounts of property damage. The court held that Hackett's conduct in furnishing the supplies to his co-defendants, although he was not involved in the manufacturing of the meth, was sufficient for him to be the "cause in fact' of the victim's injuries. Specifically, the court stated that "knowledge and understanding of

the scope and structure of the enterprise and of the activities of his co-defendants" was sufficient to render him the cause in fact of the victim's injuries.

In State v. Jones (Fr. Ct. App. 2006), the court held that the defendant's conduct was too tenuous to render the injured party a "crime victim" as defined in the FCVRA. In this case, the victim claimed that the defendant's sale of cocaine to the victim's boyfriend made him abusive towards her, and thus she was injured. The court held that this behavior might be the "cause in fact" requirement of the FCVRA standard, but stated that the victim failed to provide enough evidence to show a direct causal link. Specifically, the court noted that if the victim had provided expert testimony that cocaine could induce abusive behavior, she may have met the "crime victim" standard. In addition, in State v. Berg, the court held that the defendant's conduct was the cause in fact of the victim's injuries; defendant had given alcohol to his girlfriend, who had a history of drunk driving, while another passenger -- the victim -- was in the car. After drinking due to the defendant's conduct, the girlfriend drove the car into a tree, killing the victim. The court held that "but for" the defendant's buying alcohol and furnishing it to [the girlfriend], [the victim] would still be alive. The court held that the defendant's conduct was the "cause in fact" of the victim's injuries.

Here, Clegane's conduct was the "cause in fact" of Valerie Karth's injuries. Similar to the defendant in State v. Hackett, Clegane furnished supplies -- i.e. fireworks -- to another party, and had knowledge and understanding that the minor was going to set off the fireworks because he admitted that the minor told him he would do so. "But for" Clegane's conduct, the minor would have not accessed the fireworks and Valerie Karth would still be alive. While it is true that the defendant was not present on the occasion and had no part in the decision to ignite fireworks, he had an understanding that the fireworks would be set off and furnished them to the defendant. Thus, his conduct was the cause in fact of Valerie's injuries.

In addition, for a victim to qualify as a "crime victim" under the statute, the victim must be "proximately" harmed by the defendant's conduct. Foreseeability is at the heart of this analysis; if the result of the defendant's conduct was foreseeable, the defendant’s conduct is said to have proximately caused the victim's harm. State v. Berg (Fr. Ct. App. 2012). In the case of State v. Berg, the court held that it was foreseeable that giving alcohol to an individual with a history of drunk driving could cause the death of an third party.

Here, it is foreseeable that furnishing fireworks to a minor would lead to the injuries of a third party. Fireworks are an explosive device, which can cause fires and other destruction. In addition, minors typically do not have the full mental capacity to make the best decisions, thus the arguably the reason why Franklin enacted a statute to prevent their sale. While Clegane did not have knowledge that the minor had a propensity or history of recklessly setting off fireworks, it is immediately foreseeable that these fireworks could cause injury even if they were set off correctly or the person did not have a history of acting with recklessness. Therefore, it was foreseeable that Clegane's sale of the fireworks to a minor could cause injuries to a third party.

Because Clegane's conduct was the "cause in fact" and the proximate cause of Valerie Karth's injuries, she is a "crime victim" under the language of FCVRA. Therefore, her sister -- who is her family member -- can make a victim statement at her behalf at the sentencing hearing, as stated in the statute under Section 55(a).

C. Sarah Karth is a "crime victim" under the FVCRA because Clegane's conduct was the cause in fact and the proximate cause of her injuries.

As discussed in Section I.B., a defendant's conduct is the "cause in fact" of a victim's injury if the defendant knew of the scope of the enterprise, and "but for" the defendant's conduct, the victim would not have been injured. While tenuous connections are not sufficient by themselves, mere "multiple links in the causal chain" will not render the defendant's conduct as too outside the scope of the statute. See State v. Jones (Fr. Ct. App. 2006). While it is true that Sarah Karth was not directly injured by Clegane's conduct, she has suffered significant emotional distress and trauma as a result of her sister's injury. "But for" Clegane's conduct, Valerie Karth would not have been injured, and Sarah Karth would not have been traumatized as a result of that injury. State v. Berg (Fr. Ct. App. 2012). In addition, court have held that the interpretation of "crime victim" is to be understood "broadly;" Sarah Karth's injuries are more remote than her sister's, but following other courts decisions regarding the statute's broad interpretation would lead to an interpretation that Sarah Karth's injuries fall within the purview of the statute. In addition, the court held in State v. Berg, that any resulting harm "within the zone of risks" from the defendant's conduct would be foreseeable.

