

February 2026 Georgia Bar Examination Sample Answers

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Essay 1 — Sample Answer 1

1 RTG Breach: The issue is whether RTG breached the contract when it did not pay for any chips in 2025.

The UCC governs the sale of goods. Under the UCC and common law, a valid contract requires offer, acceptance, and consideration. In addition, there must not be any defenses to enforcement. Mutual assent requires both offer and acceptance such that the intent of parties is clear to enter into an agreement. A valid offer has enough essential terms that a court will be able to enforce the contract. An agreement is a manifestation of assent to the terms of the offer. Consideration is a bargained-for exchange of promises or performance. Under the UCC, the essential term necessary for the sale of goods is quantity. Output and requirements contracts do not require specific quantity terms to be enforceable. In an output contract, a buyer may agree to buy as many of goods as the other party produces. In a requirements contract, a party may agree to supply as many goods as the other party requires. An illusory contract is one where a party is not giving up something of legal value. The court will fill in any missing terms such as price as the reasonable price at the time of contract. The UCC requires that parties operate in good faith to execute the contract. The defenses of impracticability or impossibility may be raised when a party becomes unable to perform the contract due to an unexpected change in circumstances which represent a basic assumption of the contract.

Here, E&M made an initial offer to RTG to enter into either a output or requirements contract. The terms included the price of \$10,000 per chip for an output contract and \$15,000 per chip for a requirements contract, and installation to occur at E&M's factory. When RTG agreed to enter into a requirements contract for \$15,000 per chip, it accepted E&M's offer and a valid contract was formed. Consideration is found in E&M's promise to supply chips for RTG's needs, and RTG's promise to pay for the chips it required. The fact that RTG indicated that it "may not have a need for any chips at all" in a given year does not make the contract illusory because in a requirements contract, the parties have an obligation good faith to operate in good faith. Therefore, the parties had a valid and enforceable contract when it was entered into on January 1, 2023.

When RTG's Robot Rover crashed in February 2025 and all the robots for that year were destroyed, the subject matter of the contract became impracticable for RTG to perform because

all of the robots were destroyed. In addition, not only the robots were destroyed but all of RTG's staff except the CFO, making the future production of robots an impossibility. The ability of RTG to supply robots for the chip insertion was a basic assumption of the contract, thus RTG is relieved of the responsibility of performance due to impracticability or impossibility. Therefore, when RTG informed E&M of the accident, it was not a breach of contract because their performance was impossible.

2 E&M argument for breach:

The issue is whether RTG's accident actually relieved the company of the requirement to perform under the contract. As discussed above, the companies formed a valid, enforceable contract on January 1, 2023. Under the UCC, course of dealing and usage provide additional information to fill in quantity terms to a requirements contract. A course of dealing is informed by the terms parties have contracted and performed under in the course of their relationship.

Here, the first two years of the contract RTG required 40 chips per year, which set an initial expectation as to the quantity that RTG would need under the contract. When RTG informed E&M that it would only need 25 chips for 2025, it was a decrease in requirements but still a reasonable quantity term given the course of dealing in the contract. When RTG's robots were destroyed, E&M will argue that it did not relieve RTG of the responsibility to pay under the terms of the contract because at a minimum, RTG had agreed to the annual contract fee of \$50,000. Thus, even if RTG had no robots requiring chips in a given year, the company would have to pay the \$50,000 for the right to buy chips from E&M. In addition, just because RTG lost its robots in February of the year does not mean that it could not produce any robots for that year, as its manufacturing facilities remained a viable operations center.

Therefore, E&M will argue that RTG breached the contract when it failed to either buy chips for 2025 or pay the contracted fee for the right to buy chips from E&M.

3 Damages:

At issue is whether E&M is entitled to damages under the breach. Damages seek to give the nonbreaching party the benefit of the bargain. Under the UCC, the nonbreaching party is entitled to expectation damages to put the party in the position it would have been had the contract been performed. Expectation damages are generally the value of the contract as contracted less the value gained without performance. The nonbreaching party is expected to mitigate damages if possible, such as with the resale of goods not accepted by the breaching party. Reliance damages are those incurred in justifiable, reasonable reliance on the breaching party's promise to perform under the contract. Under Georgia law, punitive damages are not allowed for contract damages. Consequential damages, such as lost profits, may only be recovered if the nonbreaching party has a sustained and quantifiable history of profits and can prove with reasonable certainty the profits that were lost due to breach.

Here, E&M will be able to recover expectation damages due to the breach because RTG failed to perform under the contract. Thus, E&M is entitled to \$50,000 in expectation damages for the contract fee. If a court finds that RTG breached its duty to perform based on its notice of 25 chips required that year, E&M would also be entitled to the contract price of \$15,000 x 25 chips. However, because E&M was able to mitigate damages by selling the chips for a lesser amount, the \$5,000 per chip would be deducted from that amount. Therefore, E&M would be entitled to \$15,000 - \$5,000 per chip, or \$10,000 per chip x 25 chips, or \$250,000 in expectation damages for the actual chips. Thus, expectation damages would be \$300,000 if the court finds that RTG breached. If the court does not award full expectation damages, E&M would be entitled to at least the reliance damages of the \$8,000 out of pocket costs to build each chip, less the \$5,000 gained per chip by the resale. Consequential damages are not considered here because E&M's profits are clearly established under the contract, and punitive damages are now allowed.

Essay 1 — Sample Answer 2

1) Argument on behalf of RTG that there was no breach of contract

The terms of the contract which E&M offered that RTG accepted were “to provide RTG with the number of such chips it requires each year, if any, for \$15,000 per chip.” Specifically, in RTG's acceptance, RTG stated “[W]e will be governed by whatever happens and, for various reasons, we may not have a need for any chips at all.” Each side contemplated that there could be a time/year that RTG may not need chips. RTG's acceptance also allowed for “various reasons” to not need the chips, rather than any specific possible reasons. E&M accepted the terms and the risk that there could be a time when no chips were needed when it replied, “It's a deal,” and performed the first time under these terms. In this case, to the detriment of both sides, all of RTG's robots for the year were destroyed with the death of all key employees, which meant that RTG no longer needed any chips that year at all. RTG did not breach their contract because when their robots were destroyed, they no longer needed chips, and they were under no obligation to purchase chips without robots for them to go into.

Although RTG had a contract fee of \$50,000, this contract fee was only for the right to buy chips, and again was not an obligation for RTG to purchase any specific number of chips in any given year.

2) Argument on behalf of E&M supporting its claim that RTG breached the contract

The contract states that E&M will provide RTG with the number of chips that it requires in a year. For 2025, RTG stated that they would likely have 25 robots. On the day of the accident, E&M would have already had the chips prepared, the number of which validated by RTG's notification that “all 25 robots” were on the way to E&M. E&M performed their side of the bargain, up to the point of insertion of the chips. Under the theory of part performance, E&M has made substantial progress into performing their part of the bargain, while RTG is not following through on their side through payment, in breach of the contract.

By the terms of the contract, RTG was responsible for the transportation of the robots to E&M for insertion. RTG also used its own vehicle for the transportation of these robots. Both of these facts lead to RTG being at fault for the loss of the robots. If RTG was responsible for the transport of the robots, it stands to reason that RTG should also be responsible for the consequences of the loss of said robots. Because of E&M's part performance for the confirmed number of chips needed and the fault resting in RTG for the failure to complete the transaction, RTG should be liable for the breach of contract in failing to pay for these chips.

3) Damages for E&M

E&M could potentially recover for expectation damages. Expectation damages are the amount that the performer would have expected to receive had the breacher not breached. Under the contract, E&M would have received \$15,000 per chip. The lead to an expectation of \$375,000 in

revenue for the transaction.

E&M could claim reliance damages for relying on the words of RTG that there were 25 robots for 2025. E&M could justifiably rely on this statement from RTG because of their previous years' relationship. E&M had already completed 40 chips per year the past 2 years. It was justifiable that they could rely on RTG for the statement that "it would likely have 25 robots for 2025." This justifiable reliance caused E&M to produce 25 chips at \$8,000 per chip, or \$200,000 total.

The \$5,000 per chip mitigated the total loss by \$125,000 because E&M was able to at least recover part of the value in either reliance or expectation. E&M would be unlikely to recover for both reliance and expectation damages, because a court would most likely find that excessive. Under expectation damages with the \$125,000 mitigated, total damages would be \$250,000.

Under reliance damages with the \$125,000 mitigated, total damages would be \$75,000.

E&M would most likely not be able to claim consequential or punitive damages against RTG. Consequential damages in general are difficult to prove because loss of business can be difficult to find a specific dollar value. Especially here, where E&M was working on a requirement contract with no set amount to be purchased each year. Even comparing only their sales to RTG, E&M varied from \$600,000 in previous years to the intended \$375,000 in 2025. This makes the consequential damages for lost business unlikely as too speculative and unsure.

Punitive damages are also unlikely because in this case there would already be recovery for cost or expectation for E&M if the court found that RTG breached the contract. The court would most likely find no need to punish RTG because in this circumstance, there was a reason to breach that would make punitive damages go beyond the just outcome for this situation. Punitive damages are intended to deter others from wrongdoing, but it would not set a bad precedent to not punish a company that has just lost all of its key personnel (excluding the CFO) and all of its inventory of a specific product. Thus, there would likely be no punitive damages.

Essay 1 — Sample Answer 3

Issue One: The issue here is whether there has not been a breach of contract on behalf of RTG.

A contract requires offer, acceptance, and consideration (bargained for exchange). The UCC governs contracts for the sale of goods. Goods are any movable item, including electronics and computer software. Where the UCC is silent on an issue, the common law for contracts will govern that issue. For hybrid contracts, the courts will look to the predominate purpose of the contract to decide if common law or UCC governs. The court will look to the nature of the supplier's business, the nature of the contract, and the value of the goods versus the services. The UCC requires that the contract be definite as to the amount of goods in the contract. However, for a requirements contract, the quantity is objective. A requirements contract is when the quantity is for as many as one party requires for a time period. Acceptance under common law follows the mirror image rule, where the offer and acceptance terms must be the same. Acceptance under the UCC follows the battle of the form rule. Additional terms will be added unless the offer expressly stated that acceptance must conform to the offer, the additional term would come as surprise or create undue hardship, or the offeror objects to the additional term within a reasonable time. A contract can be voidable without breach under certain circumstances. If an event occurs, at no fault to either of the party and neither party assumed that the event would occur, when entering into the contract impossibility can be used as a defense to breach of contract.

