February 2022 Georgia Bar Examination Sample Answers

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Essay 1 — Sample Answer 1

1. The best basis for the objection is on the U.S. constitutional right against self-incrimination. The issue here is whether Don has waived the right by taking the stand to testify. Each individual has a constitutional right against self-incrimination which applies at trial. Although a criminal defendant waives the right to raise this defense by voluntarily taking the stand at a criminal trial, a civil defendant may not refrain from taking the stand if called to testify. Nonetheless, a civil defendant may invoke the right against self-incrimination if the defendant's testimony at the civil trial could implicate him in criminal liability.

Here, Don has been asked whether he has confessed to killing Jack. Because this is a civil trial, Don does not have the option of refusing to take the stand, but by answering the question, he could open himself up to criminal liability. Therefore, the question violates Don's right against self-incrimination, and he may elect not to answer.

2. The best basis for the objection is on attorney-client privilege grounds. The issue here is whether the question intruded on an attorney-client communication. Communications between an attorney and a client wherein legal advice was sought or given is privileged and may not be disclosed without the client's consent.

Here, the question is directly inquiring as to a communication between Don and his attorney regarding the allegations levied against Don, which is the subject of the legal representation. This is likely a conversation in which legal advice was either given or sought, and therefore, this conversation is privileged, and the question is impermissible.

3. Because this is a civil trial, the jury is permitted to make a negative inference out of Don's refusal to answer either of the questions.

The issue here is whether the trial is civil or criminal. In a criminal trial, the jury is not permitted to make any negative inference from the defendant's exercise of his right against self-incrimination or his exercise of the attorney-client privilege, as that would impermissibly shift the burden of proof onto the defendant rather than the prosecution. However, in a civil trial, this is

less of a concern. In a civil trial, the jury may infer that if the defendant did answer the question, the information would harm the defendant's case.

Here, this is a civil trial in which Don has exercised both the right against self-incrimination and the attorney-client privilege. Therefore, the jury is permitted to make a negative inference from the defendant's failure to answer a question due to the exercise of a privilege or the right against self-incrimination.

4. The objection is not sufficient if the witness has personal knowledge of the debt which is independent of the written promissory note.

The issue here is whether the best evidence rule applies at all.

The best evidence rule only applies if the evidence being testified to is a legally operative document or if the witness is only testifying to facts which the witness learned by reading the document. If, however, the facts being testified to are not those contained in a legally operative document and are not facts which the witness is merely reciting from his or her memory of the document, then the best evidence rule does not apply, and the witness may testify as to his or her personal knowledge.

Here, there is a promissory note, which is a legally operative document. However, the witness appears to merely be testifying to the existence of a debt--not the terms of the debt--of which there may be independent facts or of which the witness may have independent personal knowledge. If that is the case, then the best evidence rule does not apply. However, if the witness is merely reciting the terms of the promissory note, or only knows of the debt because of the promissory note, then the best evidence rule applies, and the promissory note should be admitted.

5. Don's attorney may request to treat the witness as hostile, which permits the introduction of leading questions on direct examination. The issue here is whether Don's attorney may ask leading questions on direct.

Ordinarily, the Georgia Rule of Evidence do not permit leading questions on direct examination of a witness. However, if that witness is hostile, then leading questions are permitted on direct examination.

Here, the witness is indicating a strong dislike of Don, is refusing to answer questions, and was a close friend of Jack's. Therefore, Don's attorney can probably request to treat the witness as hostile and then ask leading questions.

6. Yes, Don has waived his right against self-incrimination by voluntarily taking the stand, at least as to the charges in this particular trial.

Each individual has a constitutional right against self-incrimination which applies at trial. However, criminal defendant waives the right to raise this defense by voluntarily taking the stand at a criminal trial.

Here, this is a criminal trial. Don voluntarily took the stand in an effort to rehabilitate his character. However, this waived his right to against self-incrimination as to this trial, and he may not refuse to answer the prosecution's proper cross-examination having now taken the stand.

7. No, this evidence is not admissible evidence of Don's good moral character because it is not relevant. The issue here is whether evidence of Don's propensity to pay his debts tends to show that he did not commit the crime.

In both the Georgia and federal rules of evidence, evidence is only admissible if it is relevant and tends to show that a material fact is either more or less likely to be true. Although this is a low standard, it is the first hurdle in admissibility, and irrelevant evidence is never admissible.

Here, a tendency to pay one's debts does not indicate a tendency not to kill people. Although the civil trial involved the possibility of debts between Don and Jack as a possible motive, there are no facts here which indicate that the prosecution has raised this motive in the criminal trial. If the prosecution has not suggested that Don was motivated in killing Jack by a desire to escape his debts, then his tendency to pay his debts is wholly irrelevant in the criminal trial and is therefore inadmissible as a threshold matter.

8. No, this evidence would be inadmissible hearsay within hearsay for both the criminal and civil case.

The issue here is whether the evidence is offered to prove the truth of the matter asserted.

In both the Georgia and federal rules of evidence, hearsay is not admissible unless an exception applies. Hearsay is an out-of-court statement made by a human being, offered for the truth of the matter asserted. Where one statement refers to another statement, it is hearsay-within-hearsay, and the whole statement is inadmissible unless there is an applicable exception for both layers of hearsay. A prior statement made by an opposing party is one exception to hearsay.

Here, the applicable statement is hearsay-within-hearsay. The witness wishes to testify to what the cellmate said (layer 1), and the cellmate's statement involves repeating a statement by another (layer 2). Although the second layer involves a statement by an opposing party--a confession by Don that he killed Jack--there are no applicable exceptions which apply to the first layer statement by the cellmate. Therefore, the entire statement must be excluded as inadmissible hearsay.

9. The best basis for the objection is that the evidence's probative value is outweighed by its prejudicial effect.

In both the Georgia and federal rules of evidence, even relevant evidence may be excluded if it fails to meet the balancing test, such that the probative value of the evidence is outwieghed by its prejudicial effect on the jury. Where the evidence has minimal relevance or value but a high potential for prejudice, the court should exclude it.

Here, this evidence is not particularly probative: there is no evidence showing what caliber weapon was used to kill Jack, so there is no indication that this ammunition was the kind of ammunition involved. On the other hand, there is a high risk of prejudice: the jury may assume that the presence of ammunition alone shows that Don had an intent to commit violence, even if there is no evidence that the ammunition is the kind that killed Jack. Therefore, the best basis for the objection is that the evidence's probative value is outweighed by its prejudicial effect.

10. A record of the prior conviction may be admitted into evidence. Although some types of impeachment do not permit extrinsic evidence, extrinsic evidence of prior felony convictions are permitted, even if the attorney has already asked the witness and the witness has denied the conviction. Here, the attorney may admit the prior conviction into evidence to impeach the witness.

Essay 1 — Sample Answer 2

1) Best basis for objection to Plaintiff's attorney asking Don "Did you tell anyone you had killed Jack?"

Individuals have a Constitutional right under the 5th Amendment which allows them to refuse/refrain from testifying as to facts or information which may incriminate them. This is especially true in situations where the person asserting the right has criminal charges pending which directly relate to the subject of the question which he/she refuses to answer.

Here, Don i currently testifying at a civil proceeding in which he is the defendant and has been accused of causing the wrongful death of Jack by shooting him. Don is also facing criminal charges in relation to Jack's death. When the plaintiff's attorney asked Don "Did you tell anyone you had killed Jack?," Don's attorney objected. The best basis for this objection would be because Don has a Constitutional right not to as answering the question has a strong tendency to incriminate Don in relation to the shooting of Jack. The fact that Don has pending criminal charges related to this exact fact is an even stronger reason as to why he cannot be forced to answer.

Therefore, the best basis for objection regarding this line of questioning would be Don's 5th Amendment right against self-incrimination.

2) Best basis for objection to Plaintiff's attorney asking Don "Did you tell your lawyer you had killed Jack?"

Communications between attorneys and their clients concerning representation of the client which are reasonably intended to be confidential are privileged, and neither a client, nor an attorney, may be compelled to testify about the subject of those communications. Exceptions may apply where the statements were made in the presence of a third party, in a public space, or with the purpose of furthering some plan of future wrongful conduct.

Here, the plaintiff's attorney's question to Don of whether Don told his attorney that he shot Jack is asking Don to testify to communications that Don had with his Attorney related to his representation. We are given no facts as to the purpose of the alleged communication nor to the forum where the communication was made. It can be presumed that if a client made a statement to their attorney regarding their having shot someone, the communication would have been made in private and for the purpose of representing the client in current litigation rather than in furtherance of some future wrongful act.

Therefore, the best basis for the objection regarding this line of questioning would be the Attorney-Client privilege encompassing confidential communications between Don and his Attorney.

3) Is the jury authorized to consider Don's refusal to answer certain questions?

In civil cases, a jury may take into consideration a testifying witness/party's refusal to answer examination questions, but not as an admission of fault/liability.

Here, the jury is authorized to take Don's refusal to answer the plaintiff's attorney's questions, but the jury may not consider those refusals as admissions of fault or liability on the part of Don. Unfortunately, once a jury hears something during trial, the skunk is already in the jury box, and the jurors are likely to consider Don's refusal to testify as an admission to the shooting.

Therefore, yes, the jury is authorized to consider Don's refusal to answer, but not as an admission of fault/liability.

4) Is the objection based on the Best evidence Rule enough to exclude the witnesses testimony about Don's debt to Jack?

The Best Evidence Rule states that where physical evidence is concerned, an original is always preferred, but certified duplicates may be admitted as evidence in the absence of the original. Where a witness is testifying as to the circumstances surrounding the creation or existence of a document which the witness has personal knowledge of, the actual document need not be admitted in lieu of the testimony.

Here, assuming the witness has personal knowledge as to the specific debt which Don owed Jack and the promissory note between the two, then the witnesses testimony alone is fine, and the actual promissory note need not be offered.

Therefore, the objection is not sufficient to exclude the testimony.

5) What evidentiary rule could Don's attorney use to be able to ask leading questions on direct examination of his own witness?

Where, upon direct examination, a party's witness becomes hostile to the party's position, the examining party may ask the court to treat their own witness as a hostile (aka opposing) witness. Upon approval of the court, the party may then treat the witness as if he were on cross-examination--meaning that leading questions would be more than appropriate.

Here, Dons' attorney is direct examining a witness when the witness begins to become hostile (answering questions in a way which suggest he had a strong dislike for Don, was Jack's friend, and was not fully answering what was asked of him). At this point, Don's attorney should ask the court to treat the witness as hostile. If the court approves of this, Don's attorney would be free to ask leading questions of the witness without worrying about objection from the plaintiff's attorney.

Therefore, Don's attorney may use the rule governing hostile witnesses in this situation.

6) Has Don waived any rights by testifying as to other criminal offenses of a similar nature?

A defendant cannot waive his 5th Amendment right against self-incrimination except by actually answering a question which may incriminate him.

Here, Don does not wish to answer the question posed by the prosecutor which may be of incriminating nature. Don cannot waive his right against self-incrimination unless he chooses to answer the question directly.

Therefore, no, Don has not waived any right by testifying as to other offenses.

7) Is evidence of Don's good moral character admissible?

A defendant in a criminal proceeding may raise, upon direct examination of a witness or during his case in chief, the nature of his own good moral character.

Here, the nature of Don's good morals was raised by his attorney during his case in chief. Such character evidence is permitted because Don, as the defendant, is opening the door to its discussion.

Therefore, the character evidence would be admissible.

8) Would testimony about the witnesses cellmate saying that he overheard Don admit to killing Jack be admissible?

Hearsay is a statement made outside of court by a human declarant which is offered for the truth of the matter asserted. Where an out of court statement is offered for some other purpose, such as to show its effect on the listener, it is regarded as not being hearsay. Where a statement which would otherwise be considered hearsay was made by an opposing party and is being offered against that party, the statement is considered non-hearsay. Hearsay is generally inadmissible unless it is classified as non-hearsay or falls within one of several exceptions. A witness is competent to testify to only those subjects/facts which he has personal knowledge of. Where there is hearsay within hearsay, a proper basis for the admission of both statements must be established.

First, as to the statement made by the witnesses cellmate. The statement made by the cellmate is a statement made outside of the current court proceedings, and will likely be offered for the truth of the matter asserted. The statement asserts that the cellmate overheard Don confess to shooting Jack. If the prosecution offers this statement to prove that Don in fact told someone that he killed Jack, then it will be inadmissible hearsay. However, the statement may not be offered for the truth of the matter asserted. In that instance, the statement would likely be offered to show the affect that it had on the listener/witness. While this is very unlikely, its happening would change whether the statement was admissible because it would no longer be seen as hearsay.