In addition, Sarah Karth's injuries are a foreseeable result of the defendant's conduct. As discussed in Section I.B., fireworks are a dangerous entity that can cause significant damage to both persons and property. It is foreseeable that a buyer, especially a minor, would be reckless or negligent in setting them off, and thus a third party would be injured. As a result, it is also foreseeable that the third party's family members would suffer emotional trauma due to their family member being injured. For that reason, Sarah Karth's injury is within the "zone of risks" as required by the statute, and thus Clegane's conduct proximately caused her injuries.

Given that the statute's definition of "crime victim" is to be interpreted broadly, Sarah Karth also falls within the FCVRA's definition of a "crime victim." She therefore has standing to make her own victim statement at the sentencing hearing.

II. Sarah Karth can receive restitution payments, on behalf of herself and her sister, as a result of Clegane's conduct because Clegane has not presented any evidence of his inability to pay and because public policy favors payment on victims behalf.

According to Section 56(a) of the FCVRA, the court can order a defendant to make restitutionary payments to a victim when the defendant's conduct has led to either (1) property damage and/or (2) physical or psychiatric damage to a victim. The statute states that the defendant is presumed to have the ability to make restitutionary payments, and evidence stating the contrary is necessary to rebut that presumption. See State v. Humphrey (Fr. Ct. App. 2008). When determining whether to award restitutionary payments, the court weighs the following factors: (1) a general public policy sentiment that criminal should compensate for damage they caused; (2) the financial burden placed on the victim; and (3) the financial resources of the defendant.

Here, both Sarah and her sister have suffered significant financial burdens. Valerie Karth has had significant medical bills as a result of her hospitalization, and she has lost

$120,000 in salary. She also faced a property loss of the destruction of her garage. In addition, her sister has had to see a therapist as a result of the defendant's conduct. These financial payments fall within the purview of the restitution provision of the statute. In addition, Clegane has not presented any evidence that he cannot pay a potential restitutionary award. Simply stating that the defendant lacks "resources" to pay is not sufficient to rebut the presumption as evidenced in State v. Humphrey. Because public policy favors granting restitutionary payments to victims, and both Sarah and her sisters are victims of the defendant's acts, the court should grant restitution in their favor.

III. Conclusion

Sarah and her sister both qualify as "crime victims" under the language of the FVCRA; the defendant's conduct was the "cause-in-fact" of both their injuries, and it was foreseeable that, as a result of selling fireworks to a minor, third parties could be injured. Therefore, Sarah, as her sister's representative, can make a statement on her sister's behalf at the sentencing as well as a statement on her own behalf. The factors for restitution weigh in both the victims' favor, and thus restitutionary payments should be granted on their behalf.

MPT 2 - Sample Answer # 1

The issue is whether Ms. Danielle Hastings ("Hastings") can serve as either a county election judge or a precinct chair, in addition to her current role on the board of directors for Municipal Utility District No. 12 ("MUD 12"). This issue turns on application of Article XII §25 of the State of Franklin Constitution as well as the common law doctrine of incompatibility. This memo will analyze both positions in light of the Franklin Constitution as well as the doctrine of incompatibility.

I. Article XII

Article XII §25 of the Franklin constitution addresses whether an individual can hold more than one public office at any time. Specifically, this Article provides that a person cannot hold more than one civil office of emolument, with certain specific exceptions. An emolument is any "pecuniary profit, gain or advantage" received by an individual, which essentially includes anything other than a reimbursement for incurred expenses. (AG Opinion No. 2003-9). In determining whether a particular role qualifies as a civil office, one must determine "whether any sovereign function of the government is conferred upon the individual to be exercised by the individual for the benefit of the general public largely independent of the control of others." (Morris Indep. Sch. Dist. v. Lehigh, Fr. S.Ct. 1965). In the instant case, the Attorney General has issued an opinion specifically stating that MUD directorships are civil offices of emolument owing to the duties of the office and the $150 per diem payment received by directors as compensation. Next we must determine whether the county election judge and precinct chair positions are civil offices of emolument.