Here, there was a valid contract between E&M and RTG and RTG can use impossibility as a defense. Specifically, the contract provides that E&M will provide RTG with chips and install them. Since this is a hybrid agreement, the predominate purpose test applies. E&M is a supplier of chips and that is the nature of their business, the nature of the contract was to provide RTG with the chips, and there was not listed value of for the installation, only the value of the chips. This means this is primarily a sale of goods contract and the UCC applies. This is a requirements contract since it is for the sale of "the number of chips required each year, if any". Therefore, the amount is objective and a definite number is not required. Therefore, there is a valid contract. RTG may assert the impossibility defense in the breach of contract action. Specifically, RTG did not cause the accident that destroyed their robots and this was not something that the parties assumed would happen. All of the key employees of RTG was on the van, so this is evidence they did not intend for it to crash. In addition, it was a icy winter day, so it can be presumed the road conditions were bad. Since the accident occurred at no fault to RTG or E&M, then impossibility is the best way for RTG to show there was no breach of contract.

Therefore, there was a valid contract between E&M and RTG and RTG can use impossibility as a defense.

Issue Two: The issue what arguments can E&M assert that there has been a breach of contract and the relationship of the parties over time.

Under Georgia law, there a party may assert that a contract has been breach under the doctrine of promissory estoppel. Promissory estoppel may be asserted when a party relies on the assurances of another that they will perform under an agreement to their detriment, and then the other party fails to perform.

Here, E&M may assert that there was a breach of contract under promissory estoppel. Specifically, because RTG assured them that they would be delivering 25 robots and needed 25 chips for the year, they breached the contract under promissory estoppel. E&M relied on this assurance and created the chips needed for RTG. There was no reason for E&M to doubt that RTG would perform since RTG brought the chips to them before for installation for the past two years.

Therefore, E&M may assert there was a breach of contract under promissory estoppel.

Issue Three: The issue here is what damages can E&M claim, what are the amounts, what effect does E&M's mitigation have, and what is the basis for reliance damages, consequential damages, and punitive damages.

In a breach of contract action, expectation damages are generally awarded to the nonbreaching party. The goal is to put the party in the position it would have been in had performance been done. A party may mitigate the breach and the amount of the mitigation will be subtracted from the amount of damages owed by the breaching party. Reliance damages are the any costs or expenses related to what it took for the non-breaching party's performance. Consequential damages is any damages the party suffered as a result as a result of the breach. Punitive damages are indefinite and can only be awarded if the party can show that the breaching party acted with malice or fraud.

Here, E&M may be able to recover expectation and reliance damages. Specifically, they can recover the amount they expected the recover under the agreement with RTG for the 25 robots (\$8k/chip). This is what they would have recovered had the contract been done. However, this will be reduced by the amount they received by reselling the 25 chips at \$5k/chip. In addition, they will be able to recover the out of pocket expenses of \$8k that is took to make the chips since they relied on RTG's assurance before they made the 25 chips. E&M may not be able to recover consequential damages. Although E&M went out of business shortly after RTG breached, it is not enough to say that caused them to go out of business. Especially, when RTG usually purchases 40 chips and this time it was only 25 chips. This is not substantial enough to prove the need for consequential damages. E&M will not be able to recover punitive damages because there is no evidence of malice or fraud on behalf of RTG.

Therefore, E&M may be able to recover expectation and reliance damages.

Essay 2 — Sample Answer 1

1. The mortgage will encumber ABC's ownership interest.

At issue is whether a mortgage runs with the land after a conveyance.

Under Georgia property law, a mortgage is an encumbrance on the land. The mortgage creates the power in the mortgagee to foreclose on the land, sell it, and keep the proceeds to satisfy the underlying debt. Generally, only the original mortgagor is liable on the mortgage. However, when the underlying property is conveyed, the mortgage stays on the land (provided it is recorded) to the extent the mortgage is not repaid with the sales proceeds. The buyer may take "subject to" the mortgage or may "assume" the mortgage. If the buyer takes "subject to" the mortgage, he is not personally liable on the mortgage. The mortgagee may still foreclose and sell the land out from underneath the buyer, but the buyer will not be personally liable for any deficiency on the underlying debt. If the buyer "assumes" the mortgage, then he is personally liable on the underlying debt. The mortgagee may foreclose on the land and pursue a deficiency judgment against the buyer.

Here, Newnan Bank is the mortgagee, BuildCo is the mortgagor, and ABC is the buyer. Newnan Bank's mortgage is recorded. Thus, iff ABC closes on the land and BuildCo does not repay the Newnan loan in full, then the mortgage will remain on the land. Newnan Bank can still foreclose on the land and sell it out from underneath ABC. ABC may take the land "subject to" the mortgage, or it may assume BuildCo's mortgage; the facts do not state which ABC will do. ABC's liability on the underlying loan will depend on that term. But nevertheless, ABC may still lose its ownership interest in the land via foreclosure if BuildCo does not repay the \$900,000 Newnan mortgage in full.

2. ABC may get out of the contract.

Yes, ABC may terminate the contract and seek recovery for its earnest money deposit. At issue is whether breach of a land-sale contract is grounds to terminate the contract.

Under Georgia property law, conveyances of land take place in two steps. First, the parties enter a land sale contract. The contract defines the terms of the transaction, including the parties, the price to be paid, and a description of the property to be sold. The contract typically also sets a closing date. Between the creation of the contract and the closing date, equitable title is with the buyer of the property, while legal title remains with the seller. Either party may sue for breach of the land sale contract. Then, at closing, legal title to the property is transferred via deed and delivery. At that point, the land sale contract - and all obligations thereunder - "dies." The parties must sue for any breach of the deed instead.

Generally, Georgia follows the "caveat emptor" doctrine regarding sales. Caveat emptor translates to "buyer beware" and means that the seller is making no warranties about the property at issue to the buyer. However, a seller may effectively opt out of the caveat emptor

doctrine by including express warranties in a contract for sale. Express warranties are any explicit descriptions of the property in the sale contract.

When considering breaches of contract, a court may order equitable remedies, including rescission of the contract or a constructive trust, to correct for the breaching party's fraud or misrepresentation and to return any defrauded property.

Here, BuildCo made an express warranty in the land sale contract that the property "has not been contaminated with any hazardous substances." BuildCo in fact breached that warranty by allowing its trucks to leak petroleum into the soil. Moreover, BuildCo was aware of those leaks but, instead of remedying the problem, covered the stained soil with sawdust and mulch to hide the evidence of the leaks. Thus, BuildCo breached the land sale contract and fraudulently represented to ABC (and likely others) via its actions covering the soil that no contamination had occurred. Thus, ABC likely could not have found the evidence even during its inspection period because ABC was covering up the contamination. In light of this breach of the express warranty in the land sale contract, ABC is still entitled to sue under the land sale contract (closing has not occurred yet so the contract is still "alive"). BuildCo cannot seek shelter under caveat emptor because it made an express warranty. Additionally, BuildCo's fraud on ABC may entitle ABC to the equitable remedy of rescission, plus a constructive trust on the earnest money deposit.

3. Farmer Fred has no rights in the property.

There is no easement or license created in Farmer Fred's favor.

Under Georgia law, an easement is a non-possessory interest in the use of another's land. Easements generally must be granted expressly in a writing. However, easements may also be created by prescription, implication, or necessity. An easement by prescription exists when a person has used another person's land continuously for the statutory period (7 years for improved lands, 20 years for wild lands), open and notoriously (that is, sufficient use to put the true owner on notice), actual, and hostile (that is, without consent). Easements by implication occur based on the prior use of the properties by the common grantor. Easements by necessity occur when a common grantor divides a tract and leaves one tract landlocked, requiring an easement over one tract for entrance and exit to the other tract. Easements are generally of perpetual duration.

In absence of an easement, a person may also receive a license to use another's land, which is simply permission to use the land for a particular purpose or time, and is revocable at any time.

Farmer Fred has neither. First, no facts suggest a conveyance from a common grantor that would grant Farmer Fred an easement by implication or by necessity over the dirt road. Second, there has been no writing establishing an express easement in Farmer Fred's favor (the conversation with Greg was not in writing). Finally, Farmer Fred cannot meet the elements of a prescriptive easement: although Farmer Fred has used the dirt road for about 9 years, he had consent for five of those years. Thus, he cannot meet the "hostile" or "continuous" elements of a prescriptive

easement. Thus, no easement exists in Farmer Fred's favor. Farmer Fred may argue he received a license from Greg. Greg did tell Farmer Fred he could use the path. However, Greg's consent was expressly dependent on his continued employment as General Manager. As discussed, licenses are freely revocable. Thus, according to the terms of Greg's consent, any license in favor of Farmer Fred terminated with Greg's employment in 2024.

Thus, Farmer Fred has no easement or license as of today.

4. ABC may bring a quiet title action to establish ownership of the property under the warehouse via adverse possession.

Georgia law provides that a party may obtain title to real property via adverse possession. To obtain title by adverse possession in Georgia, a person must possess property continuously for the statutory period (7 years if under written evidence of title, 20 years if not), open and notoriously (sufficient to put the true owner on notice), actually and exclusively of the true owner's possession, and hostilely (without consent). Georgia also requires that an adverse possessor have some claim of title to the property; an out-and-out trespasser cannot adversely possess property.

Separately but relevantly, Georgia law allows for the creation of present and future interests in real property. One such creation is the fee simple determinable with a possibility of reverter. This creation allows the grantor to convey property to a grantee "so long as" a particular condition is met, then automatically back to the grantor or his heirs if the condition is ever no longer met.