Second, as to the alleged statement made by Don. If the cellmate's statement is admitted into evidence as not hearsay, then the witness would be able to testify as to Don's statement contained within the cellmate's statement. In that case, Don's statement would fall under the "party-opponent" exemption to hearsay, be categorized as non-hearsay, and be deemed admissible. The more likely scenario is that the cellmate's statement will be inadmissible as

hearsay not falling within any exception, thereby not allowing the witness to testify as to Don's statement directly because the witness has no personal knowledge of Don's statement without the statement of the cellmate.

Therefore, both the cellmate's statement and Don's alleged statement are inadmissible hearsay, but scenarios could be explained as to why both get into evidence.

9) What is the Best basis for an objection to admission of the .45 caliber ammunition found at Don's house?

Evidence is relevant if it has any tendency to prove the existence of a fact of consequence is more or less probable. A fact of consequence os a fact which is important to the trier of fact's ability to make a final judgment of any issue in the case. Generally, all relevant evidence is admissible. However, where the probative value of the piece of evidence is substantially outweighed by the risk of unfair prejudice, undue delay, misleading the jury, confusing the facts, or repetitive presentation of facts, the relevant evidence may be deemed inadmissible.

Here, the .45 caliber ammunition found at Don's house is definitely relevant. The crime Don has been charged with is shooting Jack. Ammunition found at the defendant's house is going to be relevant with regard to the issue of the shooting generally and other issues more specifically. Here, however, the prosecution has no evidence to offer as to what caliber ammunition was used in the shooting of Jack. If the prosecution was allowed to offer the .45 caliber ammunition found at Don's house into evidence, not only would it mislead the jury into inferring a fact which has no evidence to back it up (that .45 caliber ammunition was used to kill Jack), but it would also unfairly prejudice Don because the jury, in the absence of any evidence of what caliber was used to shoot and kill Jack, is likely to assume that if Don had ammunition at his house, he must have shot Jack.

Therefore, the best basis for the objection by Don's attorney to the admission of the .45 caliber ammunition found at Don's house into evidence is that its probative value is substantially outweighed by the risk of unfair prejudice to Don and misleading the jury.

10) What evidence can Don's attorney use to impeach this witness?

For impeachment purposes, a witness's prior felony convictions may be used during cross-examination. Where it will be used only for the purposes of impeaching a witness, the witness's prior convictions of felony offenses (a crime punishable by at least one year imprisonment), which are less than 10 years old, may be raised during cross-examination.

Here, the witness denied ever having been convicted of a felony. In order to impeach this testimony, and raise an inference that witness is not being truthful about other matters, Don's attorney may bring up the witness's felony convictions which are not more than 10 years old.

Therefore, the witness's prior convictions may be brought up for the purposes of impeachment.

Essay 1 — Sample Answer 3

1. In cross examination, an opposing counsel may ask leading questions. However, a question that is in essence a conclusion is not a proper question. Don's attorney can object because the question to Don is a disguised conclusion from Jack's family's attorney that Don killed Jack. Therefore, the question is improper. Don can also refuses to answer inciting the fifth amendment because the answer of the question might incriminate himself. Although this in the civil trial, Don can still seek the protection because his statement might be used against him for the criminal trial.

2. In Georgia, attorney-client privilege protects the communication between an attorney and a client for the purpose of seeking legal advice. The privilege only protects the communication, not the underlying fact or documents. Here, the attorney asked about the communication between Don and Don's attorney and the communication is privileged. Note that it is the client that holds the privilege and the client may waive the privilege and answer the question.

3. In Georgia, a civil jury might consider a party's refusal to answer a question against him/her only when the question is proper and the party rejected to answer without a proper cause. The civil jury is not authorized in any way to consider a defendant's refusal to answer a question if the question is improper or the refusal is based on a client-attorney privilege or other proper cause. Therefore, the civil jury may not in any way to consider Don's refusal to answer either oft he questions.

4. In Georgia, the Best Evidence rule prohibits the description of an evidence if the evidence itself can be provided at trail. Here, the proposed testimony about Don owing money to Jack is not a description of the promissory note, i.e. the testimony is not used to prove the existence and content of the note. Both the testimony and the note are relevant to prove the fact that Don owes Jack money. Therefore, the objection is not sufficient to exclude the testimony of the witness.

5. In general, leading questions is only proper for cross-examination and cannot be used in direct examination. In Georgia, there are two exceptions: (1) inquiry for the basic facts; and (2) hostile witness. Here, although the witness testifies on Don's attorney's direct examination, the witness is a hostile witness because he had a strong dislike for Don, was a close friend of Jack, the victim, and was not fully answering questions propounded to him. Accordingly, Don's attorney might ask him leading questions because he is a hostile witness.

6. Under the U.S. Constitution, a voluntary testify by the defendant in a criminal trial does not waive the fifth amendment right. Even though Don volunteered to testify about other alleged criminal actions, he didn't waive his fifth amendment right and he can still refused to answer District Attorney's question because answering that question might incriminate him.

7. Generally, character evidence is not admissible to show propensity. However, in a criminal case, a defendant can offer to show his good character that is inconsistent with the crime charged

and the prosecutor will thereafter have the right to rebut it. Here, Don's attorney is trying to provide evidence that Don paid his debts on time, which is not related to the crime charged -- manslaughter, probably a murder. Don could have provided evidence of his peaceful character and that should be admissible. Moreover, even if a character evidence is admissible, it can only be shown by reputation and opinion, instead of specific acts unless the character itself is on the issue. Therefore, even if the court find that the evidence of paying debts might show Don is a responsible person and is less likely to commit a murder, the evidence of specific acts that he always paid his debts, is not admissible.

8. Hearsay is an out of court statement offered to prove the matter asserted. A hearsay is generally precluded unless it falls within a preclusion or exception. For hearsay within hearsay, each layer or hearsay must falls within a preclusion or exception for it to be admissible. Here, the witness's testimony is an hearsay within hearsay: the first hearsay is the cellmate's out of court statement that he heard Don's confession, the second layer is Don's out of court statement of the shooting.

An opposing party's statement is precluded from hearsay. The second layer hearsay is excluded from hearsay because it is Don's statement offered against Don. However, the first layer hearsay doesn't fall within any preclusion or exceptions and the witness's testimony is therefore not admissible. The District Attorney should bring the cellmate to testify Don's statement.

Also, in a criminal case, confrontation clause requires opportunity of the criminal defendant to confront a witness against him unless: (1) the witness in unavailable, and (2) the defendant had prior opportunity to cross-exam the witness. Here, no evidence shows that the cellmate is unavailable. Also, it is likely that Don didn't have a chance to cross-exam the cellmate before because cellmate told witness Don's confession in another case unrelated to Don's.

In conclusion, the testimony is not admissible in civil case because of it's a not admissible hearsay, and not admissible in the criminal case because of both hearsay and confrontation clause.

9. An evidence is only admissible when it is relevant: it makes a material fact more probable that without the evidence. Here, the District Attorney fails to show whether the weapon is relevant because there was no evidence as to what caliber weapon was used to kill Jack. Even though the fact that Don has a gun makes it more likely that he has the means/weapon to kill Jack, the little probative value is substantially outweighed by the unfair prejudice under Rule 403. Also, the District Attorney failed to authenticate the weapon that the .45-caliber ammunition found in Don's home is what he claimed to be: the weapon used to kill Jack.

10. In Georgia, character witness can be used to impeach a witness. A convicted felony might be used to impeach a witness' creditability if the probative value outweighs unfair prejudice. Don's attorney might use the conviction of the witness to impeach him and show that he lies about his conviction of the felony. The felony itself can also be used to impeach the witness. Also, Don's attorney can consider to impeach the witness through inconsistent statement, if any.

Essay 2 — Sample Answer 1

1. Tom and Classmates' claims

Tom and each of the classmates may be able to sue the LLC under a shareholder action.

Although members of an LLC are generally not permitted to sue one another, each member may sue the LLC in a shareholder action if it is the sort of action that the LLC itself would be able to maintain. Where a manager grossly mismanages an LLC or misrepresents the financial condition of the LLC, such that the LLC is harmed, the LLC may sue the manager for the mismanagement, but the members of the LLC may initiate the suit instead.

Here, Tom appears to have, at a minimum, grossly mismanaged the funds of DD, but possibly even outright lied about the financial condition of DD to its members. Accordingly, the LLC may sue Tom for his gross mismanagement, and each of the members (Tom and his classmates included) have standing to sue Tom on behalf of the LLC.

Additionally, Tom and each of his classmates may be able to sue Tom and his daughters for fraudulent misrepresentation. The issue here is whether they reasonably relied on the representations made prior to entering the LLC agreement.

Although members of an LLC are generally not permitted to sue one another, if the members were induced to enter the agreement based on representations which the presenting party knew were false, and which the members reasonably relied, this would constitute common law fraud, and the members could sue on those grounds.

Here, it is not clear from the facts if Tom and his daughters made intentional misrepresentations prior to the classmates entering the LLC agreement, but it is clear that they made certain projections of profit that appear to be way off, so this is a possible claim to keep in mind as the facts develop.

2. Personal jurisdiction and venue

Personal jurisdiction

Georgia will have general personal jurisdiction over Tom and Dawn, and specific personal jurisdiction through the long-arm statute over Dana.

The issue here is whether the exercise of personal jurisdiction satisfies both statutory and constitutional standards.

For the exercise of general personal jurisdiction, the defendant must be "at-home" in the jurisdiction. For individuals, this means the jurisdiction in which they are domiciled: where they live with the intent to stay indefinitely. However, a court may still exercise personal jurisdiction

over a defendant if there are sufficient ties to the cause of action such that the exercise of jurisdiction does not offend justice and the long-arm statute of the statute permits it. Georgia's long-arm statute allows the exercise of personal jurisdiction over any non-resident who commits a tort within the state and any resident who commits a tort within the state and then moves out of state.

Here, Tom and Dawn both live in Georgia, and there are no facts suggesting they intend to move, so the court may exercise general personal jurisdiction over both. Dana has moved out of the state, but by potentially making intentional misrepresentations before moving, and then by sending the second set of potentially false financial statements to Georgia after moving, Dana has at least two possible grounds for specific personal jurisdiction: her conduct in connection with the fraud claim prior to moving and her conduct in connection with the ongoing fraudulent financial statements after moving. As both of these are specific to the claims involved, they both satisfy the long-arm statute and do not offend constitutional requirements for personal jurisdiction.

Therefore, Georgia will have general personal jurisdiction over Tom and Dawn, and specific personal jurisdiction through the long-arm statute over Dana

Venue

Venue will be proper in Hall County.

In Georgia, where there are multiple defendants and at least one is out-of-state, venue is proper either where at least one in-state defendant resides or where a substantial part of the events giving rise to the claim occurred.

Here, both Tom and Dawn are in-state defendants and reside in Hall County. Therefore, venue is proper there. Venue may also be proper in Clarke County, where a number of related events occurred, but since the facts are not clear as to where later events occurred, Hall County is likely the best venue choice.

3. Discovery from CPA

Yes, Tom will be able to obtain discovery from the CPA in a Georgia court. The issue here is whether an accountant-client privilege will apply.

Although some states recognize the existence of an accountant-client privilege, Georgia does not recognize such a privilege. Moreover, a member of an LLC has a right to review the financial statements of the LLC with good cause.

Therefore, if Tom seeks discovery from the CPA, the CPA may not decline to turn over relevant and responsive information solely on the basis of an accountant-client privilege

4. Consequences of joint representation

Although I am not prohibited from jointly representing the classmates, I should inform them that I am only able to represent them because I do not perceive a conflict of interest between them.

Pursuant to the professional rules of conduct, an attorney may only represent parties jointly if the attorney has reasonably determined that the parties share common interest in the outcome of the case such that there is no conflict of interest in representing both parties. However, if such a conflict should arise, the attorney must advise all parties of the conflict and advise them to seek independent legal counsel, and then give them an opportunity to do so. Moreover, although attorney-client communications are privileged, the jointly represented parties' communications with the attorney are not privileged as to each other.