A. County Election Judge

A county election judge is responsible for conducting city, county, state, and federal elections in a precinct throughout the year. Per state election law, election judges serve in a supervisory capacity over election-day activities. State election law states that the county election judge is a volunteer position in which no payments are made, but certain expenses can be reimbursed. If we apply the Morris test to the county election judge position, it seemingly satisfies the criteria of independently exercising certain governmental powers, namely ensuring our democratic election processes are followed. As such, the county election judge position would seem to be a civil office; however, as there is no emolument received in connection with the position, there would not be a conflict in holding this position as well as the MUD 12 director position under Article XII §25.

B. Precinct Chair

A precinct chair serves as the main point of contact for his or her political party within the precinct. Additionally, a large part of the role involves campaigning and organizing on behalf of political candidates. Precinct chairs are volunteers who receive no compensation per party bylaws. In applying the Morris test to this position, it would seem that even though it is a position of authority largely independent of the control of others, the position is not one that exercises any sovereign function of government for the general public. While political parties are important to our democratic process and campaigns are highly regulated, a political party is not a governmental organization. Additionally, given no emoluments would be received for this position, Hastings would not be in violation of Article XII §25 by holding this position in addition to the MUD 12 director position.

II. Doctrine of Incompatibility

The common law doctrine of incompatibility states that an individual cannot hold two civil offices if there is any conflict between the duties of those offices. This doctrine is viewed through the following three factors: self-appointment, self-employment, and conflicting loyalties. The first two factors do not come into play unless one position involves the appointment or employment of a second position. In this case, these factors are not applicable and so only conflicting loyalties must be analyzed. As stated in an AG Opinion (No. 2008-12), conflicting loyalties only applies in the case where each position constitutes a civil office.

A. County Election Judge

As discussed above, the county election judge would be deemed a civil office. As such, the conflicting loyalties prong must be considered. Loyalties are said to be in conflict when the exercise of one's duties in one office could be impacted by one's duties or interests in a second office. The AG's Office provided an example wherein an individual sought to serve as a MUD director as well as a director of the Planning and Zoning Commission (id.). In that case, the AG noted that plat approvals require review of preliminary utility plans that would include details on water and sewer services. In that case, a MUD director would likely face a conflict in situations where the Planning and Zoning Commission was reviewing plans that happened to also be in that same MUD district. In the instant case, the duties of a county election judge are less obviously intertwined with those of a MUD director, but

conflicts could still arise. For instance, a politician could run on a platform that would positively or negatively impact MUD 12. In such a case, Hastings could face a conflict wherein she may, intentionally or not, find herself favoring or disfavoring a certain candidate and thus not ensuring that she conducts her job in an impartial manner. Due to the potential for conflicts, one should not serve as both a MUD director and a county election judge.

B. Precinct Chair

Per the discussion above, the position of precinct chair should not be deemed to be a civil office under the Morris test. As such, the initial threshold is not met and the conflicting loyalties test does not apply. Even if the conflicting loyalties test did apply, however, it would be unlikely that the precinct chair position would be deemed to conflict with the MUD directorship. The potential for conflict as it relates to political candidates would be mitigated by the role of precinct chair not requiring objectivity as it relates to candidates for office. By the nature of the job, a precinct chair would be expected to have a preference for his or her own party's candidate. Additionally, the precinct chair would be campaigning on behalf of a candidate but would not be in a position to impact the integrity of the election. Whether precinct chair would be deemed a civil office or not, the Doctrine of Incompatibility should not prohibit Hastings from serving as precinct chair in addition to her role as MUD 12 director.