Here, the deed to the Railroad from the Miller Family is a fee simple determinable creating an automatic interest in the heirs of the original grantor(s) if the land is ever not used for railroad purposes. Accordingly, the Miller Family automatically resumed ownership of the 500-squarefoot tract that the warehouse sits on as soon as the warehouse was built because that land was no longer used for railroad purposes. The facts do not state when the warehouse was built, but presumably it was built in 1994 when BuildCo purchased the land. Thus, BuildCo had been possessing the land on which the warehouse sits for over 20 years when it discovered the error in 2015. Thus, BuildCo can meet the "continuous" prong of adverse possession. It also had possessed the land openly and notoriously by building on it. BuildCo's warehouse and possession have been exclusive of the Miller Family, who otherwise do not appear at all in these facts. And the Miller Family never gave consent to BuildCo for its warehouse.

Accordingly, BuildCo has established title by adverse possession. Either it, or ABC after closing, can officially establish legal title to that land by filing a quiet title action in the local Superior Court.

Essay 2 — Sample Answer 2

1. The issue is what is the impact of the \$900,000 mortgage, if any, on ABC if the closing occurs and the mortgage is not repaid in full.

When property is sold and it contains a mortgage, the default rule is that the buyer takes the property subject to the mortgage. This means that the buyer is not personally liable for the mortgage, however the mortgage is still on the property and if the seller or whoever is liable for the mortgage fails to pay, the lender can foreclose on the property. Alternatively, a buyer can take a property and the mortgage by assumption of it. This requires the buyer to accept the mortgage and makes them primarily responsible for the mortgage. However, unless the lender releases the original party responsible for the mortgage by a novation, they remain liable as well as a secondary. Generally, when a property is sold, encumbrances must be disclosed. This includes mortgages on the property.

Here, BuildCo is the primary mortgagor for the \$900,000 loan from Newman Bank. Newman Bank is the mortgagee who holds the mortgage on the property. BuildCo and ABC did not agree for ABC to assume the mortgage on the property in their contract for the sale. This is known because ABC did not even know about the mortgage until a week before the closing. Therefore, if ABC closes with BuildCo with regard to this property, they will take it subject to the mortgage as explained above.

That said, the parties have only contracted for the sale and have not yet exchanged a deed for the property. Generally, a seller had until the closing to remove any encumbrances, such as a mortgage on the property. The seller can also use the proceeds of the sale to pay off the mortgage on the property. The question assumes that the closing occurs without the mortgage being paid. However, BuildCo would still be able to provide marketable title to the property if they use the funds of the sale to pay off the mortgage right after the closing happens.

However, if they fail to do so, they likely have breached a present deed covenant that the property is not subject to any undisclosed encumbrances, giving ABC a cause of action under the deed.

2. **The issue is whether ABC has the ability to rescind the contract based on the leaks under caveat emptor and recover ABC's \$100,000 deposit.**

Caveat emptor stands for the idea that the buyer bears the risk in the purchase of property such that they must conduct inspections and ensure the property is what it claims to be. Georgia follows this rule. However, a seller is not permitted to conceal or make a false factual assertion about the property that they know is not true. When a party to a contract commits actual fraud or fraud by concealment, the other party may rescind the contract and obtain any earnest payments made.

Here, BuildCo will likely argue that ABC failed to properly investigate the property in order to find the leaks and this failure means that under Caveat Emptor that they bore the risk such that they cannot get out of the contract now. However, ABC will argue that they could not discover the leaks due to BuildCo's actions of placing sawdust to hide any evidence of such leaks. Also, Caveat Emptor will not protect a seller from an intentional misrepresentation made to deceive the buyer. In this case, BuildCo specifically stated in the contract for sale that the property "has not been contaminated with any hazardous substances." BuildCo knew this statement was false when it was made because they were already covering it up with sawdust before the contract was made. Given the fact that BuildCo concealed this fact from ABC, ABC will be able to rescind the contract and obtain its \$100,000 deposit.

3. The issue is whether there is an easement or license created in Farmer Fred's favor that requires ABC to continue providing access to him after the closing.

An easement is generally an express grant of the right of use to land that is in writing, signed by the party against whom enforcement is sought to comply with the statute of frauds. An easement may also exist by prescription. This requires that the easement continue to be used for the statutory period (in Georgia that is 7 years for developed land and 20 years for wild land). Also, the use must be adverse to the owner's interests (without consent), and open and notorious such that it can be seen.

An easement may not simply be revoked by the person granting the right of use. In contrast, a license is merely permission to use property for a purpose that is revocable. A license can be created when an easement fails to be formed, such as when the agreement is not in writing.

Here, Fred was told by the General Manager that he could use the path in 2019 until the General Manager was no longer there. This was not in writing such that it would not be an express easement. This means Fred was granted a license for the period of time that the General Manager was working. The General Manager no longer works there since his employment ended in 2024. This means that Fred's license is likely revocable by BuildCo or ABC after the sale since it is merely a license.

While Fred might attempt to argue that he has an easement by prescription, this argument will likely fail. Fred can show that his use was actual, open and notorious because his use for moving cattle was likely something that everyone could see. Since the land is developed with a warehouse on it, the time to obtain an easement is 7 years. Fred began using the path in 2017. From that period until 2019, it is likely that Fred was acting adverse to BuildCo's interest in the land such that the clock would have been ticking on him obtaining the easement through this method. However, in 2019 Fred obtained consent by BuildCo's manager to use the path while he was the manager, make his use by consent and not hostile to BuildCo. This ended the clock and prevents Fred from obtaining the easement under this method.

Therefore, there was not an easement created by Fred in using the path and the license that Fred did obtain either ended automatically when the General Manager no longer worked at Build Co

per the terms of the license or is revocable by BuildCo as the current owner or ABC after they purchase the land.

4. The issue is what legal strategies might allow ABC to maintain or resolve the encroaching warehouse structure without having to relocate the warehouse.

In order to maintain the property used by the warehouse, ABC could argue that the property was obtained by BuildCo by adverse possession. Adverse possession requires that the property is used continuously for the statutory period, hostile to the owner, exclusive, actual, open and notorious. In Georgia the statutory period for adverse possession under color of title is 7 years. However, without color of title, it requires use for 20 years. Also, Georgia requires that a person who takes under adverse possession do so in good faith. Adverse possession may be tacked between owners in privity, such as when property is sold from one person to another for value and in good faith.

Here, ABC likely takes any adverse possessory interest in the land that BuildCo has since it is in privity of contract with them for the sale of the property. Also, BuildCo's adverse possession clock likely started ticking once the warehouse was built as early as 1994. However, the facts do not indicate exactly when the building was constructed. Assuming that it was around that time, they have been using the land for the last 20 years as required. During that period of time, BuildCo's use was actual, open and notorious because the warehouse was able to be seen by others. Also, the use was hostile to the owner's interest in their own land since they did not consent to the use. Also, BuildCo (and ABC) can argue that the use of the land was in good faith because they did not by an error in the survey, not as an attempt to take land that did not belong to them. The use was exclusive as it was only used by BuildCo for their warehouse and not shared with others. Therefore, ABC could argue that the land is theirs by adverse possession and bring an action to quiet title for that 500 square foot section owed by Newman Railroad.

Alternatively, ABC could argue that the restriction to Newman Railroad, granting them title to the land is subject to the rules against perpetuity in Georgia such that the title should go to the railroad in fee simple, allowing them to sell the land to ABC or BuildCo without triggering the ownership of the Miller family. In Georgia, RAP applies. However, Georgia applies the wait and see approach and extends the time from 21 to 360 years instead of 21. Executory interests are subject to RAP, and here the Miller Family is able to cut off the Railroad's interest, making them future executory interest holders and making their interest subject to Georgia's RAP statute. Here, if the property is sold to ABC or BuildCo it will no longer be used as a railroad and will trigger the executory interest. Given that the railroad has had the property since 1890, 360 years have not yet lapsed such that Georgia may uphold the interest in any event.

Essay 2 — Sample Answer 3

(1)

The issue is what impact the mortgage has on ABC if the closing occurs and the mortgage is not paid in full.

The rule is that a mortgage is a loan that is obtained from a bank or outside funding in exchange for either an interest in the property (by deed) or a contract to be paid back (by promissory note). It is typical for properties to have mortgages on them as it can be expensive to buy property. Often times when a property is sold, the proceeds from the sale are used to pay off the remaining balance on the mortgage. When you enter into a land sale contract, equitable title passes to the buyer and the seller retains legal title. During this period (that is, up until closing) the seller is doing what they can to get marketable title on the house. Typically, that means free from any encumbrances or liens. The seller has the opportunity to do this until the closing, which is what transfers legal title to the buyers. If there are still encumbrances or liens on the property, then the seller may be liable for failing to provide marketable title to the buyer. If that is the case, the buyer may seek specific performance or may rescind the land sale contract and seek damages as a result. A mortgage is typically due on sale and does not automatically pass to the buyer.

When you apply the rules to the facts, here, a \$900,000 recorded mortgage on the BuildCo property exists. When the parties entered into the land sale contract, BuildCo made an agreement to provide marketable title to ABC at the time of closing. When BuildCo failed to do so, by having a \$900,000 mortgage left on the property, ABC can rescind the contract as this is not marketable title. It is not free from encumbrances and liens. Typically, absent an agreement, ABC will not take the property subject to the mortgage as it likely has a due on sale clause and ABC would be able to see that the mortgage has not been paid off prior to her time of signing. The mortgage was recorded, so a satisfaction of mortgage would need to be recorded as well.

The conclusion is the mortgage existing on the property is a breach by BuildCo to provide marketable title and ABC will be able to rescind the contract.

(2) (a)

The issue is ABC has/does not have the ability to rescind the contract based on the petroleum leaks in light of the caveat emptor (buyer beware) doctrine.

The rule is that caveat emptor means buyer beware. When this is present, a buyer takes a property subject to all defects in the property. It is almost as if the property is taken "as is". However, this does not protect the seller from intentionally hidden defects or defects in which the seller knew of and intentionally concealed from the buyer. The seller will be liable for the defects.