Here, I should disclose the following: 1) that I am only able to represent them because I have reasonably determined that they share a common interest in the outcome of the case, such that there is no conflict of interest in representing all of them, 2) that should such a conflict arise, I will inform all of the jointly represented parties, advise them to obtain independent legal counsel, and give them an opportunity to do so, 3) and that any conversations between myself and them are privileged, but that I may disclose the details of those conversations to other members of the jointly represented group. I should then allow them time to review the engagement letter and consult with outside and independent counsel before the representation commences.

Essay 2 — Sample Answer 2

I. Tom and Classmates vs. Joe and his daughters

The issue here is the applicable claims Tom and his classmates have against Joe and his daughters under Georgia law.

Under Georgia law, shareholders of a corporation have the right to sue the company either derivatively or directly. A shareholder derivative action is one in which the shareholder, after giving a written demand 90 days prior without response from the company, sues the leader of corporation on behalf of the other shareholders. The day period may be waived if there is irreparable harm that'll occur to the shareholders if immediate action isn't taken. A direct action is when one shareholder sues the company or director directly. Here, the shareholders can decide to sue directly. They may sue on the basis of Joe's failure to act within his duty of loyalty to the corporation. The director or managing member of a corporation has the duty of loyalty to the corporation and that duty includes working in the best interest of the company. Here, the corporation has stories about it from irate customers and the corporation failed to pay their Oregon lumber supplier. These actions adversely impact the corporation, monetarily and the corporations reputation because when customers complain it is bad for business. These negative actions may cause the shareholders shares to decrease in value. So, the shareholders may sue on the basis on Joe not acting on the best interests of the company and violating his duty of loyalty and his duty to act in the best interest of the corporation.

Tom and his classmates may also have a claim for fraudulent misrepresentation. When a person uses deceit, lies, or misrepresents material facts, he knows the facts are untrue, he knows the other party is relying on these material facts to make a decision, the other party relies on the material facts, and the other party is harmed by the fraudulent misrepresentation of those material facts, that person is guilty of fraudulent misrepresentation. Here, Joe and his daughters told Tom and his classmates that their money would be used to secure the commitment from the Oregon lumber company to have more inventory for its sales, a material fact. Tom and his classmates relied on this material fact when they signed the agreement. More evidence is needed to determine if Joe knew this was false at the time or if he ever intended to use the money to pay the Oregon company, or when the Oregon company actually cut off Joe. Nonetheless, Joe and DD no longer are in business with the company and so that may cause a financial injury to Tom and his classmates. There needs to be more information provided, but Tom and his classmates may have a claim for fraudulent misrepresentation.

II. Personal Jurisdiction

The issue here is the basis for personal jurisdiction in a Georgia court over each defendant and the proper venue for the suit, if all three could be named as defendants.

In Georgia, personal jurisdiction is asserted over a Georgia resident in the county in which they live. If a defendant is not a resident of Georgia, personal jurisdiction may be asserted over them

based on Georgia's long arm statute if they committed a harm or injury in Georgia, in the county where the harm was committed. Venue is proper in the county of any defendant if all the defendants are residents of Georgia. If not venue is proper in the county where the harm took place.

Here, Joe and Dawn are residents of Hall County. Dana, DD's registered agent, has moved to Oregon, but formerly was a resident of Hall County. Personal jurisdiction can be asserted over Joe and Dawn in Hall County because that's their residence, and Dana in Hall County as well because the harm that would give rise to the suit is based on a contract that was signed in Hall county, a company that is registered in Hall county. Therefore, the injury would be considered to arise in Hall County, making the Georgia long arm statue available to assert personal jurisdiction over Dana in Hall county. Venue is proper where the harm occurred. Here the harm occurred in Hall county and the contract is signed in Hall County, so venue is proper in Hall county.

III. CPA discovery

The issue here is whether Tom will be able to obtain discovery from the CPA in a Georgia court to see whether the CPA has information that would support a cause of action under Georgia law.

Georgia has an accountant-client privilege, protecting the records and accounting and communications between an accountant and their client. The privilege may be broken if there is no other possible way to obtain the information, a substantial hardship, and the information is sought after is to be used to for fraud.

Here, Tom is attempting to show fraud and if he can show a substantial hardship to get the information another way he may be able discover. Otherwise, the accountant-client privilege of Georgia protects the information from the CPA.

In conclusion, If he can show a good cause for overcoming the accountant-client privilege, Tom may be able to discover the information.

IV. Consequences of Joint Representation

The issue here is the consequence of a joint representation that should be address in my engagement letter with Tom and his classmates.

Joint representation is allowable if all the parties consent via a written waiver, even with a conflict of interest. However, the consequences of joint representation are that as litigation moves forward there may arise a conflict of interest which may make one member of the joint representation adverse to the other members. As best as possible as lawyer of the joint group, the interest of everyone will be considered, but it is possible some members may not have all of their interests protected via the joint representation. If one member becomes adverse, the attorney client privilege may be broken because the members of the same joint representation

have the same attorney. If one member sues another, the attorney-client privilege will be waived for the suit.

The consequence of lack of parties interest being protected and waiver of attorney client privilege in future suit against members should be addressed in the engagement letter.

Essay 2 — Sample Answer 3

1. A limited liability company allows the members of the LLC to retain limited liability for the actions of the other members. Unlike a corporation, an LLC is not an entity that is responsible for its own actions. Typically when the actions of a member of the LLC are tortious, that specific member retains all liability for his actions. This is one of the primary benefits of an LLC versus a partnership or corporation.

In this case, it's unclear exactly what happened between DD, Joe, Dawn, and Dana, and its suppliers, but it appears that the money that was invested has been fettered away in a likely illegal manner. Members of LLCs are not allowed to use funds or supplies of the LLC for their own personal use. If Joe and his daughters were using the money illegally, the members may sue to recover their shares of the funds. Although we do not have specific facts indicating that Joe or his daughters embezzled or stole from the company (it is possible they just mismanaged the money such that the LLC could not pay its bills), it seems likely that something is awry.

The plaintiffs may have a claim for conversion if they can prove that the defendants intended to take their investment and deprive them of it. It is likely that Joe and his daughters lied about what the money was being used for, so a claim of conversion may be the best route if they are found to have stolen the funds from the LLC.

Tom may also have a unique claim specific to the false records he was given. A member of an LLC is always entitled to ask for financial records. Tom exercised his right as a member of the LLC and was given false statements.

If the plaintiffs can prove that Joe and his daughters intentionally misrepresented the financial condition of the company when they signed the "offering memorandum" they can sue to have the contract rescinded because there was no meeting of the minds. If an individual signs a contract believing things to be a certain way and the other party intentionally misled them, then the party at issue may sue for recission and recover his or her investment. It is unlikely that Joe and his daughters are liable for breach of contract, so no monetary damages would be available outside of recovery of their investments.

2. Personal jurisdiction refers to a court's ability to exercise its jurisdiction over a particular individual. When assessing personal jurisdiction, the court must decide if the jurisdiction is constitutional and statutorily authorized. Personal jurisdiction may be general or specific. General personal jurisdiction is created in the court in which an individual is domiciled. In the case of a corporation, personal jurisdiction is exercised where 1. the corporation is incorporated; and 2. where it has its principal place of business (if that is different). Specific personal jurisdiction arises when an incident, tort, breach of contract, or other act is committed in a geographic area and the court may exercise its jurisdiction for this specific incident.

In this case, DD has its principal place of business in Hall County, where two of the other defendants reside. The third defendant resides out of state, and thus could be subject to personal

jurisdiction in any Georgia court that has jurisdiction over the other defendants. Because the other three defendants are domiciled in Hall County, the Hall County Superior Court would have personal jurisdiction over all of the defendants.

It is hard to pinpoint the specific incident from which this claim arises. If it is found to have arisen from the initial meeting in Clarke County, then Clarke County courts would have specific personal jurisdiction in this matter. However, although all the plaintiffs signed the contracts in Clarke County, when they received the call for the additional funds, they were not alleged to have been in any specific place. Therefore, it would be easier to assert personal jurisdiction in Hall County without more information about the alleged claims and when the specific incident occurred.

Venue refers to the court in which the suit can properly be adjudicated. In Georgia, that is partially dependent on the type of claim asserted. Venue in the county which retains jurisdiction over the defendants is proper. In land disputes, venue in the county in which the land is located is proper. In this case, the Superior Court of Hall County would most likely be the proper venue, as it has jurisdiction over all the defendants and there is no evidence that it would be difficult for any party to adjudicate in this venue.

3. Georgia recognizes the accountant-client privilege. This privilege is much like the attorney-client privilege in that it is absolute and it is held and waived only by the client. The privilege survives the severing of the relationship, and so the accountant's records may not be discoverable even though he resigned from the relationship. However, it is unclear whether the accountant was retained by Joe, or by the LLC itself. If the accountant was retained by the LLC, the other members of the LLC (the plaintiffs) should have access to the accountant's records as holders of the privilege themselves. If, however, the accountant was retained directly by Joe, it is unlikely these records would be discoverable, even if they are relevant to the LLC's financial standing. Because Joe was the managing member of the LLC, it is also possible that he can dispute the release of the records against the objections of the other seven plaintiff-members.

4. Attorneys must not take on representation of multiple parties if there is a chance that a conflict could arise between the parties. Typically, attorneys should not agree to represent multiple clients with potentially different interests, because it is very likely that there will be something that arises that disrupts the attorney's process and ability to effectively represent the clients. In this case, Tom and the other plaintiffs own equal shares of the LLC and were all impacted by the same set of circumstances as each other. Therefore it is highly unlikely that there would be a conflict. Potential conflicts could arise in the paying of the fee, and a letter should set out exactly what the responsibilities of the parties will be if one party is unable or unwilling to pay. Additionally, the letter should explain that if there are any facts that arise during the case that impact the attorney's representation, the attorney may need to withdraw from handling certain plaintiff's claims. This group is also too small to be certified as a class for a class-action lawsuit. Generally it is not recommended that attorneys represent co-plaintiffs in this manner, but if everyone in the group submits a written consent after reading the outline of the potential conflicts, the attorney may represent the seven plaintiffs together.

Essay 3 — Sample Answer 1

1. The October 1, 2010 letter is a valid and enforceable contract between North and South. Under Georgia law, a valid contract requires offer, acceptance, and consideration. The three elements are present here. Here, the parties offered to each other not only an invitation to deal but an ability to clearly define the boundaries in which they have under exclusive ownership to distribute for "National." There was an acceptance by the parties in that North agreed to the agreement as stated in clear terms in the October 1, 2010 letter and perhaps even more evidence of acceptance on the part of South when it sent the letter. There was also consideration. Consideration is defined as something given to the promisor by the promisee in exchange for the promise. Here, both parties offered their time and resources to define the lines, and the benefit was that they each could have further clarity in noting which boundary lines were correct or enforceable. Although both parties agreed and participated in the same endeavors in getting the new boundaries, this does not change the fact that there was still offer and consideration. Additionally, the meeting of the minds requirement often assessed by courts in determining whether or not there was consideration is also met here, as the facts show that the parties "conferred and agreed" that they would survey the territories, compose correct descriptions, and subject their narratives to National.

Because this is a contract that involves land (and is not a sale of goods), the common law of contracts under Georgia law applies (as opposed to the UCC). Additionally, because this is a contract involving land, the statute of frauds will apply to the contract. Under the Statute of Frauds, certain contracts must be in a writing (including contracts made regarding marriage, service contracts that take longer than a year, contracts involving land, executory contracts, goods worth more than $500, and suretyships). Here, the statute of frauds is satisfied because the contract is in a writing and it is also signed by the party to be sued, here South. The fact that both parties did not sign the contract does not mean that the contract is invalid because it is North that is bringing a claim against South, and South signed it. The contract also includes definite terms of the land - something required by the statute of frauds if it is a contract involving land. The fact that the more definite description of the land is likely not determinable as to whether or not it is sufficient enough, however this is a likely argument that South will raise should we go forward with a cause of action for breach of contract. However, we should respond by saying it is definite.

Should the court state this does not meet the requirements of the statute of frauds, one exception we could assert is that the October 1, 2010 is a merchant's confirmatory memo, although this will not likely be a winning argument. A merchant's confirmatory memo will uphold a contract that would otherwise fail if both parties agree to a certain agreement, and one of the merchant's send a confirmatory memo after that oral conversation confirming what was agreed to. Here, however, the merchant's are not dealing with each other in the normal course of their business (distributors) but rather as competitors surveying land together. In any event, this exception to the statue of frauds will be a defense we should at least raise.