III. Conclusions

As a final consideration, the Franklin Election Code §480 could have also been a cause for concern on the county election judge position as it does not allow a person up for election to also serve as an election judge on the same day the individual is up for election. Given MUD elections are in May and partisan elections are in November, this would not be an issue. The county election judge position would not be a problem under Article XII§25 of the Franklin Constitution. Ultimately, though, it would not be my recommendation to pursue the county election judge position as it would likely be deemed to run contrary to the Doctrine of Incompatibility, which the AG's Office has addressed in multiple opinions. The position of precinct chair, however, does not run counter to Article XII §25 of the Franklin Constitution, nor does it seem to conflict with the Doctrine of Incompatibility, and as such could be pursued in addition to Hastings' current role with MUD 12.

MPT 2 - Sample Answer # 2

To: Emily Swan, Esq.
From: Examinee
Date: February 27, 2018
Re: Daniel Hastings Inquiry

Dear Ms. Swan:

You asked me for a legal opinion with respect to Danielle Hastings' ability to serve as MUD 12 director and either county election judge or precinct chair. For the reasons set forth

hereinafter, I believe she can hold either position while serving as MUD director. For a further discussion please see below.

A. Whether Franklin Constitution 25 bars Ms. Hastings from holding the MUD director position and the county election judge position.

Section 25 of the Franklin Constitution bars any person from holding more than one civil office of emolument. In order for Section 25 to bar Ms. Hastings from holding both the MUD job and the election judgeship, both offices would have to be civil offices of emolument. The first inquiry is whether the office constitutes a civil office. The next inquiry is whether the person holding the office receives any emolument for their service. If both exist for both positions, the person is unable to hold both offices.

Whether a position qualifies as a civil office depends on if any sovereign function of the government is conferred on the individual to be exercised for the general public welfare. See 2003 Atty. Gen. Op. (citing Morris Indep. Sch. Dist v. Leigh). Whether a position receives on emolument depends on if they receive any type of pecuniary profit, gain or advantage. See Id. While compensation and per diem will count as emoluments, actual reimbursement for actual expenses incurred in service will not be considered an emolument. The refusal to accept compensation allowed will not change the office as one receiving an emolument. The Attorney General previously advised that an MUD director likely constitutes a civil office. See 2008 Atty. Gen. Op. This is because the MUD directors have the power to issue bonds for development and collect and levy taxes, among many other powers. The job also receives an emolument in the form a $150 per diem for attending board meetings to handle the district's affairs. Accordingly, the MUD director job is a civil office of emolument. Ms. Hastings will be barred from the election judge position if it also constitutes a civil office of emolument.

The Franklin Election Judge position almost certainly counts as a civil office. The test being whether the position exercises a sovereign government function for the public benefit. Ms. Hastings informed us that she would likely be appointed chief judge. Franklin Code 471 provides that the chief judge manages and conducts the elections for the precinct, appoints clerks to assist, prevents breaches of the peace and may appoint special peace officers to enforce that duty, and may administer oaths. These are all inherent sovereign government functions and are directly touching on the fundamental right to vote. Enforcing these will be for the general public welfare. Accordingly, the judgeship would be a civil office. The next question is whether the judgeship receives any emolument. The information provided by Ms. Hastings indicates that judges are volunteers and receive compensation only for actual expenses incurred. No provision for compensation or per diem exist. Therefore, no emolument exists. Because the office is not a civil office of emolument, Section 25 of the Constitution will not bar Ms. Hastings from holding both jobs.

B. Whether the doctrine of incompatibility bars Ms. Hastings from holding both jobs.

The inquiry about holding both positions does not end with the Constitutional inquiry. She may also be barred if the common law doctrine of incompatibility applies. See 2010 Atty. Gen. Op. (citing Spencer). The doctrine of incompatibility applies where conflicting duties will prevent a person from holding both offices. See Id. Both positions must not involve

self-appointment, self-employment or conflicting loyalties. Self-appointment or self-employment exist where one position is entitled to appoint the other position or employ the other position. See Id. Conflicting loyalties exist where the jurisdiction or powers of each office overlaps. See Id. This can occur where the job involves controlling or imposing its own policies on the other's. See 2008 Atty. Gen. Op. (citing Spencer).