When you apply the rules to the facts, BuildCo was aware of the petroleum leaks. They failed to take any remedial action. Instead, what they did was routinely covered the stained soil with sawdust and mulch to hide evidence of the leaks. This is bad faith and is intentional concealment. This is the type of behavior that is not covered by caveat emptor because the seller intentionally concealed the defect. Unless this was included in disclosures, which it likely was not, then BuildCo would be liable for breach of contract and would not be able to use caveat emptor due to its intentional concealment of the defect.

However - the contract further states that the property has not been contaminated with any hazardous substances. Here, it is arguable that petroleum is a hazardous substance. The contract further provides ABC with an ability to inspect the premises and could terminate the contract for any reason during the inspection period. Although the petroleum period has passed, it is likely that even if ABC had an inspection done, the leak would not have been found as BuildCo concealed the defect with sawdust and mulch.

The conclusion is that ABC may rescind the contract based on the petroleum leaks as it was fraudulently and intentionally concealed from the buyer.

(2) (b)

The issue is ABC has the ability to recover ABC's \$100,000 earnest money deposit.

The rule is that earnest money is given from a buyer to a seller as a sign of good faith - that the buyer is ready, willing, and able to purchase the property. Earnest money (EM) may be given back to the buyer when the contract is rescinded (money may be taken out of EM for incidental costs to the nonbreaching party or if the contract was entered into as a result of fraud or deceit).

When you apply the rules to the facts, here, it is likely that ABC would be able to receive EM back as BuildCo was acting in bad faith by intentionally concealing the petroleum leak. BuildCo fraudulently concealed and hid the evidence of the leaks. Because of this, the contract may be rescinded and EM may be given back to the buyer.

The conclusion is that ABC may recover its \$100,000 earnest money deposit.

(3)

The issue is whether there is an easement or license in Farmer Fred's favor that will require ABC to continue providing access to Farmer Fred after the closing of the purchase. The rule is an easement is a nonpossessory interest in another's property/land. A license is a nonpossessory interest to temporarily use another's land for a limited purpose. An easement may be express (that is, direct authorization to use another's land), due to necessity (that is, when your property is landlocked and you cannot otherwise access your property), or through prescriptive means (that is, continuous, open and notorious, actual and exclusive, and hostile for a period of 7 years). A license is an express or implied authorization to use another's land, typically we think of

business invitees - when a store invites people or allows them to use their property to shop. They don't have an interest in the land, but they are allowed to be there. An easement appertenant is an easement that benefits one property and burdens another. This does not run with the land.

When you apply the rules to the facts, Farmer Fred has been using a disputed portion of the property since 2017. In 2019, Greg gave Fred an conditional, express easement by telling him that he may use the path for as long as Greg is the general manager. In 2024, Greg's employment terminated. Farmer Fred will argue that he used this path for over seven years and therefore should be entitled to a prescriptive easement. However, he was using the path from 2019-2024 with the express permission of Greg. This tolled the period of hostility and further negates the hostile element of a prescriptive easement which requires that it be done without the permission of the title owner. The express easement was terminated when Greg no longer was the general manager. This was expressly stated in the express easement. Greg likely has a license to temporarily use the path but again he would need to obtain permission to do so. Not only does Greg not work there anymore, ABC will now after closing be the new owner. While Fred likely had an easement appertenant, he got to use the path for his benefit and Greg/BuildCo did not receive any benefit of this, this does not run with the land and will not continue to exist after BuildCo sells to ABC.

The conclusion is that Farmer Fred does not have an easement or license that requires ABC to continue providing access to Farmer Fred.

(4)

The issue is ABC may be able to resolve the encroaching warehouse structure without having to relocate the warehouse through a quiet title action/action for adverse possession.

The rule is that an encroachment is something that exists on another's property without permission or authority. This is subject to the Rule Against Perpetuities which means that any transfer of an interest must vest within 370 years in GA otherwise it fails.

In order to make a claim for adverse possession, there must be continuous, open and notorious, actual and exclusive, and hostile use of the disputed property for a period of 20 years in Georgia, or for a period of 7 years for a prescriptive easement. When there is express authorization to use the property, it negates the hostile requirement. It must be open and obvious that the trespasser is using property that they are not supposed to be using in a manner that is sufficient with its typical use.

When you apply the rules to the facts, here, an encroachment exists due to a surveying error that occurred during construction. There is a 500 square foot section of a warehouse on the Railroad's property. This was discovered in 2015. The parties agreed that BuildCo would purchase the strip of land in question provided that BuildCo could confirm that the Railroad was able to sell the property without regard to any legal restriction. Here, the property was given by the Miller family to the Newnan Railroad Company so long as it was used for railroad purposes. This is a fee simple

determinable. The Newnan Railroad Co will only own it if used for railroad purposes. The heirs of the Miller family may then obtain the property if it is no longer used for railroad purposes. This is subject to the rules against perpetuities.

Here, the only way that the Newnan Railroad Co can sell the property is if it is used for railroad purposes. The facts state that due to a surveying error, the property encroaches the Railroad's property.

To be safe, the Newnan Railroad Co should obtain the consent from the Miller Family in order to properly effectuate the transfer and to avoid litigation later on.

While ABC will argue adverse possession, this likely will not be met because the parties had an agreement to resolve the dispute and BuildCo failed to meet the needs necessary to effectuate their end of the bargain. ABC will try to make the argument for adverse possession, but they would need to show that they used the property for 20 years. Absent more facts, that cannot be made here.

The conclusion is that ABC will bring a claim for adverse possession/quiet title and seek a declaratory judgment action to determine who owns the property under the Miller Family deed.

Essay 3 — Sample Answer 1

(1) The issue here is whether Cam has any ethical concerns under the GA rules of Professional Conduct for how he gained representation in Gloria's case.

There are multiple ethics concerns that can be brought against Cam and Phil:

Phil's solicitation of Gloria

Under the Georgia Rules of Professional Conduct, an attorney is not allowed to actively solicit and ask an individual to become their client. The client must find the attorney. Attorneys are allowed to advertise within certain guidelines discussed in detail below; however, they are not allowed to go and seek out a client and induce them to join their practice. Here, Phil charmed his way into an ICU to acquire Gloria's business by dropping off artificial flowers and a brochure. Phil will likely argue that he did not do this for himself but rather for Cam and as a private citizen he is allowed to advertise business for whomever he wants; however, Phil will also likely face liability because he gained something out of this in the form of a steak dinner. Moreover, even though Phil is held to Florida standards, as he is a Florida attorney, Georgia will still be able to discipline Phil because this action occurred in Georgia and involves a Georgia case.

Accordingly, Georgia could also construe this as an unauthorized practice of law, given that Phil is not licensed in Florida and was not admitted for a limited purpose. This argument is a reach, however, and will likely not be implemented. Cam will argue that he should not be found liable because he did not go and solicit the client. Cam will also argue that he did not know that the client was solicited because he stated to Phil that "he doesn't know how Phil did it." However, GA can hold that Cam was under a duty to reasonably inspect and did not perform this duty to the best of his abilities.

Cam and Phil's deal for a steak dinner/ referral agreement

Under the Georgia Rules of Professional Conduct, lawyers are not allowed to have referral agreements unless disclosed to the client. Here, Cam and Phil did not disclose to Gloria of Phil's involvement in procuring Gloria's case. Cam and Phil did not tell Gloria that a steak dinner was on the line. While a steak dinner is a nominal consideration for a referral agreement, GA rules of professional conduct are strict in ensuring that a client is aware of the full facts surrounding the procurement of their case. Cam will likely argue that he posed the steak dinner not as a referral agreement but in jest. However, his subsequent grant of a \$100 gift card to Jay's steakhouse will void this argument because as soon as he sent over the card, he was in a referral agreement that the client did not know about.

Cam's Brochure

Under the Georgia Rules of Professional Conduct, lawyers are not allowed to falsely advertise to acquire business. Honest Puffery is allowed with a relevant disclaimer, however claims that a

lawyer is better than the others are not allowed. Here, Cam's brochure states that he is "better than all the other lawyers in Georgia at wreck cases." The facts do not suggest any type of disclaimer. This statement is not allowed and can be seen as fraudulent under the GA rules of Professional Conduct. Cam will argue that Phil gave this brochure to Gloria and he should not be held liable for its claims; however, this argument will likely fail because Phil got this brochure from Cam's office and Cam prepared it himself. Cam will be liable in all the cases he handed this brochure out.

(2)(a) Can Cam bring a wrongful death claim and an estate survivorship claim in this case

Cam can bring a wrongful death claim and an estate survivorship claim. Wrongful death actions can be brought when an individual wrongfully died due to the negligent or intentional behavior of another party. Survivor actions can be brought to avenge the harm suffered by an individual after an injury even if that injury ultimately led them to death. Here, Gloria wrongfully died because of her severe injuries from the speeding tractor trailer. Gloria also suffered while she was alive from her injuries. She was in pain for weeks in the hospital and was initially in a coma in the ICU before her ultimate demise. Accordingly, Cam can bring a wrongful death claim and an estate survivorship claim.

(2)(b) if so who is the correct person to be named the actual named Plaintiffs to bring such claims

In a wrongful death claim, the named plaintiff (in order) must be the plaintiff's spouse, children, parents, or next of kin and if no next of kin the executor of the estate. Here, Gloria does not have a spouse, however, her children can bring the claim. In Georgia, an individual is presumed to be a biological child of his mother, while children that are legally adopted are also presumed to be children under the law. Individuals not legally adopted or born biologically from the mother are not considered children under Georgia law. Here, only Alex and Claire can bring the wrongful death action. Even though Mitchell was raised by Gloria, he was not legally adopted by her and thus cannot raise such a claim. Gloria's parents will have no role in this action given that Alex and Claire are of legal age to bring the action (20 and 18 respectively) and the parents do not need to raise an action on their behalf.

In a survivorship action, the Plaintiff's estate will bring such a claim. Here' Gloria's executor (if she has one) will bring this claim.

(2)(c) what types of damages can be recovered for each claim

In GA for a wrongful death claim, parties can recover the full value of the decedent's life, which would include their value to society, their value to their family, their value to their respective communities, their jobs, etc. For both wrongful death and right of survivorship, recovery is allowed for general damages as determined by the enlightened conscience of the jury for pain and suffering and mental pain and suffering. A party can also recover special damages in the form of medical bills, lost profits, and other losses resulting from the loss of the individual.