Finally, if the court states this does not meet the statute of frauds or is not a valid contract, we could assert that it is an implied-in-fact contract or a quasi-contract to which both parties have relied on as evidenced by the course of dealing between the parties. Here, for ten years from October 2010 to April 2020, the parties distributed their products within the boundaries they set for themselves in the October 1, 2010 letter. This type of dealing and reliance may lead a court to assert the equitable remedy of an implied-in-fact contract is appropriate.

For these reasons, the contract is a valid and enforceable contract.

2. South's claim of ownership alone likely does equate to a breach. Here, South's duties under the agreed to contract was to distribute within the confined territory both parties agreed to. The fact that South stated that it owned part of the territory both parties claimed caused damage to North in that Bigger Beverage required that $2,000,000 of the $10,000,000 purchase price be placed in escrow (noting this is not a permanent damage depending on the resolution of South's claim, but equates to damages nonetheless) and refused to go forward with the agreement. Because South had a duty to operate within the terms of the agreement South itself signed, this will equate to a breach. Of course, more facts would be helpful - such as, did South in fact operate outside of the bounds or only say so? - but this will likely still be viewed as a breach.

An additional claim that North may bring against South is interference with a business opportunity. Here, North had a valid opportunity to benefit its business through contracting with Bigger Beverage. The fact that South, through a single phone call to Bigger Beverage, but this lucrative contract in question is grounds enough for a non-frivolous claim against South for interfering with a business venture.

North may also bring a claim against South for defamation, but this will likely lead to no avail. Under Georgia tort law, for a private plaintiff to win on a claim of defamation, it must show that the defendant made a false claim about the plaintiff with the intent to make such a claim (which can be met by recklessness) and the statement is published. This will further be shown if it directly affects the plaintiff's business or livelihood. Here, the publication element is met because the statement was published in that another party heard it, but the other two elements will likely not be met. That is, it is unclear whether or not there is even a statement made against North that would be untrue. We could argue that South is saying North is a liar or a person that conceals information (here the oral agreement), but this statement was not made directly and it is possible that South even believes it is true which would negate the intent factor.

Finally, as stated above, we could argue there is an implied-in-fact contract as shown by the parties course of dealing and reliance upon the agreement.

3. First, the alleged oral agreement does not affect whether the October 1, 2010 letter is enforceable as written. The terms of the contract will be used as the primary indicia of the intent of the parties. However, although the contract will still be a valid contract regardless of whether or not the alleged oral agreement was made, it may not stand alone in expressing the intent of the parties. That is, evidence of the oral agreement may come in as explained below. Second, if

the oral agreement was made contemporaneously, it may be able to come in as evidence, but if it was made later, it may be viewed as a modification, which must meet its own set of requirements in order to come in as proof of the parties' intent.

(a) Regarding the first question, the parol evidence rule may bear on this analysis. Under Georgia law, the parol evidence rule will not allow oral agreements made during the execution of a contract unless it is the case of the following exceptions: to interpret a vague term, to explain a mistake or conflicting clause, and so on. Nothing in the facts show that outside evidence of an oral agreement is needed either to interpret any terms or to show the intent of the parties. Additionally, even if the parol evidence rule would not bar any oral conversations, the contract is still valid.

(b) It may matter if the oral loan agreement was made contemporaneously with the October 1, 2010 letter or whether it was made after the contract was signed (still assuming it is a valid contract). One factor that will weigh on this analysis is whether or not the contract was a fully integrated contract or partially integrated contract. Nothing in the terms state whether or not it is one or the other, so a presumption that it is fully integrated will apply. However, if facts show it was partially integrated, the fact that the parties may have made an oral agreement later on will be treated as a modification and that modification may affect whether or not it is a valid contract. Modifications in common law are generally allowed so long as there is good faith. Here, because of the disagreements between the parties, there was likely no good faith if the oral agreement was made as a modification to the contract after it was signed. However, if the oral agreement was made contemporaneously, it will be suspect to a parol evidence rule analysis as outlined above.

Essay 3 — Sample Answer 2

1. The issue here is whether there is a valid and enforceable contract in the October Letter (the Letter). In order for a valid contract to be formed there must be an offer, acceptance and consideration. An offer is a manifestation of the intention to be legally bound by the terms of the offer that gives the power of acceptance to the offeree. An acceptance is an objective manifestation of an agreement to enter into a legally binding agreement based on the terms of the offer. Where a contract covers the sale of goods, it is covered by the UCC but where the sale of goods is not involved the contract is governed by the common law. A contract requires consideration. In GA, there may be good or valuable consideration for a contract and courts do no generally assess the adequacy of consideration where it can be found. Consideration must provide either a benefit or burden in the exchanged promises so that the parties obtain some bargain of the exchange. Release of a disputed claim can serve as valid consideration for an agreement.

In this instance, there was no pre-existing contract between North and South prior to the Letter. When North and South received the new proposed territory maps, they noted an inaccuracy in the maps provided by National. This was not a contract between North and South. They jointly obtained a survey and submitted them with a request to National. The facts do not indicate that National responded. However, since North and South operated on a common territorial boundary, it is possible that the conduct of obtaining a joint survey and composing corrected descriptions could be construed as an agreement between North and South as to the respective territories they claim. As such, this could qualify as promises made by North and South to each other that North would serve Franklin and Paris and South would service the other territories. A release of any claim to the disputed borders as presented by National would serve as the consideration for this agreement. North would be giving up territory it could claim under the incorrect description and South would getting the rights to territory that it is not allocated in the agreement. As such, a valid contract could be found on the terms of the Letter.

In order to be enforceable, certain contracts must satisfy the Statute of Frauds. The Statute of Frauds (SOF) requires that the agreement be in a writing that provides the details of the agreement and is signed by the party to be charged. This contract would likely fall under the SOF since it is a long standing agreement that was in operation for a decade. Where the contract, by its terms, cannot be completed in a year or less, then the SOF will apply for it to be enforceable. The agreement with National was meant to be an update to the territories and intended to last well over a year, possibly until the next adjustment of territory and so must satisfy the SOF to be enforceable. Here there is a writing evidenced in the Letter. The Letter details the territory as agreed between North and South. The writing requirement is therefore satisfied. The party to be charged would be South as they are the party disputing the boundaries at this point. Since the Letter was signed by the CEO of South, the signing requirement is satisifed. As such, this contract would satisfy the SOF and be enforceable as against South. If South sent a copy of the Letter to North - which is likely - then the Letter would be enforceable as against North. Even though North did not sign the Letter, North is a merchant. A merchant deals in the kind of goods at issue or holds himself out as having the knowledge of a merchant. North is identified as a distributor and

so is a merchant. When a merchant receives correspondence, the contents of which they should be aware, and fails to object in 10 days to the correspondence, they are charged with its adoption. Here, there is no indication North objected and they too could be charged with the Letter. Therefore, the contract is enforceable against both parties.

2. Since the Letter is a valid and enforceable contract, South is in breach by claiming territory not listed to it in the agreement. The exchanged promises would be to service the territory per the agreement. South's attempt to gain more territory flies directly in the face of the agreed promises. As such, North may have a claim for breach of contract in tat regard.

North may also have a claim for tortious interference with contract. Tortious interference with contract requires that the tortfeasor be aware of a contract and make some affirmative act to cause a party to the contract to not conclude the deal. South's CEO contacted the CEO of Bigger knowing that there was a tentative sale with North. South's CEO disputed the territory of North in direct breach of their agreement. Further, since the territory was a material part of the transaction, South was aware that dispute of the territory would sink the deal. North would be able to make a prima facie claim for this tort as South owed a duty under the contract that they breached by disputing the territory to Bigger. This was the direct cause for Bigger to pull out of the deal and caused North damages.

3. The alleged oral agreement does not change the analysis of the enforceability of the Letter. The Letter must satisfy the SOF. The SOF may also be satisfied by conduct of the parties. Since North and South operated under the agreement and consistent with the Letter, this would also go towards enforcement of the Letter and not the oral agreement. If the oral agreement was reflected in the party conduct, that would have changed the analysis. If the oral agreement was made contemporaneously with the agreement, it would be barred by the Parol evidence rule which bars introduction of oral or written prior or contemporaneous agreements to contradict the writing but it may be allowed to explain or supplement. the parol evidence rule does not bar oral agreements made after the contract is formed or apply to separate agreements. This would not qualify as a separate agreement since it pertains to the contract. The oral agreement does not appear to have occurred after the writing since the parties conduct conform to the writing. Also, South cannot argue for a modifcation since this is a common law contract and a modification would require new consideration.

Essay 3 — Sample Answer 3

1. The issue is whether the October 1, 2010 letter is a valid and enforceable contract.

A valid contract exists where there is mutual assent (offer and acceptance) and consideration. This is not a contract for goods, which would fall under the UCC, so it is controlled by common law. An offer expresses an offeror's intent to be bound, and creates a power of acceptance in the offeree. An acceptance by the offeree may be communicated in any reasonable manner, if not specified by the offeror. Acceptance may also be expressed by performance. Consideration is an exchange of promises to do or refrain from doing what a party has a legal right to do. In a contract between merchants, a signed letter confirming an agreement, if not objected or responded to within 14 days, is considered accepted by the receiving party and defeats the statute of frauds. The statute of frauds applies to contracts for marriage, suretyship, contracts for services that cannot be completed within one year, UCC contracts over a certain amount, and real property.

Here, the facts show that the parties came to an agreement over a boundary line in dispute after extensive surveys and negotiations, and South memorialized the agreement in writing. There was consideration because the parties agreed to certain territories, restricting the areas each would pursue in the course of their business. Both parties are merchants, and so the letter memorializing the agreement, signed by South, should have been objected to within the allowed time if North had any objection, and it otherwise was accepted. This overrides the defense of statute of frauds, although that defense does not appear to apply here, because this is clearly not a marriage or suretyship issue, it is not a service taking longer than one year (just sets boundaries of a territory), is not a goods/UCC contract, and while it sounds similar to a contract for real property it is not, because it is simply a sales territory issue. However, even if it was subject to SOF, again North should have rejected. This is a proper memorialization of the parties agreement and therefore is a valid contract.

2. The issue is whether South's claim of ownership would be a breach of the contract, if valid, and other claims North might pursue against South.

A breach occurs when a party performs at variance with the terms of the contract. Here, the verbal claim of ownership alone might be a breach because one of the terms is that "North agrees with the boundary as described in the attachment."

Another claim might exist against North for tortious interference with a business opportunity/relations. This occurs where a party intentionally interferes to harm a business transaction or steal customers using false or misleading statements, outside of the typical scope of a business competitor, and causes harm to the business. There was a pending sale between North and Bigger Beverage, and North certainly interfered with this agreement by calling and making a (allegedly) false claim to the assets. This potentially will cost South $2,000,000, or at least will delay the same while the matter is resolved. Therefore, there may be such a claim against North.

3. The issue is the impact of the alleged oral agreement, and whether it matters if it was made contemporaneously or sometime after the letter.

The parol evidence rule prevents the admissibility of extrinsic evidence, including oral statements, made before or contemporaneously to a written agreement where the extrinsic evidence contradicts the term of the agreement. Evidence that is not in conflict with the agreement, but is a condition precedent to the agreement or adds additional terms to the agreement, is not barred by the PER. Here, the agreement purports to correct an erroneous boundary line that was established by National, which was not a "loan" agreement. An oral agreement that purports this was just a loan would contradict this agreement. Therefore, the PER would bar this contradictory oral statement if it was made contemporaneously. However, because the PER does not apply to statements or agreements made after the written agreement, it will not be barred if made after the October letter.

Essay 4 — Sample Answer 1

1. Duty of Loyalty

Yes, Ben breached his duty of loyalty to the corporation and its shareholders by his actions at the Magic Board meeting at which the contract was approved. The issue here is whether this interested transaction was properly approved by a majority of disinterested and informed board members.

A director of a corporation has a duty of loyalty to the corporation and its shareholders, which includes a duty to avoid interested transactions. Interested transactions include transactions between the corporation and any entity in which the director holds a significant financial interest. A director may only avoid a violation of the duty of loyalty with an interested transaction if he discloses his interest in the transaction to the board and then a majority of the disinterested board members ratify the transaction.

Here, this is an interested transaction. Ben holds a significant financial stake in DJJ, and therefore, he has a duty to avoid transactions between Magic and DJJ. The moment it became apparent that such a transaction might occur, Ben should have notified the entire board at the meeting--not just the chairperson. Moreover, Ben should have refrained from voting and allowed the vote to pass only from disinterested board members. However here, he only notified the chairperson, he did not properly inform the board of his interest, and therefore he did not obtain a majority vote of informed and disinterested board members.