We know that MUD directors and election judges are both civil offices. Therefore, we need only analyze whether they have conflicting duties under the doctrine of incompatibility. Here, the facts do not indicate that either the election judge or the MUD director have any power to appoint the other's office or employ the other in those offices. The only remaining question is whether the election judge and the MUD director have any overlapping duties. According to Ms. Hastings, MUD's appoint their own election judges and administer their own elections in accordance with Franklin Code 492. If state law did not provide this mechanism concern would exist that a dispute about the administration an MUD election could be determined by the same MUD director who is involved in the dispute. However, since MUD handles their elections separately, and election judges only oversee the partisan November elections, no overlapping jurisdiction exists. Likewise, Franklin Code 480 also helps remove any concern. If Ms. Hastings were a candidate in an MUD election, she could not also serve as election judge on that same day. However, since the elections are held at different times and with different judges appointed, no overlap exists. Accordingly, since the doctrine of incompatibility does not prevent Ms. Hastings either, she could hold the MUD director and election judge positions simultaneously.

C. Whether Section 25 bars Ms. Hastings from holding the MUD director position and the precinct chair position.

As mentioned in Section A, the constitution only bars holding both offices if they both constitute "civil offices of emolument." We established above that the MUD director is a civil office of emolument. The only remaining inquiry is whether the precinct chair constitutes such an office. First and foremost, we must determine if the precinct chair is a civil office, i.e. one exercising a sovereign governmental function for the benefit of the general public. Because the precinct chair does not exercise any sovereign governmental function it is unlikely to be considered a civil office. The duties of the precinct chair are derived from party bylaws which are drafted by executive committees for each political party. The precinct chair is a political position and does not exist by legislative creation.
They contact, guide and organize voters in favor of their respective political parties. All of these are private organization functions. None of these actions were traditionally served by the government. Sovereign government functions have previously included: collecting taxes, appointing agents and employees of the government, entering contracts for the government, purchase and selling property, borrowing money, and other necessary acts to carry out legitimate government functions such as emergency services or water services. See 2003 Atty. Gen. Op.; see also 2010 Atty. Gen. Op. Undoubtedly, the positions acts for the public welfare but without the government function, no civil office exists. Even assuming the precinct chair constituted a civil office, it does not carry an emolument. The position is volunteer and chairs are not compensated for their service. Accordingly, the Constitution will not bar Ms. Hastings from holding both positions.

D. Whether the doctrine of incompatibility bars Ms. Hastings from holding the MUD director

and precinct chair position simultaneously.

As mentioned in Section B, even if constitutional, the common law doctrine of incompatibility may bar the person from holding both offices if conflicting duties exist. Even for this doctrine, if both offices are not civil offices then the doctrine will not apply. However, even if the precinct chair is a civil office, the doctrine still does not apply. No indication exists that the MUD director can appoint or employee a precinct chair or vice versa. Similarly, no indication of overlapping jurisdiction exists. The position of precinct chair is a purely partisan exercise while the office of MUD director is all about water allocation and service provision. The job of MUD director is non-partisan by its nature. There might be some concern that the political party could exert influence over the utility district and put its own policies in place there. However, it is hard to imagine how partisan policies could be implemented to benefit a political party through water, sewer and drainage services in any meaningful way. Accordingly, this doctrine will not bar Ms. Hastings from serving as precinct chair and MUD director.

E. Conclusion

Because neither the Constitution nor the doctrine of incompatibility prevent Ms. Hastings from holding both offices, she can hold the MUD director and either election judge or precinct chair at the same time. Thank you. If you have any questions, please do not hesitate to let me know.

Respectfully submitted,
BELFORD & SWAN, S.C.

MPT 2 - Sample Answer # 3

Memorandum

I. Issue

This memorandum will address whether Danielle Hastings ("Hastings") can apply for and hold the county election judge position or the precinct chair position while simultaneously serving as a member of the board of directors for MUD 12.

II. Legal Analysis

There are potential two challenges that could be raised against Hastings simultaneously serving as a director for MUD 12 and a election judge or precinct chair. First, Hastings cannot hold these positions if it would violate Article XII of the State of Franklin Constitution (the "Constitution"), which contains a clause prohibiting a person from holding more than one civil office of emolument. Second, Hastings cannot hold these positions if it would violate the common law doctrine of incompatibility. Each of these potential challenges will be discussed in further detail herein.