Here, for wrongful death, the court will look at factors such as Gloria's role raising her kids and taking care of her parents as well as the loss and devastation felt by her family members. The court will also likely consider the 1 million dollar bonus she could have gained, her wages as a 2 time MVP for the Atlanta Dream, her impact on the community as an MVP for a huge team, and her contribution to the WNBA. The court may consider the fact that Claire is raising Mitch and use that to calculate the damages. For the right of survivorship claim, the court will likely give damages because Gloria suffered for weeks in physical pain and suffering as well as mental pain and suffering. The Court will also give special damages for the hospital bills and maybe the profits that could have been earned like the million dollar bonus. The court can also give special damages because Claire has quit her job to take care of Mitch.

(2)(d) which of Gloria's family members have a legal right to receive a portion of any recovery.

Because Gloria has no will, the funds derived from recovery will pass through intestacy. Georgia follows a per stripes distribution method where the property is divided at the children's level. Usually, a spouse is also entitled to a third of the proceeds as according to GA's intestacy laws. If there is no spouse, the proceeds are divided amongst the children. As described in 2(b), Gloria has no spouse so the property would go to her children. As also described in 2(b), only Alex and Claire will be seen as children of Gloria and will be given 1/2 of the recovery each.

Essay 3 — Sample Answer 2

Memorandum

To: Cam

From: Examinee

Date: February 24, 2026

Re: Gloria's death and our representation

Pursuant to our earlier conversation, I have researched the two questions you put to me and I address each in turn.

I. Serious ethical concerns cloud your representation in this case.

The Georgia Rules of Professional Conduct ("RPC") govern your representation. If you commit a violation of the RPC, knowingly assist others in so doing, or send an agent to violate the RPC on your behalf, you are subject to discipline. Additionally, if you are found to have entered into a representation in violation of the RPC, you may be precluded with continuing the representation. The facts yield several potential violations of the RPC.

First, the RPC prohibit certain conduct in advertising. One rule is that a lawyer may not compare himself to other lawyers unless the comparison may be factually verified. You earned the representation of Gloria in part because of a brochure that you prepared stating that you are "better than all the other lawyers in Georgia at wreck cases." This is a comparison that cannot be factually verified, and you may be disciplined for such a statement.

Second, the RPC include certain solicitations for representation. In particular, a lawyer may not solicit business in-person, such as approaching a person on the street and offering to represent them. A lawyer may send targeted mail to solicit business, but targeted mail based on a particular accident or injury cannot be sent until at least 30 days after the underlying accident or injury occurs. And as mentioned above, it is a violation of the RPC to send an agent to do something that you are not otherwise allowed to do yourself. Here, Phil brought flowers and a brochure in person to Gloria's room after the accident. He left the flowers and brochure in her hospital room. Thus, on these facts, Phil approached Gloria in person on your behalf to solicit representation, which violates the RPC.

Several facts, however, may provide a viable defense. First, we can argue that you did not know Phil would approach Gloria in the hospital until after it occurred. Note this fact is weakened by our conversation with Phil about him "get[ting] that case signed up for you" and you did not dissuade or disabuse him. Second, we can argue that Gloria was still in a coma until 31 days after the accident. Based on this timeline, we could argue that neither Phil nor you ever approached

Gloria "in person" because she was totally unconscious. Instead, we would argue the flowers and brochure are the functional equivalent of mail, which was received 31 days after the accident and would therefore be allowed under the 30-day rule.

Note here that Phil may also be subject to discipline by Georgia and Florida for violating the RPC because he is also a lawyer. We would want to emphasize similar facts if we were to defend Phil.

Third, lawyers are not allowed to pay for referrals under the RPC. Here, it may be argued that you paid Phil for his referral of Gloria by giving him a \$100 gift certificate to Jay's Steakhouse after Gloria hired you. You got this for him because you apparently knew Phil had approached Gloria for you and knew Phil wanted a steak dinner for securing you this representation. Thus, this is another ethical qualm of your representation in this case.

II. The claims.

First, we may bring both a wrongful death claim and an estate survivorship claim in this case. Georgia provides, inter alia, two separate causes of action under the umbrella of negligence. The first is a wrongful death claim, which is essentially a claim that the defendant's negligence wrongfully caused a person's death. A wrongful death cause of action does not belong to the decedent; rather, the cause of action belongs to the decedent's family (more on that below). By contrast, the decedent retains her own cause of action for the negligence that caused her pain and suffering before she died. Under Georgia's survival statute, this claim "survives" the death of the decedent and belongs to her estate. Each may be pursued separately and simultaneously.

Second, the named plaintiffs in Gloria's wrongful death claim would be Alex and Claire, and the named plaintiff in Gloria's estate survivorship claim would be her personal representative on behalf of her estate.

As mentioned, under Georgia law, a decedent's wrongful death claim belongs to her family. Generally, the named plaintiff in a wrongful death suit would be the decedent's surviving spouse. If no surviving spouse, then the decedent's children would be plaintiffs. If no children, then the decedent's parents would be the plaintiffs. Here, Gloria was not married at the time of her death. Accordingly, her children would be entitled to press her wrongful death claim. Her children, under Georgia law, would be all of her biological and adopted children, which here is Alex and Claire. (Note that although Gloria was taking care of Mitch at the time of her death, she had not adopted him, and no facts support equitable adoption in this case).

For Gloria's estate survivorship claim, the named plaintiff would be the personal representative of her estate. If Gloria had died testate, her executor would be this person. However, because she died intestate, the Probate Court will have to appoint a personal representative. Generally, preference is given first to a surviving spouse (none here), then to adult children (Alex or Claire), then to the decedent's parents, but the Probate Court may select any willing and able person. Thus, it is likely that Alex and/or Claire would also be the plaintiffs for the estate survivorship claim; however they would be merely representatives of Gloria's estate rather than the real

parties in interest. The claim - and any proceeds therefrom - belong to Gloria's estate itself, not to the representative(s) who bring this claim.

Third, the wrongful death claim would yield the value of Gloria's life in damages, and the estate survivorship claim would yield Gloria's general pain and suffering damages plus specific damages.

For wrongful death claims, Georgia allows the plaintiffs to recover the full value of the life of the decedent. That value requires a determination of the age, health, earning capacity, accomplishments, and services of the decedent, projected for the rest of their natural life. Expenses, even necessary medical expenses, are not deducted. Here, this value is likely to be very large considering Gloria's extremely successful WNBA career, though we could not put a definite figure on this beforehand.

We can also get punitive damages on this claim if we can prove willful and wanton conduct.

(Note, however, that Alex and Claire could not recover for loss of consortium; Georgia does not recognize loss of parental consortium).

For Gloria's estate survivorship claim, that claim is essentially Gloria's own negligence claim. Under Georgia tort law, courts award damages to compensate the plaintiff for her injuries, to put her in the position she was in before the injury occurred. Accordingly, when a plaintiff is injured, she may recover general damages and specific damages to compensate. General damages are presumed to flow from the tort itself and include, for example, pain and suffering. The plaintiff need not prove these damages specifically; she may simply testify as to the surrounding circumstances of her injury, and "the enlightened conscience of impartial jurors" will award a figure.

Specific damages, on the other hand, require a plaintiff to plead and prove them. These are specific dollar figures to compensate for specific expenses incurred as a result of the injury. A court can also award future lost wages provided they can be proved with reasonable certainty.

Here, Gloria's general damages will be awarded by the jury based on her "suffer[ing] pain for weeks in the hospital." We can ask for a figure, but it will be up to the jury.

Gloria's specific damages would include her thousands of dollars in medical bills and potentially her lost bonus, though we will have to prove she would have earned the MVP award with reasonable certainty. This will be hard to do, though note she was favored, which helps our case.

We may also get punitive damages on this claim, designed to punish the defendants' conduct, if we can prove willful and wanton conduct.

Fourth, Alex and Claire would be entitled to all of the proceeds from both claims.

As discussed above, the wrongful death claim would ultimately be Alex and Claire's to pursue. Generally, proceeds from a wrongful death claim are divided among the decedent's surviving spouse and children just like intestate distribution. But here, there is no surviving spouse, so Alex and Claire will have a joint right to the proceeds that the wrongful death claim yields.

As for the estate survivorship claim, as discussed, the claim and its proceeds belong to Gloria's estate. Gloria left no will, so the proceeds will be distributed according to Georgia's intestacy statutes. Georgia's intestacy statutes provide that the surviving spouse is entitled to a certain percentage of the estate, and then to the decedent's children "per stirpes." Per stirpes means that each child takes an equal share of the estate. If no surviving spouse or lineal descendants, then the decedent's parents take. But the surviving spouse and lineal descendants of the decedent, if they exist, take to the exclusion of everyone and anyone else.

Here, Gloria had no surviving spouse, but she had Alex and Claire as lineal descendants. Each would accordingly be entitled to half of the estate, which would include the estate survivorship proceeds. Because Gloria had lineal descendants, her parents would take nothing. Moreover, Gloria never adopted Mitch, and no facts support an equitable adoption, so Mitch also would not take anything from Gloria's estate.

In sum, Alex and Claire take all available proceeds, one way or another.

Essay 3 — Sample Answer 3

1. Phil violated the anti-solicitation of an injured party rule and you (Cam) may have some exposure for aiding his violation, failing to report it, and providing remuneration for the referral

The first issue is whether Phil violated any ethical rules by delivering Gloria flowers and a card in her hospital bed.

The Georgia ethical rules do not outright bar attorneys from advertising to customers and the First Amendment protects attorneys' rights to present truthful information about their services. However, they place various restraints aimed at preventing clients from feeling pressured or having lawyers harass potential plaintiffs. Significantly, the rules preclude live solicitation, meaning a live conversation between an attorney and potential client seeking to recruit the client as a customer, and forbid attorneys from reaching out to personal injury plaintiffs in non-live advertising within 30 days of their accident. Moreover, even advertisements that don't run afoul of the above must not be misleading. For example, they cannot make factually unsupported comparisons of attorneys.