Thus, Ben breached his duty of loyalty.

2. Harm to Corporation or Shareholders

Yes, Ben's actions could have potentially harmed the corporation. The issue here is whether his acts actually could have caused the harm that resulted. Interested transactions are a violation of the fiduciary duty because there is a temptation to get the 'better' end of the deal over the corporation to which the duty is owed. That is why an interested transaction should be ratified by disinterested and informed directors to not be considered a violation of that duty.

Because this was an interested transaction and because the other board members were not properly informed of the interest, the contract was not properly scrutinized prior to entering into the contract. Had Ben informed the other directors of his interest, the other members might have been more inclined to scrutinize the transaction rather than relying on the highlights, and they may have wanted to wait for the VP of manufacturing to be available for further scrutiny. Therefore, Ben's failure to disclose his interest potentially could have caused the lack of scrutiny, thereby resulting in a bad deal for Magic, which harmed the corporation.

3. Business Judgment Rule

The Business Judgment Rule in Georgia states that a board of directors does not breach its fiduciary duties to the corporation if it makes a reasonable business decision after a reasonable investigation of the relevant facts, using their business judgment, even if the ultimate result is a loss to the corporation. The public policy reasoning for such a rule is to encourage corporate boards to take calculated risks in investment and growth, which would not occur if directors were liable for every potential loss to the company.

There is a statutory presumption that the board of directors has acted in a reasonable manner in complying with their fiduciary duties and therefore will be protected by the Business Judgment Rule. This presumption may be rebutted by evidence that the board of directors were either willfully ignorant in failing to investigate the facts or that they knowingly, recklessly, or intentionally violated a fiduciary duty (for example, by failing to disclose an interested transaction to the rest of the board prior to a vote).

4. BJR's Protection of Board

Here, the Business Judgment Rule will probably not protect the board of directors. The issue here is whether they were willfully ignorant in failing to investigate the facts.

Although a board member may properly rely on the representations made by another board member with superior knowledge,that does not excuse the board member of his duty to investigate the facts at all. Each board member has a duty to the corporation and may not merely rely on the representations of other board members unless those board members have superior expertise. A board member still has a duty to reasonably investigate the facts prior to determining whether to vote one way or the other on a given corporate act and may not rely on willful ignorance to protect himself.

Here, none of the board members even read the contract. Although they listened to the VP of Sales' summation of the contract, she is not a lawyer, and the facts do not indicate that she has any other kind of particular expertise that should make her contractual reading more reliable. It does not appear that any members bothered to ask further questions about the potential concerns in Brazil, or how those might affect their ability to supply this heightened demand. No members ask for a repetition of the transaction information that was given during the technical difficulties. All of these fact taken together indicate an extreme lack of care in investigating either the terms of the contract or the surrounding circumstances that might make performance difficult. Although there is a presumption that the board of directors has exercised its reasonable business judgment and reasonably investigated the facts, the facts in the present case rebut that presumption by demonstrating that there was no reasonable investigation at all here.

Therefore, the business judgment rule will probably not protect the board of directors.

Essay 4 — Sample Answer 2

1. Ben's actions at the Magic Board meeting breached his duty of loyalty to the corporation and its shareholders under Georgia law. Ben should have disclosed his interest in DJJ to all the directors at the meeting and abstained from voting as an interested director. By only disclosing his interest to the Chairperson and not to the other directors and officers at the meeting and by voting on a matter where he was considered an "interested" director, as a 40% shareholder of the company being contracted with, Ben violated his duty of loyalty.

2. Although Ben's actions constituted a breach of his duty of loyalty, they do not appear to have caused any harm to the corporation or its shareholders. Although, he should not have voted, the vote passed 6 to 2, so if he had properly abstained the contract still would have been approved. It is possible that had he disclosed his interest in DJJ it would have changed the other directors' opinion of the deal or caused them to scrutinize it more closely, but that is not at all clear and does not seem likely from the facts. In fact, Ben seemed to be the director who asked the most questions about the deal, exercising more diligence than the other directors and did not seem to try to push the deal through or conceal any information, other than his own interest.

3. Under Georgia law the Business Judgement Rule protects directors from liability for decisions that cause losses for a corporation. The policy reasons for the BJR stem from the desire for directors to take risks and make business decisions without fear of liability. Risky decisions that sometimes fail are part of doing business, and public policy favors this kind of risk taking over excessively cautious behavior that will limit risk but subsequently limit reward. Therefore, the BJR provides a statutory presumption that directors' decisions are an exercise of their sound business judgment and that presumption may only be rebutted by a showing of gross negligence or violation of the duty of loyalty.

4. Ignoring any potential breach of Ben's duty of loyalty, the BJR will likely protect the directors here because, although they arguably did not exercise reasonable care, their conduct did not rise to the level of gross negligence.

Here, the board reviewed the contract without getting any legal advice, entered into a manufacturing contract without any input from the VP of Operations, failed to remedy a technical glitch during a Q&A with the VP of sales that prevented some directors from hearing the questions presented and the VP's answers, and failed to follow up on the mention of increasing flooding conditions in Brazil by the CEO.

Nonetheless, none of this conduct rises to the level of gross negligence. The directors did hold a meeting attended by all directors and properly called and held in accordance with Georgia law, where they discussed the contract, including an oral summary of the salient points, Q&A opportunities, and a presentation from the CEO. This meeting likely made the decision to enter into the contract a valid exercise of their sound business judgment, and the directors will not be held liable for the company's losses. There was nothing inherently wrong with the contract itself, and the fact that the directors did not follow up on the mention of increased flooding is not gross

negligence. Increasing flooding did not necessarily mean that there was going to be such extreme flooding as that which occurred, and it was not gross negligence to take the risk of entering the contract without further diligence. The BJR will likely protect the directors from liability.

Essay 4 — Sample Answer 3

1. Ben was a director at Magic and thus owed the company a duty of loyalty. A director breaches this duty by competing against the business, or engaging in business practices that are self serving to their own individual business interests. Ben had a duty to disclose that he is a major shareholder of DJJ and owning 40% of the stock because of the conflict of interest. Ben stood to gain personally because of the deal between Magic and DJJ, when a director stands to gain personally like that they have a duty to disclose the information to the other decision makers. Although, Ben told the Chairperson the entire board was entitled to know this information prior to voting, moreover Ben should have been excluded from voting because of the obvious conflict of interest.
2. By not disclosing his personal conflict Ben did breach a duty to the Corporation but his failure to disclose did not cause any potential harm to the corporation because the resolution to approve the contract would have passed without his vote and Ben did not attempt to sway the other board members to approve the deal. There is no causal link between Ben's failure to disclose and any harm that Magic now faces.
3. The business judgment rule is a guiding principal that gives board members the rebuttable presumption that they act based on their prudent business judgment and with the corporation's best interest in mind when making business decisions. Thus the members used their best judgment when making a business decision regarding the corporation. Shareholders would need to show that board members violated this rule to pierce the corporate shield. This is a high bar to clear because it frees courts from second guessing any and all decisions board members make in regard to a corporation and promotes judicial efficiency. Moreover, courts are unwilling to "play the result" in these situations and determine that because a corporation lost money or experienced some harm the board members failed to act in a prudent manner. The presumption that board members acted prudently and fairly is rebutted by showing that the board members did not complete due diligence when determining to make a business decision and acted with a disregard for the corporation. Stockholders must show that the board members were more than negligent when they decided to enter into this deal, or that they acted with bad faith or in violation of a duty of loyalty to the corporation. A failure to investigate is not enough to show that a board violated the business judgment rule.
4. The BJR is likely to protect Magic's board of directors. Magic's board acted in similarly to the board of many other companies. Although stockholders may point to several flaws in the board meeting such as (1) the fact that no director read the contract, (2) the technical difficulties which caused some of the directors to hear the Sales VP's statements, (3) the absence of one of the directors, or (4) the fact that no director raised the issue of continued flooding in Brazil these are not generally enough to rebut the presumption afforded by the BJR. None of the directors read the contract, but they were informed as to the salient points, the technical difficulties only affected a small portion of the board meeting were one VP was answering questions, the absence of one director did not cause the board to not have a quorum of votes, and the fact that the board members failed to ask further questions or seek assurances regarding the flooding in Brazil and its affects on sugar production is not

determinative that they violated the BJR. The board and its directors acted in good faith and with prudent business judgment. The fact that the company experienced harm after the deal was agreed to does not mean they they violated the BJR.

MPT-1 — Sample Answer 1

Memorandum

To: Partner

From: Associate

Date: 2-22-22

Re: Denise Painter Divorce

This memo will analyze whether the court will be more likely to award joint legal custody of Emma to Robert and Denise or sole legal custody to just Denise. Additionally, this memo will address the assets and debts of Denise and Robert and how those assets and debts will be categorized (marital or separate), distributed and how any appreciation and enhancement of assets will be treated.

I. Custody of Emma

The court will award joint legal custody of Emma to Robert and Denise. Section 420 of the Franklin Family Code (FFC) defines legal custody as "the right to make decisions about a child's medical care, education, religion, and other important issues regarding the child. In determining whether a party should be granted legal custody, the court will consider the following factors in FCC §421: (1) the agreement or lack of agreement of the parents on joint legal custody, (2) the past and present abilities of the parents to cooperate and to make decisions jointly, (3) the ability of the parents to encourage the sharing of love, affection, and contact between the child and other parent, and (4) the mental and physical health of all individuals involved. Under FCC § 422, there is a rebuttable presumption of joint legal custody. Joint legal custody is defined under FCC §420(c) as "means an order of the court awarding legal custody of a child to two parents. Joint custody does not imply an equal division of the child's time between the parents.

(1) the agreement or lack of agreement of the parents on joint legal custody

The courts will consider whether or not the parents agree on custody. Here, the Denise wants sole custody and Robert wants joint legal custody. There is a rebuttable presumption in favor of joint custody, so in order to get sole custody, Denise will have to show evidence to rebut this presumption.

(2) the past and present abilities of the parents to cooperate and to make decisions jointly

In *Sanchez v. Sanchez*, the court established that joint legal custody requires that the parents be willing and able to to communicate and cooperate with each other and reach agreement on issues regarding the child's needs. The court will consider past and present abilities of the parents to cooperate and make decisions jointly. This does not require the parents have a completely

amicable relationship. In *Sanchez,* the mother remained hostile towards the father, refuses to communicate directly with the father, and the experts concluded that the mother was unable to communicate on a rational level because of the mothers anger towards the father. The court also determined that where the is no substantial evidence too fin that both parents are able to communicate and cooperate in promoting the child's best interests to work together, an order for joint legal custody is not appropriate.

Here, past abilities of parents cooperating are present. Denise stated that they had a positive and loving relationship and both very involved with Emma on a day-to-day basis. They were able to jointly make decisions about her child care, schooling and extra curricular activities. Presently, their communication is not the most effective as they cannot agree on a means of communication. Denise prefers phone calls and Robert prefers texting. Because this Denise and Roberts communication issues are due to a difference in communication methods and lack a showing of hostility, total refusal to communication and anger preventing effective communication as in *Sanchez*, the court will not find the parents are unable to communicate and cooperate to be able to have joint legal custody of Emma.

(3) the ability of the parents to encourage the sharing of love, affection, and contact between the child and other parent, and

Here, Denise has only let the child see her father twice in ten months, however she has remained open to communicating about custody, permits Emma and Robert to text. Robert admitted some lack of contact with Emma is because he needing to work on himself, and was not solely due to Denise.

(4) the mental and physical health of all individuals involved.

In Williams v. Williams, an untreated drug addiction was a legitimate factor in rebutting the presumption of joint legal custody. Here, Robert has a drinking problem, however it is not untreated as in Williams. Robert is in treatment for his alcoholism and is 4 months sober. The courts will likely consider this a positive step in the right direction and not against joint legal custody.

Considering all these factors, the courts will likely award joint legal custody.