A. The Constitution's Prohibition Against A Person Holding More Than One Civil Office of

Emolument

The Constitution provides the following concerning the ability of a person to hold more than one civil office: "No person shall hold or exercise, at the same time, more than one civil office of emolument, except for justices of the peace, county commissioners, and officers and enlisted men and women of the United States Armed Forces, the National Guard, and the Franklin State Guard, or unless otherwise specially provided herein." Franklin Constitution, Article XII, Section 25(a). The Constitution, however, provides an exception from the limitation on a person's ability to hold more than one office in the following circumstances: "a public schoolteacher or retired schoolteacher may receive compensation for serving as a member of a governing body of a municipal utility district (MUD)." Franklin Constitution, Article XII, Section 25(b). The constitutional dual-office holding prohibition applies if both positions (1) qualify as "civil offices" and (2) are entitled to an "emolument." Ethics Opinion No. 2003-9 (March 17, 2003). "The determining factor which distinguishes a civil officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by the individual for the benefit of the general public largely independent of the control of others. Morris Indep. Sch. Dist. v. Lehigh (Franklin Supreme Ct. 1965). An emolument is "a pecuniary profit, gain or advantage". Ethics Opinion No. 2003-9 (March 17, 2003) (citing State v. Babcock (Franklin Ct. App. 1998). If an officeholder is entitled to compensation, his or her office is an "office of emolument" even if the person refuses to accept any compensation. Id. The term "emolument" does not include the reimbursement of legitimate expenses. Id.

An ethics opinion from the Attorney General of Franklin has previously held that the position of MUD director constitutes a civil office of emolument. See Ethics Opinion No. 2008-12 (February 6, 2008). As a result, whether or not Hastings will be able to serve as a director of MUD and either an election judge or precinct chair will depend on whether those positions are also considered civil offices of emolument. If so, Hastings would be prohibited from simultaneously serving as MUD director, election judge, or precinct chair.

I. The Position of Election Judge

County election judges conduct the city, county, state, and federal elections in a precinct during the year. Election judges are the head officials in charge of election-day activities. Election judges administer the election procedures set forth in the Franklin Election Code to help ensure that elections are secure, accurate, fair, and accessible to all voters.

Election judges also serve on a panel to resolve any voting-related challenges that may arise. Although election judges are nominated by his or her political party, no display of any party affiliation is allowed during the election. Election judges are volunteers and are only entitled to reimbursement of legitimate expenses.

Since election judges do not receive compensation and are only entitled to reimbursement of expenses, this position would not be considered a civil office of emolument.

ii. The Position of Precinct Chair

Precinct chairs are political positions created by their political parties and not by statute and

are responsible for contacting, guiding, and organizing voters from their respective political parties in their precincts. Each precinct chair is the contact person for his or her respective political party in his or her precinct. Precinct chairs are responsible for working with others to mobilize and organize voters and get them to the polls, bridging the gap between voters and elected officials, and promoting their party's candidates and events.

Candidates for precinct chair are elected to serve two-year terms by voters in their precincts in the respective Democratic or Republican primary election every two years. Precinct chairs are volunteers and are only entitled to reimbursement of legitimate expenses.

Since precinct chairs do not receive compensation and are only entitled to reimbursement of expenses, this position would not be considered a civil office of emolument.

B. The Common Law Doctrine of Incompatibility

The common law doctrine of incompatibility bars one person from holding two civil offices if the offices' duties conflict. Ethics Opinion No. 2008-12 (February 6, 2008) (citing Spencer v. Lafayette Indep. Sch. Dist. (Franklin Ct. App. 1947). The doctrine has three aspects: self-appointment, self-employment, and conflicting loyalties. Id. Self- appointment and self-employment are only implicated if the responsibilities of one person include appointing or employing the second position. Id.