Here, Phil arguably violated both of these rules when he showed up to Gloria's hospital bed to provide her your information. One the first rule, while Gloria was not conscious when Phil arrived, Phil showed up in person prepared to advertise your legal services. If an ethics challenge arises, Phil should argue that he only provided her a written advertisement which is not solicitation prohibited by the rule. That may provide him a technical way out but his conduct still raises ethical concerns. Moreover, Phil plainly violated the 30-day moratorium on advertising to potential personal injury plaintiffs. Similar to the above, Phil showed up with an advertisement in his hand, but Gloria only saw the ad on the 31st day after her crash. Thus, Phil may mount a similar technical defense here that any attempt to violate the rule was a failure. Unfortunately, however, the Supreme Court may still punish his attempts to violate the rules.

You may be exposed for aiding his violation of the ethics rules, as you arguably had notice that Phil was going to solicit Gloria. However, there is scant evidence that you had actual knowledge of his plans, so the claim would likely fail. In contrast, your statement that you are "better than all the other lawyer in Georgia at wreck cases" may subject you to liability for misleading marketing as an unsupportable comparison. I would advise taking that out of your brochure. You can defend the statement as obvious puffery that doesn't make a specific factual comparison to any attorney, but it is a close call as to whether that would succeed.

Lastly, your provision of the gift card for the Gloria referral may run afoul of the ethics rules on referrals. While an attorney can make a referral to another attorney, it should not be based on the financial benefits available to the referrer. With that said, the evidence indicates Phil just thought you were the right attorney and did not deliver the client on the expectancy of a financial reward, so this referral is probably permissible. Nevertheless, it will likely be scrutinized in light of the above.

2. Wrongful Death/Survivorship Claim and Right of Recovery

The issue is how the wrongful death claim will operate under Georgia law.

Under Georgia law, a decedent's estate can bring a wrongful death claim on their behalf postmortem and can take on actions where they were the plaintiff before death. Typically, a wrongful death claim should be brought by the decedent's spouse on the decedent's (estate's) behalf, but if the spouse cannot bring the claim, the decedent's descendant's can bring the claim on behalf the estate. All tort claims allow recovery for general damages, meaning the damages that naturally flow from the misconduct in an amount determined by the enlightened conscious of the jury. Moreover, parties can specifically plead special damages like loss of income and medical bills and punitive damages. The plaintiff will be the decedent's estate, and recoveries will accrue to the estate, unless they are special damages that accrue to the non-plaintiff like loss of consortium. Once a recovery is made, the amount is passed through the estate according to the decedent's will or through intestate succession if none exists.

Here, Gloria had no spouse, one biological child (Alex) and one adopted child (Claire). She also took care of a young boy named Mitch but had no legal relationship to him. Thus, Alex and Claire can bring the wrongful death suit on behalf of the estate. While they could have carried on other suits pending at the time of Gloria's death, it does not appear any such suit existed. While Alex and Claire will be the individuals facilitating the suit, the claim will be on behalf of the Estate of Gloria, and the estate will recover the damages. Mitch will not be able to join because he has no legal connection to Gloria. As with any tort claim, they can recover general damages for the accident, such as pain as suffering. They should also make sure to specifically plead special damages for loss of income in the amount of \$1 million and for the thousands in medical bills Gloria expended. They should also specifically plead punitive damages based on willful and wanton misconduct because the tractor trailer driver was drunk. That recovery will all go into the estate.

The next issue is who will benefit from the recovery under intestate succession.

It does not appear that Gloria had a will when she died; As such, recovery from the suit will pass through intestate succession. Georgia uses a model, which prioritizes the spouse (guaranteeing at least a 1/3rd share) and descendants per stirpes. If there is no spouse at the time of death, the estate is split evenly by descendants with existing lines or who are surviving and the funds are distributed down the chain. If no descendants exist at the time of death, property goes to the parents, then siblings, then grandparents then aunts and uncles. Adopted children can recover as descendants but non-adopted, non-biological kids cannot claim as descendants. Moreover, it is not significant that a child is estranged at the time of inheritance.

Here, Alex and Claire as the only surviving descendants will split the recovery fifty. There is no spouse who will recover, and Mitch has no cognizable interest.

Essay 4 — Sample Answer 1

1a. The issue is whether Velma's cellphone conversations with Marjorie are admissible.

Hearsay issues arise when a party seeks to introduce an out of court statement for the truth of the matter asserted. Exceptions to the rule against hearsay are divided by whether the declarant must be unavailable for trial. One exception to the rule against hearsay is the state of mind exception. The state of mind exception to the rule against hearsay applies when a person makes a statement manifesting their emotional condition, such as being hungry or happy. This exception extends to manifested beliefs held by the declarant.

Here, Velma made a statement that qualified for the state of mind rule against hearsay exception. Her statement to Marjorie manifested that she was scared and that she suspected Dante was a conman and that he may hurt her. These manifested her current state of mind, creating an exception to the rule against hearsay. Marjorie similarly made a statement falling into the state of mind exception. Marjorie believed that Dante was dangerous and that she did not like him. These similarly manifested Marjorie's state of mind. As such, the conversation between Marjorie and Velma is admissible as the hearsay falls into the state of mind exception.

1b. The issue is whether Velma's cellphone conversations with “Alexis Moon” are admissible.

It is an exclusion to the rule against hearsay if it is a statement made by an opposing party being offered against that party. Here, the accounts were linked to Dante and the statements are sought to be introduced against Dante. Assuming that the prosecution lays the foundation that Dante was acting as Alexis Moon, the statement is admissible as a statement against party opponent. On cross-examination Dante is entitled to challenge the connection between him and Alexis or, should he desire, he may take the stand to clarify the events surrounding Alexis Moon.

2. The issue is whether the SmartTalk AI voice logs are admissible.

Hearsay can only occur when a person has spoken. Statements by machines are not hearsay. Double hearsay occurs when the statement is hearsay and a statement within the statement is hearsay. Statements by party opponents are admissible when they are introduced against the party who communicated. Here, the state seeks to introduce what is presumably Dante's words as recorded by the SmartTalk AI. Credibility is an issue for the jury's determination. The rule of completeness generally permits admissibility where necessary to avoid undue prejudice or confusion.

SmartTalk's record is not hearsay as it is not an assertion by a person. As such, there are no hearsay concerns. The assertions made within the recording are, however, subject to the hearsay rule as assertions out of court by persons. As such, exceptions for the hearsay within the non-hearsay must be determined before it can be admissible. Here, there was a statement made by Velma, an unavailable declarant, with someone suggested to be Dante. As it lies within the jury's purview, the court should not decide whether Velma was actually talking with Dante at that time

when deciding admissibility. As such, the court should find that the rules favor admissibility and let the jury determine the weight and credibility to be given to Velma's statement. The statement presumably made by Dante was offered against Dante, putting the statement into the party opponent exclusion to the rule against hearsay. The rule of completeness would, at that point, demand the introduction of Velma's statement to avoid unnecessary confusion.

3. The issue is whether Dante's laptop is admissible.

The admissibility of Dante's laptop likely turns on 404(b) of the Georgia evidence code. 404(b) permits evidence of other wrongdoings to establish modus operandi, intent, preparation, or any other non-propensity purpose. Propensity arguments are inadmissible, particularly in criminal cases. The evidence contained on the laptop, however, can be admissible to demonstrate lack of mistake, knowledge, method of operation, or any other non-propensity purpose.

The other point on which the admissibility of Dante's laptop turns is one based on hearsay. Inadmissible hearsay bars the introduction of otherwise admissible evidence. Here, the fact pattern does not elucidate what on the laptop exactly is specifically being sought for admission. Hearsay may potentially present issues for the laptop's admissibility if the messages on the laptop sought to be admitted were hearsay. However, the laptop may generally be admitted.

4. The issue is whether the blockchain records are admissible.

Another exception to the rule against hearsay applies to business records. Business records are those that are kept in the course of normal business and made contemporaneously or shortly after an event. Business records may be certified or may require a witness to authenticate them.

The blockchain records are a record made in the regular course of business. The amounts contained within crypto wallets are tracked by the blockchain in response to changes in the account or account value. IP addresses are similarly logged by nearly every facet of the internet. The expert will almost certainly testify to those and certify them as business records. Account registration forms, digital or not, are also created in the normal course of business and otherwise meet the business records exception to the rule against hearsay. Because the expert can authenticate the records, they are admissible substantively.

Essay 4 — Sample Answer 2

At issue is the admissibility of four pieces of evidence in the case of *State v. Dante*, listed below.

In Georgia, the rules of evidence do not apply in grand jury proceedings prior to indictment, but Dante has already been charged with felony murder, theft, and wire fraud. Therefore, the Georgia rules of evidence will apply to each of the following proffered by the prosecution. Evidence is admissible if it is relevant, or has any tendency to make a fact of the case more or less likely to be true. However, evidence is not admissible if it is hearsay, or an out of court statement offered to prove the truth of the matter asserted, unless it falls into an exception or is offered to prove something other than the truth of the matter asserted. The Court makes the decision on whether evidence will be admissible (as opposed to the jury). The Court will weigh whether the probative value of the evidence will outweigh its prejudicial effect, or in laymen's terms, whether it's relevance outweighs the possibility that it will bias the jury and result in an unfair verdict for the defendant.

1) Velma's cellphone with text and Whats App messages.

In Georgia, hearsay is defined as an out of court statement offered to prove the truth of the matter asserted. Statements that may be hearsay can fall into an exception to be admissible or they can be offered to prove something other than the truth of the matter asserted. Here, the text and What's App messages are out of court statements offered to prove the truth of the matter asserted, that Dante stole from Velma.

"I think Dante is a con man who hacked my digital wallet. I'm scared he'll come after me if I confront him" - Velma's text would likely be admissible under the hearsay exception for then-existing state of mind because it explains what she was thinking and how she was feeling. A statement which was made regarding the state of mind of the declarant at the time is admissible under this exception.