II. Asset and Debt Distribution

Franklin in a community property state which the Franklin Community Property Act (FCPA) under §430(b) defines as "property acquired by either spouse or both spouses during the marriage that is not separate property. Under FCPA §430(a) Separate property is (1) Property acquired by either spouse before marriage or after entry of a decree of divorce, (2) property. acquired by either spouse by gift, bequest, devise or descent, and (3) property designated as separate property by a written agreement between the spouses. The court must determined what constitute community property and community debt and what constitutes their separate

property and separate debt. (Barkley v. Barkley). The FCPA defines separate debt and community debt under §431(a) and (b) respectively. Separate debt is a debt incurred by a spouse before marriage or after entry of a divorce decree. Community debt means debt incurred by either or both spouses during the marriage. Under FCPA §432 property acquired and debt incurred during the marriage by either spouse or both spouses is presumed to be community property or debt.

Before the marriage, Denise acquired the house at 212 Lake Street from her Uncle Sam Golden. The house was paid off. Under §430(a)(2), the house is separate property because it was acquired by a gift. The value of the house when gifted to Denise was $215,000 and the current value is $245,000, a difference of $30,000 in increased value during the marriage. However, Robert claims that he wants to ensure he gets his fair share of the house in relationship to the work he put in on the garage and deck. In Barkley v. Barkley, the court determined when the husband made improvements to the wife's house, the additional value of the house was community property subject to equal distribution. Alternatively, the court in *Chicago v. Chicago,* determined that community property includes all income and appreciation on separate property due to the labor, monetary or in kind contribution of either spouse during the marriage. In *Chicago,* passive income was described as income acquired other than as a result oof the labor, monetary or in-kind contribution. As in *Barkley,* where the husband made improvements that increased the value of a home that was the wife's separate property but could claim the increased value due to the improvements as community party, here the Robert can claim the same. As in *Barkley,* Robert spent money made during the marriage to make improvements on the house that arguably increased in the value. This value was not increased by merely passive incomes, such as market conditions. Instead, the value was increased due to money and labor. Therefore, the $30,000 increase in value is community property subject to equal division.

The debt acquired during the marriage is $10,000 that will be split equally pursuant to FCPA §432, and 433, which states: Separate debt is a debt incurred by a spouse before marriage or after entry of a divorce decree. Community debt means debt incurred by either or both spouses during the marriage. Under FCPA §432 property acquired and debt incurred during the marriage by either spouse or both spouses is presumed to be community property or debt. 433 determines that the debt is split equally between the husband and wife. Denise will take $5,000 and Robert will take $5,000 of the debt.

Robert will be able to keep the motorcycle as separate property since it was a gift from his father.

The remaining assets will be split as requested and will likely be approved by the court because it is equal. Robert requested half of the improvements to the house ($15,000) to both. Denise can keep the bedroom set, dining set, 2014 ford explorer, deck, detached garage leaving her with around $18,000. Robert will keep the 65 inch TV, couch and loveseat, 2017 pick up truck that amounts to the same $18,000.

MPT-1 — Sample Answer 2

MEMORANDUM

To: Harold Huss

From: Examinee

Date: February 22, 2022

Re: Denise Painter divorce

1. Joint Legal Custody is likely to be granted to both Denise and Robert.

Legal Custody as defined by 420 of the Franklin Family Code (FCC) is "the right to make decisions about a child's medical care, education, religion, and other important issues regarding the child." Legal custody can be sole or joint custody, but there is a rebuttable presumption that joint legal custody is in the best interest of the child. In determining custody rights, the court will consider the the factors outlined in 421 of the FCC. The rebuttable presumption of joint custody can be rebutted by findings of fact supported by "substantial evidence" as stated in *Sanchez v. Sanchez* (2010). Further, joint legal custody does not require an equal division of time.

There are four factors outlined in 421 of the FCC that can weigh in favor of, or against joint custody. First, the court shall consider the agreement or lack of agreement between the parties; second, the past and present abilities of the parties to cooperate in making decisions jointly; third, the ability of the parents to encourage the sharing of love, affection, and contact with the child; and fourth, the mental and physical health of all parties involved. In this situation, Mr. and Ms. Painter do not agree on sharing joint custody of Emma, so this factor will not be helpful in awarding custody. Second, the cooperation of the parents. The court in *Sanchez* stated the the parents do not have to have an amicable relationship, but it cannot be hostile, and there must be a "record of mature conduct... evidencing an ability to communicate with each other concerning the best interest of the child." The court in *Sanchez* determined the parents could not effectively communicate because of hostility, anger and a refusal to communicate. Here, Denise and Robert had a somewhat hostile ending to the marriage because of Robert alcoholism. The parents have not had extensive communications since the separation regarding Emma, but the communications they have had have been amicable. Denise allowed Robert to see Emma twice in the past few months, and is accepting of Robert attending her soccer matches. One factor weighing against their ability to communicate is they have a record of not responding to the other because they disagree on the medium, text versus phone calls. This makes it difficult to show a record of communication as required by *Sanchez.* Although they disagree on the method of communication, it is likely the court will not consider this enough to overcome the rebuttable presumption of joint custody because the parents have still been able to arrange visits, and it does not appear there is any hostility, anger or absolute refusal to communicate as was the case in *Sanchez.* Further, the court will look at Robert's expression that he wanted to get clean before

he became involved in Emma's life, and that he wants to be involved and make things work in the future. His alcoholism and subsequently getting clean is a justifiable reason for not being as involved in Emma's life as he wanted to be. The court will likely consider his ability and desire to be involved in the future, not just his past, infrequent visits.

The third factor is the ability to encourage the sharing of love, affection, and contact. Denise has allowed Robert to see Emma on a few occasions and allows him to text her, but she has not responded to his texts about seeing her, although she has returned his calls. This factor may be against sole custody for Denise because she has not encouraged a relationship between Emma and Robert, she has merely allowed it. The court may want to grant joint custody to ensure Denise allows and equal opportunity for Robert to develop and maintain a relationship with Emma. The last factor is the mental and physical health of the individuals involved. In *Williams v. Williams* (2005), the court held that an untreated drug addiction was a sufficient reason to rebut the presumption of joint custody. In order to rebut the resumption, there must be "a nexus between the parent's condition and the parent's ability to make decisions for the child." (*Ruben v. Ruben* (2004)). This factor will weigh against Robert because of his alcoholism. His alcoholism has inhibited his ability to keep a job, take care of Emma (as evidenced by failing to pick her up from school), and maintain a relationship with Denise. As distinguished from *Williams* where the drug addiction was untreated, Robert has undergone extensive rehabilitation including six months in a treatment plan and he is now four months sober. This factor will certainly weigh against Robert, but the record of sobriety coupled with his expression to be involved in Emma's life (including sports, spirituality, and music lessons) will be unlikely to overcome the rebuttable presumption of joint custody being in the best interest of the child.

2. Division of Marital and Separate Assets

Below is a list of assets that is categorized as community property or debt, or as separate property or debt. Denise and Robert were married in 2013. Community property as defined in 430 of Franklin Community Property Act (FCPA) is property acquired by either or both spouses during a marriage that is not separate property. Separate property is property acquired before marriage, by gift or bequest, or by written agreement. Community property and debt will be distributed equally, but the court has discretion on awarding specific property and debt.

1. Bedroom sets: This is community property because it was acquired after their marriage. Any increase in value or decrease will be shared by the spouses equally.

2. 65 - Inch TV: This is community property because it was acquired after their marriage.

3. Couch and Loveseat: This is community property because it was acquired after their marriage.

4. Dining Set: This is community property because it was acquired after their marriage.

5. 2017 Pickup: This is community property because it was acquired after their marriage.

6. Kawasaki Motorcycle: This is Robert's separate property. This was acquired during their marriage, but it was a gift to Robert from his Father, so it would be treated as separate property consistent with FCPA 430. Any appreciation, maintenance and expense will be attributed to Robert as well.

7. Deck: This is community property because it was acquired/built after their marriage. Although this was an addition to the house as separate property (see below), the addition was based on the contribution of both spouses' savings, and so it will be treated as community property. This is similar to the additions made in *Barkley v. Barkley* (2006), where the husband made various improvements to the wife's house, so the court considered these improvements community property. Here, the court can award credit to Robert in the amount of 50% of all the improvements to the house.

8. Detached Garage: This is community property because it was acquired/built after their marriage. Although this was an addition to the house as separate property (see below), the addition was based on the contribution of both spouses' savings, and so it will be treated as community property consistent with the above analysis.

9: House at 212 Lake St: This is Denise's separate property. First, it was acquired before her and Robert's marriage, and even if it was acquired during their marriage, it was a gift from her uncle so it would be treated as separate property. The house was valued at $215k when Denise acquired it, and now has a value of $245k. The appreciation in value will be separate property if it is considered "passive income" and is not due to the "labor, monetary, or in-kind contribution of either spouse during the marriage." (*Barkely)*. In *Barkley,* a husbands SIP plan was acquired before marriage and appreciated during marriage due to contributions from the husband, and market factors. The court attributed the contributions from the husband to community property, and the market appreciation to separate property. Similarly, the court here will attribute the increase in the value of the house based on market factors alone to Denise. There is a $30k total increase, and $10k of this will be community property (see above) and the remaining $20k will be separate for Denise. Denise may be able to introduce evidence that a calculation based on FMV of the property before the additions (deck and garage) vs. the FMV of the property after the addition could be used which may be more beneficial to Denise, but it is unclear if the court will allow this calculation to be used based on *Barkely.*

10. Best Buy CC debt: This is community debt because it was acquired after their marriage.

11.. Carmax Loan: This is community debt because it was acquired after their marriage, and it related to community property because the truck was acquired during their marriage.

12. Target CC: This is community debt because it was acquired after their marriage.

MPT-1 — Sample Answer 3

To: Harold Huss

From: Examinee

Date: February 22, 2022

Re: Denise Painter divorce Memo

1. The court will likely award joint legal custody of Emma to Robert and Denise rather than sole legal custody to Denise.

In Franklin, legal custody is defined as the right to make decisions about a child's medical care, education, religion and other important issues regarding the child. The court can either decide between sole custody to one parent or joint legal custody to two parents. To determine between is best, the court looks at. a number of factors in accordance to the best interests if the child. These factors include: (i) agreeability between the parents on joint custody; (ii) past and present abilities of the parents to cooperate and make joint decisions; (iii) the ability of the parents to encourage the sharing of love, affection, and contact between the child and the other parent; and (iv) the mental and physical health of all individuals involved. *Franklin Family Code Section 420, 421*. There is also a rebuttable presumption that joint legal custody is in the best interests of a child.

A. Robert and Denise do not agree on joint custody, but the rebuttable presumption of joint legal custody will likely be enough to overcome this factor.

The rebuttable presumption of joint legal custody can be rebutted by certain evidence such as a mental condition affecting a parent's ability to participate in decision making. In order to rebut this, there must be a nexus between the parent's condition and the parent's ability to make decisions for the child. *Ruben*. Further, untreated drug addictions also held to be a legitimate factor in rebutting the presumption of joint legal custody. *Williams*.

Here, In Denise's consultation, she stated that she is seeking sole legal and physical custody of their daughter, Emma. In Robert's consultation, he wants to request join legal custody. Since the presumption in Franklin is towards joint legal custody rather than sole, it will likely be controlling absent a rebuttal from the petitioner seeking sole legal custody and that it is in the best interest of a child. Though Denise can argue that Robert is heavily reliant on alcohol, Robert has been voluntarily participating in an outpatient rehabilitation program for the last six months, where he gets tested regularly. He states he has not consumed any alcohol in four months. This can be distinguished from Williams because currently, the alcohol (drug) is not a nexus between Robert's condition and his ability to make decisions for Emma. He states that he has even been keeping away to clean up his act to come back. He clearly has the right headspace to help make decisions for Emma and the presumption of joint legal custody would be in favor of it. However, Denise's

best argument would be to attack the credibility of the fact he has only been in rehab for a few months and may not complete it.

B. Though communication could improve, the past and present abilities of the parents to cooperate and make joint decisions likely favor joint custody over sole custody.

In *Sanchez*, the court stated that this factor requires the parents be "wiling and able to communicate and cooperate with each other and reach agreement on issues regarding the child's needs." Further, this does not require the parents to be completely amicable, they simply must be cooperative enough to make important decisions regarding their child. However, joint legal custody should not be rewarded unless there is a record of "mature conduct" on part of communications concerning the best interests of the future.

Here, Denise stated that both her and Robert had a loving relationship in the seven years prior where they jointly made decisions about Emma's childcare, schooling, extracurriculars, and medical care. However, due to Robert's drinking and his DUI it significantly affected Robert's ability to make joint decisions for Emma. Though Robert has been in rehabilitation for the past six months, there has been very little communication on his behalf. Denise stated she feels more comfortable talking on the phone and called 12 times to no avail in the past four months. Robert stated he was frustrated because he prefers communication over text and Denise will not reply to them. They also do not talk much at Emma's soccer games.