In order for the aspect of conflicting loyalties to apply, each position must constitute a "civil office". As noted above, "[t]he determining factor which distinguishes a civil officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by the individual for the benefit of the general public largely independent of the control of others. Morris Indep. Sch. Dist. v. Lehigh (Franklin Supreme Ct. 1965). The third aspect of the doctrine of incompatibility, conflicting loyalties, bars the holding of simultaneous civil offices that would prevent a person from exercising independent and disinterested judgment in either or both positions. Ethics Opinion No. 2010-7 (September 5, 2010). It most often arises when one person seeks to be a member of two governing boards with overlapping jurisdictions. Id. If, for example, two governmental bodies are authorized to contract with each other, one person may not serve as a member of both.

Here, the only aspect of the doctrine of incompatibility that would apply is conflicting loyalties. This is because as a MUD director, Hastings would not have the ability to appoint an election judge or a precinct chair. In order to properly analyze whether there would be conflicting loyalties, the positions of election judge and precinct chair must be evaluated in connection with a MUD director.

I. The Responsibilities of MUD Director Compared With the Responsibilities of Election Judge

As an initial matter, an election judge would constitute a civil officer. This is because they are in charge of and responsible for the management and conduct of the election at the polling place of the election precinct where the judge serves. Franklin Election Code 471(a).

An election judge is also tasked with preserving order and preventing breaches of the peace and violations of the Election Code. Franklin Election Code 471(f). Since the process of voting is a function of the sovereign and an election judge is tasked with overseeing this process, it is a civil office.

Even if an election judge is a civil office, the doctrine of incompatibility will not apply unless there is an overlap of jurisdiction or responsibilities between a MUD director and an election judge.

A MUD Director is on the board of a municipal utility district that provides water, sewer, drainage, and other services to suburban communities. The board of a MUD can levy and collect a tax for operation and maintenance purposes, charge fees for provision of district services, issue bonds or other financial obligations to borrow money for its purposes, and exercise various other powers set forth in the Franklin Water Code. While MUD directors are elected, the MUD conducts its own elections and they are held in May while other elections are held in November.

County election judges conduct the city, county, state, and federal elections in a precinct during the year. Election judges are the head officials in charge of election-day activities. Election judges administer the election procedures set forth in the Franklin Election Code to help ensure that elections are secure, accurate, fair, and accessible to all voters.

Election judges also serve on a panel to resolve any voting-related challenges that may arise. Although election judges are nominated by his or her political party, no display of any party affiliation is allowed during the election.

After evaluating the various responsibilities of a MUD director and an election judge, there does not appear to be much overlap. MUD directors assist with functions of a utility while election judges oversee the election process. The only conceivable connection concerns the ability of a MUD director to vote to raise fees or issue bonds to assist with utility infrastructure. Arguably, there could be a political motivation in raising funds by a MUD director, but this does not appear to create such a conflict as to trigger the doctrine of incompatibility. Such a situation would be more akin to the factual scenario discussed in Ethics Opinion No. 2010-7 (September 5, 2010) which found that a trustee of an independent school district could simultaneously hold the office of county treasurer.

ii. The Responsibilities of MUD Director Compared With Responsibilities of Precinct Chair

As an initial matter, it does not appear that a precinct chair would constitute a civil office. This is because precinct chairs are political positions created by their political parties and not by statute and are responsible for contacting, guiding, and organizing voters from their respective political parties in their precincts. Each precinct chair is the contact person for his or her respective political party in his or her precinct. Precinct chairs are responsible for working with others to mobilize and organize voters and get them to the polls, bridging the gap between voters and elected officials, and promoting their party's candidates and events. Candidates for precinct chair are elected to serve two-year terms by voters in their precincts in the respective Democratic or Republican primary election every two years. If a precinct chair does not constitute a civil office then the doctrine of incompatibility would not apply. Even if the position did constitute a civil office, there would still be insufficient

connections.

III. Conclusion

Article XII of the Constitution would not prohibit Hastings from simultaneously serving as director of MUD and either election judge or precinct chair as neither the office of election judge or precinct chair constitute offices of emolument. The doctrine of incompatibility would also not prevent Hastings from simultaneously serving as director of MUD and either election judge or precinct chair. This is because there is not a sufficient overlap of jurisdiction between a MUD director and an election judge, even though an election judge is a civil office. Likewise, the position of a precinct chair would not be considered a civil office because it is a partisan position. Even if a precinct chair was considered a civil office, there is still not enough overlap to trigger the doctrine of incompatibility.