"BE CAREFUL. I never liked him and I think he is dangerous and could hurt you." - Marjorie's text could likely also be admissible as then-existing state of mind. It could also be categorized under the exception for present-sense impression, which is a reaction to something that is currently happening.

"[Don't] make trouble about things she didn't understand" - This was a disguised account run by Dante. This message could fall into the hearsay exception for statements against interest, which are statements that are hearsay but are admissible if they go against the declarant's property or penal interest. It is a threat against Velma, which was disguised as being from Alexis Moon, but was actually from Dante, and it was against Dante's penal interest to be threatening Velma. If he was not guilty of some wrongdoing, he would not be threatening Velma.

2) SmartTalk AI voice logs that recorded the "You'll regret this" conversation.

As discussed above, hearsay is defined as an out of court statement offered to prove the truth of the matter asserted. The conversation was out of court and is being offered to prove the truth of the matter asserted, that Dante stole from Velma. Hearsay is traditionally inadmissible, but there are exceptions. This would likely fall into the statement against interest exception. The statement "you'll regret this" is relevant because it does tend to make it more likely that Dante is guilty of some wrong-doing. In determining its admissibility, the Court must weigh the probative value versus the prejudicial effect. The threats will likely have a prejudicial effect because the threat was made hours before Velma was found dead by strangulation. However, the Court will find it admissible if it is probative, or relevant, enough.

- 3) Dante's laptop, including files suggesting he had engaged in other cryptocurrency thefts and had been accused by other people of hacking their digital wallets.

Character evidence, including prior acts, is generally not admissible. Prior acts are admissible in a few instances, such as to prove motive, identification, absence of mistake, intent. The files arguably show absence of mistake as he unequivocally has engaged in this activity before.

Another way this evidence may be admissible is through the hearsay exception for business records. If the files were records made in the regular course of business, even if it was illegal activity, they would be admissible under the exception. If the files are records of all his activity and the money earned from them, this may be a possible way to get the files admitted.

- 4) Blockchain records showing Velma's digital wallet was emptied ten days prior to her death. A blockchain expert traced the stolen cryptocurrency through a series of anonymous wallets to an exchange account registered to Dante, supported by account registration emails and IP logs matching Dante's home address.

An expert is someone who the Court has certified to have the scientific, technical, and advanced knowledge necessary to provide an expert opinion on a topic. To get this evidence admitted, the Court would have to certify the Blockchain expert as a witness. This requires an expert witness affidavit presented to the Court including the education and experience the proposed expert has. If the Court certifies this witness, he may testify to this information he has obtained.

Essay 4 — Sample Answer 3

(1) As a general rule, Hearsay is an out of court statement made for the truth of the matter asserted that courts, in their discretion, may exclude from evidence if it does not fall under an exception or is not considered to be nonhearsay. Generally, a criminal party is afforded a right to confront individuals who make incriminating statements against them under the 6th Amendment's confrontation clause unless the nonparty acquired the party's unavailability (like a victim) or the party was examined under cross examination in a prior trial under oath.

Here, Velma's texts are admissible as a present sense impression. Present sense impressions are considered to be exceptions to the hearsay exception where a party is stating what they presently observe. Mental sense impressions are an exception to the hearsay rule that state that Here, Velma is stating that she "thinks Dante is a con man.. and that she feels scared." This statement is a present sense impression of what she thinks and how she feels. Marjorie's statements could come in and be admissible under an excited utterance exception (where she stated "BE CAREFUL"). Marjorie's statements could also be argued to be a present sense impression based off her reaction to Velma's news. However, Marjorie isn't describing anything she is currently witnessing. This argument can go either way and admissibility is up in the air; however, I think it can be admitted under a present sense impression exception. Dante will likely argue that admitting these statements violate his confrontation clause rights as Velma is unavailable. Dante can also claim this if the prosecution is not willing to put Marjorie up as a witness. However, as to Velma, this argument will likely fail because Dante procured her unavailability and the court allows statements by an individual who was rendered unavailable by a party to come in. As to Marjorie, if she is not put up as a witness, Dante has a colorable argument to make against the admissibility of her statements.

A statement by an party opponent are considered nonhearsay under Georgia law and can be admitted under evidence laws even if the statement was not made under oath (different from the federal rules where an oath is required). Here, the Alexis Moon statements, because they were made by Dante who they will be used against will be admissible because they were made by Dante.

(2) The log between Velma and the phone does not come under any hearsay exception. The prosecutor could argue that this was a present sense impression after Velma saw that \$2 million dollars had disappeared from her digital wallet. The prosecutor can also try to argue that this was an excited utterance given that Velma had just discovered that the money was gone and was asking for help. I doubt that either of these arguments would work and the statement will likely not be able to come under a hearsay exception. The log between Dante and Velma arguably could come in under the dying declaration exception for Velma's statements and statements by a party opponent for Dante's statements. For the dying declaration, a declarant must be unavailable, the exception can only be used in a homicide or civil case, and the declarant must believe that the threat of death is imminent. It is unlikely that Velma's statements could come in under this exception because there is no evidence suggesting that she believed she was under the threat of imminent death unless the prosecutor puts witnesses on the stand like Marjorie to show that

Velma was severely worried that Dante would murder her. However, a judge has discretion to allow the statement in if it is absolutely necessary, a notice is given to Dante in advance that the statement will be used, and its probative value is not substantially outweighed by any prejudicial effect. Moreover, Dante procured Velma's unavailability by murdering her, so the court may allow the statements in under the hearsay exception that an individual's statements come in against a party if the party procured her unavailability. Accordingly, this statement could arguably come in under this exception. Dante's statements from the log would come in because as discussed in (1) they are statements by a party opponent and are admissible. Dante can argue that it was not his voice on the call but this can easily be fixed by someone identifying his voice either in court or in prior exchanges. As noted by the rules of evidence, a statement of identification is not hearsay and accordingly can come in if Dante poses a hearsay argument to the identification of his voice. The log itself can be argued to be a record kept in the ordinary course of business if it is shown that the log is made at the time the statement is made (which here it is) and a log is regularly made (which the facts suggest the SmartTalk voice log is).

(3) Evidence that is relevant is admissible as long as it is subject to a rule 403 balancing test where the judge has the discretion to block evidence if its probative value is substantially outweighed by its prejudicial value (i.e. confusion of the issues to jury, repetitiveness, etc). Improper character evidence, meaning evidence that tends to show the propensity of a defendant committing a crime or an act, is usually not allowed in criminal cases, unless the defendant opens the door himself or the evidence is habit evidence or a specific reaction to a certain set of stimuli. Character evidence can also come in to show another purpose other than propensity such as motive, intent, common scheme or plan, and identification. Here, this evidence cannot be brought in to show that because Dante has done this in the past he has done this again, but can be used to show that perhaps he has engaged in this scheme before (for example, if the reports show that in the other cases he was on dating app, using the moniker CryptoKing, and robbed his victims). This evidence is also not habit evidence because it isn't showing that Dante reacted a certain way to a certain set of circumstances each time. The evidence can also only be brought in if Dante opens the door by claiming his good character or Velma's bad character if he asserts a self defense argument. The evidence can also be brought in for impeachment purposes.

(4) Evidence that is relevant is admissible as long as it is subject to a rule 403 balancing test where the judge has the discretion to block evidence if its probative value is substantially outweighed by its prejudicial value (i.e. confusion of the issues to jury, repetitiveness, etc). Here, a judge may block this evidence for the murder charges given that it may be prejudicial to a jury as it insinuates a clear causation between the murder and the stolen property. The Judge however may allow this evidence to be allowed in for the sole purpose of a theft and wire fraud charge. To make sure the jury doesn't use this evidence for the murder charge, the judge will have to give a limiting instruction saying so. The records themselves could come under the business records exception as they were made in the regular course of business, at or around the time of the incident, and were properly recorded by a custodian (i.e. the computer).

MPT-1 — Sample Answer 1

MEMORANDUM

To: Beverly Garcia

From: Examinee

Date: February 24, 2026

Re: Kari Otto Property Characterization

Introduction

Our client, Kari Otto, seeks an amicable divorce from her husband, Eric Nolan. You asked me to assess whether Kari and Eric married in 2006 or 2019 and how Franklin law would characterize their property for purposes of equitable distribution upon divorce in either case. As discussed further below, Franklin law would likely recognize the beginning of their marriage in 2006 and characterize property accordingly. As you requested, the end of the memo also addresses property characterization in the event their marriage in fact began in 2019.

1. Kari and Eric likely married in 2006.

A. Legal Standard

Franklin recognizes common law marriages, Fr. Fam. Code § 211, which are marriages entered into without a formal ceremony, *see Schwartz v. Darrow* (discussing putative “couple's express agreement to marry even without a formal ceremony”).

Common law marriage in Franklin has two elements. *Id.* The first is “mutual agreement of the couple to enter the legal and social institution of marriage.” *Id.* The second is “conduct manifesting that mutual agreement, often referred to as ‘holding out.’” *Id.* (quoting *Howard v. Howard*).

Whether a common law marriage exists “depends on the totality of the circumstances.” *Id.* Conduct tending to show the existence of a common law marriage includes (1) “cohabitation,” (2) “reputation in the community as spouses,” (3) “maintenance of joint banking and credit accounts,” (4) “purchase and joint ownership of property,” (5) “filing of joint tax returns,” (6) “evidence of shared financial responsibility,” (7) “evidence of joint estate planning,” (8) “symbols of commitment, such as ceremonies, anniversaries, cards, and gifts,” and (9) “the couple's references to or labels for one another.” *Id.*

When the incidents of marriage exist as a convenience, that tends to show now bona fide common law marriage exists. *See id.* (citing *Ridley v. Brooks*). And when one putative spouse has

stated his intent to others never to marry, that also tends to show that no common law marriage exists (because it undermines the credibility that he *intended* to be married). See *id.* (citing *Ridley*).

The party claiming a common law marriage exists bears the burden to establish it by clear and convincing evidence. *Id.* (citing *Howard*).