While this element seems to be lacking, it can be distinguished from the Sanchez case where the court found that the mother was hostile towards the father and would only communicate with him by calling his parents to relay messages. Also, the court found the mother's anger towards father skewed their communications and that they were so "acriminious" that the judge made the parties exchange their child at a public library. Here, the parties are not completely amicable, but there is direct communication with each other. There is also no evidence that shows either of the parents have so much animosity towards each other that they would act irrationally when making decisions for Emma, or that they would need to meet in a public space for drop off. Mere frustration by either parties is likely not enough to rebut this factor, so sole custody would be favored here as well.

C. The court will likely the ability of the parents to encourage the sharing of love, affection, and contact between the child and the other parent is met

Denise stated that she is highly involved in Emma's life and they have a close relationship. They do homework together and watch movies. Robert, admittedly, has not had very much contact with Emma, but claims its because he wants to get clean before spending more time with her. However, he has attended every one of Emma's soccer games and texts Emma from time to time, which Denise is okay with. He does not object to Emma living with Denise and just wants to have regular visits with Emma. It is clear from these facts that each parent, although not completely amicable, care about Emma and impliedly encourage Emma to have a relationship with both parents. Robert and Denise both agree when Robert wants to visit and they even have casual

conversations at the soccer games. Further, this element is likely met to establish joint legal custody.

D. The mental and physical health of the parties involved may be a detrimental factor in favoring Joint Custody on behalf of Robert

Both Denise and Emma have demonstrated healthy physical and mental well-beings, but Robert has a recent history of alcoholism and has only been in rehab for six months and is has only been clean for four months. However, as stated above, this is distinguished form the Williams case because the Williams case presented an untreated drug addiction and that there was nexus between this condition and the parent's ability to make decisions for the child. In our case, Robert voluntarily admitted himself and is working towards treatment. Depending on how much "treatment" is deemed necessary by the court, this may be an inhibiting factor for Robert.

In sum, the court with its rebuttable presumption towards joint legal custody over sole custody, it is likely the court would favor joint legal custody of Emma between Robert and Denise rather than sole custody by Denise based on the best interests of Emma.

2. In Franklin Separate Property is property acquired by either spouse before marriage or after divorce, by gift, or designated to be separate. Community property is property acquired by either spouse or both spouses during marriage that is not separate property. The notions for debt are specified the same way.

Under code section 432, property acquired and debt acquired during marriage by either spouse or both spouses is presumed to be community property or debt. The distribution shall distribute community property equally between the spouses and the court may exercise discretion in awarding specific property and debt to each spouse to reach an equal distribution.

Assets:

A. Bedroom set, Samsung TV, Leather couch and loveseat, dining set

Each of these would likely be considered community property because they were likely acquired during the marriage. They are each valued at $500, which would add up to $2000 and these proceeds should be split equally between Denise and Robert.

B. Toyota pickup, Kawaski motorcycle, Ford Explorer

While both were acquired during the marriage, only the motorcycle would be considered separately since it is a "gift" to Robert. Therefore, absent any more information about the pickup it is likely community property, but the motorcycle is not. For the same reason, the Ford Explorer is likely community property and should be distributed equally along with the pickup.

C. Deck and Garage

Denise and Robert both paid $5000 for the deck in 2016 and the detached garage. These were made with the couples savings, making them both community property. While Robert can make the argument that he "put in a lot of work" into both of these, the court is not likely to make a special reward because it would qualify as community property-- they both paid the same amount and were married when adding to the home. He could use the Barkley case to argue these improvements are ones that she keeps and adds value to the house and ask for the difference between the fair market value and market value, but there is no evidence as to the value he added. Howver, since it's equal to 50 percent or more, the court may reward him with half.

D. House at 212 Lake Street

The court would likely state this is Denise's separate property because it was gifted to her mortgage free before her and Robert were married. However, Robert could argue that the value in 2013 at $215,000 and its current value of $245,000 would yield him some of the profit. Similar to above, though he does not state how much value he actually added, the court could make a special finding and crediting him with some of the value he provided. However, absence of any evidence to determine whether the improvements increased the fair market value of the house, the court may reward credit to Robert for paying for improvements equal to 50% of the total cost. He could argue his 50% profit towards the Deck and Garage go towards adding value of the house and be credited with half.

E. Debts

Each of these debts were acquired during the marriage, and should be equally distributed. Passive income should be taken into consideration.

MPT-2 — Sample Answer 1

ARGUMENT AND CITATIONS OF AUTHORITY

I. Joinder of all three counts in one indictment was improper because each count is dissimilar to the other, nor does either of the three share any commonality either in the type of charge or the nature of the charge.

Pursuant to Rule 8(a) of the FRCP, an indictment or information may charge a defendant in separate counts with two or more offenses if the offenses charged - whether felonies or misdemeanors or both - are *the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan*.

FRCP Rule 8(a) is very clear in its language in defining when it is acceptable to charge a defendant in separate counts with two or more offenses. First and foremost, Defendant was indicted three times for offenses that occurred on two separate occasions. Rule 8(a) allows for such joinder of counts, but only in certain instances. The first count stems from an interaction Defendant inadvertently experienced while at a friend's home. An informant for the police presented to the door of Defendant's brother's home to purchase cocaine and the informant provided the money to Defendant after retaining powder cocaine from her brother. This portion of the indictment charges Defendant with "knowingly [selling] 10 grams of a substance containing cocaine, a controlled substance." Now, the second count arose six months later when she was pulled over for swerving out of her lane. Defendant was subsequently arrested for DUI, and the officer searched, and found, marijuana, a small scale, and empty plastic baggies in the backseat of the car and a handgun in the trunk. These two counts of the indictment not only occurred on two separate occasions, but also involved different types of drugs, as well as very different circumstances. The Prosecution likely joined these claims together under the "same or similar character" portion of Rule 8(a). However, the court in State v. Saylers accurately stated "[s]imply because the two charges have "robbery" in their titles is not a sufficient basis on which to join the charges in a single indictment." State v. Saylers. Similarly, just because both charges pertain to drugs does not mean that they are "the same or similar character." The court in Saylers continues on to differentiate between the two robbery charges and how they involved different circumstances dissimilar to one another. Likewise, Defendant's drug charges are dissimilar. One charge pertains to cocaine, whereas the other charge involves marijuana. The remainder of Rule 8(a) is irrelevant on the grounds that these incidents did not occur in the same act or transaction, nor were they connected with or constitute parts of a common scheme or plan. The incidents involved different substances, different circumstances (one being in a home and the other being in a vehicle), and in no way could these charges be seen as a parts of a common scheme or plan given the differences between the two situations. As to the firearms charge, this charge is in no way similar or part of the same act or transaction, nor is it connected with or constitutes parts of a common scheme or plan. In every possible way, the firearms charge is of a different kind and nature to that of the drug charges, and therefore should have never been included in the same indictment.

Therefore, this Court should find that the joinder of all three counts in one indictment was improper because the different counts involve different circumstances and facts dissimilar to one another.

II. Based on the decision in State v. Ritter, joinder of all counts in the indictment would provide sufficient prejudicial effect on Defendant because conviction on the gun possession charge would automatically deem Defendant guilty on intent to sell marijuana.

Under FRCP Rule 14, if joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever defendants' trials, or provide any other relief that justice requires.

Consolidation of all three charges into one indictment and, subsequently, one trial, is improper because doing so would prejudice the Defendant. In the present matter, it is undoubtedly clear that joinder of all three counts, or charges, into one trial would prejudice the Defendant. In State v. Ritter, the court lays out three scenarios and their sufficiency to justify severance. In doing so, the court states "prejudice may occur when evidence that the defendant is guilty of one offense is used to convict him of another offense even though the evidence would have been inadmissible at a separate trial." State v. Ritter. The prosecution intends to introduce Defendant's prior conviction for assault with intent to commit murder. In doing so, the prosecution will argue that the presence of the firearm in the car, correlated to count two of the indictment, provides the intent to sell the marijuana found in the car. Therefore, if Defendant was to be found guilty of being a felon in possession of a firearm, she would by virtue be found guilty of intent to sell marijuana as well because the gun would have been considered in her possession. This is the exact type of situation the court in Ritter discusses. It would be unduly prejudicial to allow the conviction of one crime to automatically result in the conviction on a separate crime. Rather, Defendant should be able to present evidence in her defense on both charges, separate from one another, without the possibility of prejudice.

Therefore, the prejudicial effect the joinder of all claims would have on Defendant would result in simultaneous conviction of two crimes based on a finding of guilty on one crime. Such a circumstance entails extreme prejudicial upon Defendant.

III. Based on the decision in State v. Ritter, the court should separate the counts into three separate trials because unfair prejudice would occur in preventing the Defendant from being able to defend herself through testifying.

Under FRCP Rule 14, if joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever defendants' trials, or provide any other relief that justice requires.

The court in State v. Ritter stated, "prejudice may result if the defendant wishes to testify in his own defense on one charge but not on another." the court further states "[s]everance of counts is warranted when a defendant has both important testimony to give concerning one count and

a strong need to refrain from testifying on [another count]." In the present case, Defendant desires to testify as it relates to the two drug charges listed in the indictment. However, she would be unable to do so if the counts remain joined together. Defendant's prior assault conviction is undoubtedly admissible as it relates to the gun charge because it provides the basis for convicting her as a felon in possession of a firearm. However, this also prevents Defendant from testifying because, with the joinder of all counts, the prosecution would be able to admit evidence of the prior conviction as substantive evidence relating to the felon in possession of a firearm charge. However, in the event the counts are separated, evidence of the prior conviction may be admissible to impeach Defendant's credibility, but it would not be admitted as substantive evidence. Given this, the need for separate trials is apparent. Failure to separate the counts in different trials disables Defendant from presenting her constitutionally protected right to assert her defense to the charges brought. Moreover, to separate the counts into different trials would follow the directive handed down by State v. Riitter.

Therefore, the counts should be separated into different trials because joinder of the claims in one trial would inhibit Defendant's ability to testify in her own defense because evidence of her prior conviction could be admitted as substantive evidence if the trials are combined.

In conclusion, joinder of all three counts would prejudice the Defendant in more ways than one. In conjunction with prejudice, the joinder of all counts is improper pursuant to FRCP Rule 8(a). Therefore, this court should separate the counts into different trials to permit the Defendant to present her defense without undue prejudice.

MPT-2 — Sample Answer 2

Motion to Sever

Statement of the Case:

Statement of Facts:

ARGUMENT

According to Franklin Rule of Criminal Procedure (FRCP), if the joinder of offenses or defendants in an indictment, an information, or consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants, trials, or provide any other relief that justice so requires. *FRCP 14a.* Here, the joinder of all three trials should be severed because, if allowed, the joinder will be unfairly prejudicial to Ms. Sylvia Ford.

When determining severance, there are three kinds of prejudice if separate offenses, particularly those that are merely of similar character and do not arise out of a single transaction, are joined. They are discussed below.

I. Sylvia will be prejudiced by the joinder of the offenses because the jury will consider her a bad person of all offenses because she is charged with more than one.

The defendant may be prejudiced because the jury could consider the defendant a bad person and find him guilty of all offenses simply because he is charged with more than one offense, but this is rarely a sufficient basis to justify severance. *State v. Ritter, Franklin Court of Appeal (2005).* Here, Sylvia has been charged with multiple offenses, two drug offenses and one weapons charge. The jury will consider her a bad person based on her being charged with three offenses, and, therefore, she will be prejudiced by joinder of offenses.

II. Severance should occur because evidence that Sylvia is guilty of one offense may be used to convict her of another offense even though the evidence would have been inadmissible in separate trials.

If two or more offenses are of the same or similar character, are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan, they may be charged in the same indictment. *FRCP 8a*; *State v. Saylers, Franklin Court of Appeal (2013)*. The burden is on the defendant to establish severance of joinder and the court should generally limit itself to those facts contained in the indictment, but if the indictment does not provide sufficient facts to clarify the connection between the counts, the trial court may look to other documentary evidence in the case such as affidavits in support of arrests or affidavits in support of search warrants. *Id.* In *Saylers*, the court stated that just because two charges had "robbery" in their titles, the charges weren't entitled to joinder alone. *Id.* Because they were different types of robberies and they were two years apart, and there was no other evidence, including affidavits,

used to support a find that the acts were of the same character, transaction, or scheme, the charges didn't warrant joinder. *Id.* Here, both charges are for drugs, but they contain the same word like the robbery in Saylers, even though the charges concern drugs. Also, there are affidavits to support the charges, unlike in *Saylers.*

If proof of the defendant's commission of one of the illegal acts would not otherwise have been admissible in the trial for the other offense, the defendant will be prejudiced, and severance should be granted. State v. Ritter, Franklin Court of Appeal (2005). The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice or misleading the jury. FRCP Rule 403. In *Ritter*, the court found that the evidence of each heroin sale would have been permissible in a trial involving the other transaction because they go to show a common scheme or plan to sell heroin in the same neighborhood due to Ritter selling the heroin in the same area, from the same vehicle, in the same period of time. Also, the court found that carrying a weapon is highly correlated with the intent to sell drugs, similar to possession of baggies or scales, therefore, gun possession is relevant to intent and the probative value is not substantially outweighed by unfair prejudice, especially when there is a limiting instruction.Here, Sylvia has been charged with two drug charges. The first charge stems from the alleged sale of 10 grams of cocaine. While at her brother's apartment she answered the door, her brother gave a man cocaine and the man handed the money to Sylvia, which he immediately gave to her brother, and Sylvia then left. The second drug charged stems from a DUI arrest while Sylvia was driving her boyfriend's car, where after being arrested, the arresting officer found marijuana, a small scale, and empty baggies in the backseat. During that arrest, the officer found a handgun in the trunk. Because she was a felon, she was charged with being a felon in possession of firearm, but the DUI charge was let go. Sylvia's case is different from Ritter because the drug charges here are from two different substances, marijuana and cocaine, while in Ritter the drug charges both stemmed from marijuana. Also here, she was pulled over driving under the influence, while the other charged occurred. In *Ritter,* the evidence would have been admissible in each trial because they could use the evidence to show common plan, but here there is no common scheme or plan. The drugs are different types, she is being alleged to have one while on the road and one in a house, and there's evidence to show that the drugs belong to different people, her brother and her boyfriend. The evidence of the marijuana wouldn't be admissible at the trial for the cocaine and vice versa. Also, like in *Saylers,* the court can consider the time between offenses. Here, the assault conviction was from six years ago, even longer than the two years in Saylers. Therefore, if the trials are all together, Sylvia will be unfairly prejudiced.

III. Sylvia wouldn't testify in the trials for the separate drug charges because her prior assault conviction could be used to impeach so severance should be granted because forcing Sylvia to testify in one single trial unfairly prejudices her by allowing the prosecution to impeach her when she otherwise wouldn't be susceptible to this impeachment in separate trials.

Prejudice may result if the defendant wishes to testify in his own defense on one charge but not the other. *Ritter.* Additionally*, s*everance of counts is warranted when a defendant has made a convincing showing that he has both important testimony to give concerning one count and a strong need to refrain from testifying on the other. In State v. Pierce, Franklin Court of Appeal

(2011), court found severance was appropriate because if it weren't for joinder of the offenses in one indictment, the jury would have no reason to know about separate protective orders. The court stated that because the second order wasn't relevant to any issue in the trial for violation of the first order, the introduction of the second order prejudiced the defendant, reasoning that when a jury learns of a separate offense committed by a defendant, jury can be tempted to infer the worst. In *Pierce,* the jury would have no reason to know about the second order if it weren't for the joined trials. Id. Here, Sylvia has been convicted for assault with intent to commit murder previously. If she testifies in the trials for the drug charges, the prosecution could use her prior assault conviction to impeach her because it is a felony and admissible. So would be advantageous for her not testify for those charges to keep her prior convictions from damaging her credibility for the jury.

We believe Severance should be granted because joinder is unfairly prejudicial to Sylvia.

MPT-2 — Sample Answer 3

STATE OF FRANKLIN
DISTRICT COURT OF HAMILTON COUNTY

STATE OF FRANKLIN

Plaintiff,

v. **Case No. 2021 CF 336**

SYLVIA RUTH FORD

Defendant.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO SEVER OFFENSES

Statement of the Case: (Omitted)

Statement of Facts: (Omitted)

Argument:

Defendant Sylvia Ford ("Defendant") moves this court to sever these three offenses and hold three separate trials because joinder of these convictions would unfairly prejudice her if joined in a single trial. Under the Franklin Rules of Criminal Procedure (FRCP), Rule 8 states that joinder of offenses is permissible if the offenses are (1) of the same or similar character; (2) are based on the same act or transaction; or (3) are connected with or constitute parts of a common scheme or plan. Relief from joinder may be granted under FRCP Rule 14 if joinder appears to prejudice a defendant or the government. For the following reasons, Defendant's claims should be tried in three separate and distinct trials.

<u>If Defendant is charged with all three acts in one trial, she will be unfairly prejudiced because admission of these acts will constitute impermissible character evidence that would not otherwise be admissible in separate trials under the Federal Rules of Evidence.</u>

Under Franklin Rules of Evidence Rule 403, the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of...unfair prejudice. Additionally, Franklin Rule of Evidence 404(b) prevents evidence of other crimes, wrongs, or acts from being admitted as impermissible character evidence to prove that on a particular occasion the person acted in accordance with the character.

Defendant's charges are wholly unrelated to each other, and if they were tried in separate trials, each distinct act would not be admissible because its probative value would substantially outweigh the risk of unfair prejudice. Although some of these instances may be admissible for other purposes, it would not have the same prejudicial effect as holding one trial for all three charges.

In *State v. Ritter*, the Franklin Court of Appeal noted that "carrying a weapon is highly correlated with the intent to sell drugs." Thus the State believes here that evidence of the handgun will be admissible regardless of whether or not the two incidents are tried separately. However, what would *not* be admissible is Defendant's prior felony charge for assault with a deadly weapon. If tried together, the jury will be alerted to the fact that Defendant has a prior felony for assault, which may unfairly prejudice Defendant as a jury may believe she has the propensity to commit violent crimes. Further, because Defendant intends to testify, it is possible that this evidence is admitted to impeach her, should it be relevant. Those admissions are acceptable under the Federal Rules of Evidence, but a single trial for all three would create a situation in which "the jury can be tempted to infer the worst about the defendant." *State v. Pierce.* Evidence of possession of the gun is not contested, but admitting evidence of Defendant's prior conviction for assault would likely fail as it does not speak to Defendant's "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident" when looked at in relation to her charge of possession and intent to distribute marijuana. *See* FRE 404(b)(2).

Further, Defendant has not been convicted of any drug charges yet. "Prejudice may occur if proof of the defendant's commission of one of the illegal acts would not otherwise have been admissible at a separate trial." *State v. Ritter*. Admission of the charge of intent to sell cocaine would be inadmissible to prove propensity in the trial for intent to sell heroin, as would its converse. In *Pierce*, the court found that evidence of two similar protective orders would not have been admissible if tried separately because they would have created significant jury bias. Additionally, the court held that the subsequent protective order was not relevant to any issue in the trial for the first order, such that Pierce was prejudiced by the introduction of this evidence. That is relevant to Defendant's current situation, in which two distinct incidents that led to similar charges would unfairly prejudice a jury into believe that Defendant had a propensity for selling drugs. Taken apart, with each incident's distinct circumstances (as discussed below), a jury might simply find that Defendant was in the wrong place at the wrong time in one instance or another.

Further, evidence of these drug trials would not have been admissible under any of the exceptions in 404(b)(2), except perhaps impeachment if Defendant testifies. In *Ritter*, in which the court found evidence of a common scheme or plan which *would* have been admissible at trial. In Defendant's case, the two acts resemble those in *Pierce*, as there is no evidence of common scheme or plan (see *infra*).

For those reasons, one trial of all three charges would unfairly prejudice Defendant's case in violation of FRCP Rule 14, and the three charges should be severed.

Simply because the two charges related to an intent to sell drugs does not mean they were "of the same or similar character" such that charges should be joined in a single indictment.

Defendant is charged with three counts - two relating to intent to sell drugs and one relating to possession of an illegal firearm. The distinction between the intent to sell drugs and the possession of a firearm as a convicted felon are clear. The question remains as to whether Defendant's two unrelated charges of intent to sell drugs are of the "same or similar character" such that they can be permissively joined under FRCP Rule 8.

"In deciding whether charges have been improperly joined, the trial court should generally limit itself to those facts contained in the indictment." *State v. Saylers*. However, if the indictment does not provide sufficient facts, "the trial court may look to other documentary evidence in the case." *Id.* In *Saylers*, the appellate court overturned a determination by the trial court that two incidents were related simply because "they both had robbery in their titles." The two incidents were distinct in that one was a robbery of a convenience store and one was attempted robbery of an individual in a state park. The Court of Appeal also found that the trial court erred in *not* looking at the available documentary evidence available.

In the present case, both the indictment and the documentary evidence show that the incidents described bear almost no common facts. The first incident, which occurred in April 2021, occurred when Defendant was seen receiving money for a drug transaction that was instigated by her brother. Officer Diaz states in his sworn affidavit that they had been tipped off about potential illegal activity at Defendant's brother's apartment, where Defendant happened to be at the time of the alleged activity. Defendant did not even hand the substance over to the informant, it was furnished by her brother, but she received the money from the informant, for which she was charged. The second incident, which occurred in October 2021, presented an entirely different set of facts. Officer Amanda Carter states that she pulled Defendant over for what appeared to be a DUI. After lawful arrest, she searched the back seat of the car and found baggies and scales, which are typically associated with intent to sell drugs. She also found four kilograms of marijuana. This car belonged to - and is registered to - Defendant's boyfriend. The circumstances here do not present evidence of same or similar character. One occurred when Defendant was visiting a relative, and one occurred when Defendant was driving someone else's vehicle. Additionally, these were different substances.

Timing is also relevant to whether two incidents were "same or similar." In *Saylers*, the court noted that 2 years had passed between the two incidents. This was a significant amount of time. Although Defendant's case presented a shorter time span, the two incidents still occurred six months apart, which should be considered in whether the two incidents were same or similar.

The three acts were not based on any of the same acts or transactions, as the two drug charges occurred six months apart, and the possession of the gun was not related to the possession of the drugs.

If the joined acts occurred as part of the same act or transaction, the acts may be joined. In the present case, it is clear that Count I and Counts II and III occurred at different times. But Counts II and III should not be considered part of the same act or transaction just because they were part of a single incident.

Count II is possession and intent to sell marijuana and Count III is felon in possession of a handgun. Defendant was charged with assault with intent to commit murder in 2015, making her possession of the handgun illegal. This felony is not related to the charge of intent to distribute marijuana. The discovery of the gun is incidental to an arrest, and may be introduced as evidence showing intent to distribute drugs (per *State v. Ritter*, as discussed, possession of weapons is correlated with selling drugs), but she is not a felon in possession of a handgun *because* she was convicted of a felony for selling drugs. Because the underlying felon related to the possession of the gun is not related, the two counts are not of the same act or transaction even though they were discovered during a single arrest.

<u>The three acts were not part of a common scheme or plan, as all three are wholly unrelated to each other.</u>

The three acts as outlined in the indictment are clearly not part of a common scheme or plan, as all three are wholly unrelated to each other. Count III is clearly distinct from Counts I and II because it is a felon in possession charge, and the underlying felony is not related to drugs. Count I and II are more closely related, but are also clearly distinct.

In *Ritter*, the court did not sever the defendant's indictments, because there was enough evidence that the two incidents *were* part of a common scheme or plan. The court noted that Ritter sold heroin in the same area, from the same vehicle, in the same period of time, which demonstrated a common scheme or plan and presented admissible evidence. Defendant's situation is entirely distinct from the case in Ritter. Defendant was not in the same place, the same vehicle, or the same time period when the two events occurred. Nor did the two events even constitute the same substance. If tried in two separate trials, it is likely that a court would find that admitting evidence of the other drug charge would be highly prejudicial to Defendant's case, and would prevent it from being entered. Therefore, these acts should not be permissively joined because they are not part of a common scheme or plan.

<u>Conclusion</u>

In conclusion, Defendant's indictment should be severed because evidence of each incident would be highly prejudicial to Defendant's case in all three instances. Further, the three instances should not be joined because they fail as to all three acceptable reasons for joinder under FRCP Rule 8 - they are not of the same or similar character, they do not arise out of the same acts or transactions, and they are not part of a common scheme or plan.