B. Mutual Assent Marry

Here, the parties both agreed to enter the institution of marriage. Eric gave Kari a diamond ring (a symbol of commitment) and asked her to marry him. She accepted the ring and gave her assent to marry him in August and September 2006. Further evidence that they mutually assented to marriage includes that they obtained a marriage license and gathered with close friends to celebrate the occasion (even though they did not have a formal marriage ceremony). Indeed, in Eric's interview, he concedes that he asked Kari to marry him and that she agreed in late 2006.

It is true that Eric now claims this was only a promise to marry later, not a then-existing assent to be married. But he referred to himself as her husband as early as 2007 in an anniversary card for their first anniversary, all of which indicates that he did, in fact, agree to marry her in 2006. He also admits that he began referring to Kari as his wife as early as 2006, which shows that he had agreed to marry her in 2006. The strong weight of the evidence is therefore likely enough to overcome Eric's claims that the ring was just a promise ring and that they did not in fact marry until 2019, even with the heightened bar of clear and convincing evidence.

C. Holding Out

The parties also held themselves out as spouses. Most of the factors for determining the existence of a common law marriage exist here.

The parties had a reputation with others as married. Kari said friends and family believed them to be married. Indeed, Kari's family was unhappy that they were not able to be there to celebrate the new marriage with the couple in 2006. Eric's own grandmother made a commemorative cross-stitch of their marriage from around that time. Their friends began referring to them as married around that time too. All of that supports a finding of a common law marriage.

They have long sent out joint Christmas cards with their photos in which they referred to themselves to the recipients as spouses, which shows they held themselves out.

The parties maintained joint bank and credit accounts, including the joint bank account they opened in December 2006, which they both used to add money and pay expenses.

They also jointly bought property together (the bungalow whose mortgage they paid with joint funds) and filed joint taxes together.

They had their celebratory dinner after obtaining their marriage license and later held another ceremony to celebrate their marriage, which tends to show the existence of a marriage relationship.

Although the record does not reflect any joint estate planning, the totality of the circumstances weighs heavily in favor of finding that a common law marriage exists here from the parties' holding themselves out as such.

2. Property Characterization for 2006 Marriage

A. Legal Standard

Franklin employs a system of equitable distribution of property among spouses upon their divorce. See Fr. Fam. Code § 215(a)(2) (discussing equitable distribution of marital property). The before a court determines how to distribute the property, it must first characterize the spouses' assets as either separate or marital. See Fr. Fam. Code §§ 200(c)(d), 215(a)(1)(2). A spouse's separate property is not subject to distribution. See Fr. Fam. Code § 215(a)(1) ("Separate property shall remain as such."). By contrast, marital property is subject to distribution. See Fr. Fam. Code § 215(a)(2) ("Marital property shall be distributed equitably between the parties . . ."). This different treatment makes the characterization question very important because it is the difference between a spouse's keeping an asset and its value entirely and her having it subject to distribution with her spouse.

In general, marital property is "all property acquired by either or both spouses during the marriage." Fr. Fam. Code § 200(c). By contrast, separate property is "property acquired before marriage or property acquired" through succession or nonintra-spousal gift. Fr. Fam. Code § 200(d)(1).

Whether an increase in value of property is characterized as marital or separate depends on whether both spouses in some way contributed to that appreciation. See *Jones v. Cardiff* (citing *Price v. Price*); see also Fr. Fam. Code § 200(d)(3) (discussing appreciation in value of even separate property as subject to equitable distribution). Contributions subjecting appreciation in value of otherwise separate property to distribution as marital property may be direct or indirect, financial or nonfinancial. *Id.* (citing *Price*) (recognizing direct, nonfinancial contribution to appreciation in separate property as marital); *Bower v. Bower* (citing *Litman v. Litman* (recognizing marital treatment of indirect spousal contribution to appreciation in separate property)). Indirect support includes "pledging . . . personal credit for . . . debts" as well as providing support in the home as a homemaker and parent. See *id.*

Furthermore, the mere fact that property acquired during the marriage is of the same kind as property one spouse held before marriage does not mean that later-acquired property is necessarily separate rather than marital. See *id.*; Fr. Fam. Code § 200(c).

B. 2006 Characterization – Application

The following characterization will apply if the parties' marriage became effective in 2006.

i. House at 1505 Clark Street

The house is marital property. The parties bought the house during the marriage (2008) and paid for it with joint funds from a joint account. The fact that Eric rented the Bungalow is of no consequence; the statute concerns itself with when one or both of the spouses acquired ownership. Nor is the fact that he negotiated the transaction.

He may contend that the initial 20% down payment was his separate property he earned as a photographer and that therefore that amount and the share of that amount that appreciated should remain separate property. That will be difficult to contend because there was intermingling of the funds in the parties' joint account beginning immediately after the marriage (December 2006) and well before this purchase in 2008. But that would be a closer call.

Otherwise, the appreciation in value occurred during the marriage and on a marital asset, so the appreciation is also marital.

Debts are also subject to characterization, and the mortgage will be a marital debt for the same reasons as stated above.

ii. Tract of Land in Frankfurt Acres

This land was Kari's separate property because she owned it since before they met and before they married.

The issue is whether any of the appreciation on this separate property is marital. It arose primarily from the efforts of Kari and using money that was separate property since it came as a gift to her alone. All that points to the appreciation's being separate.

Nothing suggests Eric contributed directly in a financial or nonfinancial way to the appreciation. He may contend that he contributed indirectly by supporting her at home and by providing his own income to other areas of their married life, which freed her to spend that money and energy and time on the tract of land. That may be enough, but unlike in *Bower*, there is no sign that he pledged his credit for any debts related to this or engaged in any parenting or homemaking responsibilities. So the possibility that this will be enough for this property potentially to be subject to marital distribution is low.

iii. Photography Equipment

The initial photography equipment was separate property because he owned it before the marriage. But the equipment obtained to augment and replace is marital property even though it is of the same kind as what he is replacing. *See Bower*.

iv. Cars

The cars were acquired during the marriage with marital funds and are thus marital property.

v. Joint Checking Account

The joint checking account contains intermingled marital funds and is thus marital property.

C. Property Characterization for 2019 Marriage

i. House at 1505 Clark Street

Kari would be entitled to only the amount of the appreciation since 2019 because the house and mortgage is in his name alone. The amount she contributed to principal and that the property appreciated since then (from payments from their joint account) would be marital and subject to distribution.

ii. Tract of Land in Frankfurt Acres

The analysis of this issue would be the same as above because the only contested issue is over the extent of increase in value from the efforts that took place in 2022, after even the 2019 marriage would have taken place.

iii. Photography Equipment

Analysis of this issue would differ in that all the cameras, not only the ones obtained before the 2006 "marriage" would be separate property.

iv. Cars

Analysis of the cars would be the same. They are marital property.

v. Joint Checking Account

Analysis of this would be the same. The joint checking account is marital property.

MPT-1 — Sample Answer 2

MEMORANDUM

To: Beverly Garcia

From: Examinee

Date: February 24, 2026

Re: Kari Otto matter

I. INTRODUCTION

Our client Kari Otto (“Kari”) is seeking a divorce from her husband, Eric Nolan (“Eric”). At issue is whether the parties were married in 2006 and obtained a common-law marriage or in 2019 when they had a wedding ceremony and filed a marriage certificate with the county clerk. Also at issue is what property is marital property and which property is separate property, and if the date of the parties' marriage has any effect on the characterization of property. Please see below for an analysis of those questions.

II. ANALYSIS

1. The question is whether the parties' marriage was created in 2006 or 2019.

Common law marriage is recognized as a valid marriage in this state. FR. FAMILY CODE §211. A common-law marriage may be established by clear and convincing evidence showing the mutual agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement, often referred to as “holding out.” *Howard v. Howard*. The burden of proving common-law marriage lies with the person claiming its existence. *Id.* The key question is whether the parties mutually intended to enter into a *marital* relationship - that is, to share a life together as spouses in a committed, intimate relationship of mutual support and mutual obligation. *Id.* Ultimately, a common-law marriage finding depends on the totality of the circumstances. *Schwartz v. Darrow*. Relevant conduct includes, but is not limited to, cohabitation; reputation in the community as spouses; maintenance of joint banking and credit accounts; purchase and joint ownership of property; filing of joint tax returns; evidence of shared financial responsibility, such as leases in both parties' names, joint bills, or other payment records; evidence of joint estate planning, including wills, powers of attorney, and beneficiary designations; symbols of commitment, such as ceremonies, anniversaries, cards, and gifts; and the couple's references to or labels for one another. *Id.*

In *Ridley v. Brooks*, the court held there was no common-law marriage even though the parties lived together, shared living expenses, and indicated that they were husband and wife on a health insurance form and their apartment lease, because the evidence established that the health

insurance designation was done as a convenience to save money on premiums, and one of the parties often stated to friends that she had no intention to marry. Thus, the court in *Schwartz v. Darrow* held that courts must determine whether the parties in fact agreed to be married. The court in *Schwartz v. Darrow* held that the party asking the other party to be his wife, which she accepted, and that he provided her with a ring can be evidence of the couple's express agreement to marry even without a formal ceremony or the presence of some of the other supporting factors. *Id.* However, although a couple's decision to maintain separate finances remains relevant, it is not necessarily indicative of the lack of the parties' intent to be married. *Id.*

Here, although Eric and Kari did not have a wedding ceremony before the marriage license expired, nor did they file a marriage certificate with the county clerk's office in 2006, Eric and Kari mutually intended to enter into a marital relationship and in fact agreed to be married in 2006. In August of 2006, Eric gave Kari a diamond ring and asked her to marry him, to which Kari said yes. On September 19, 2006, Eric and Kari obtained a marriage license, and shortly thereafter, Eric started referring to Kari as his "wife". They told their friends they had gotten married, and their friends started referring to them as a married couple. Moreover, Eric gave Kari an anniversary card on September 19, 2007, where he referred to himself as her "husband" and celebrated their "first anniversary" together as a married couple, as they had already been dating together for several years. Lastly, Eric stated that he was intending to officially marry Kari in September of 2006 and began calling Kari his wife after that date. Although Kari had never used Eric's last name and only began to use "Otto-Nolan" as her last name after the 2019 wedding ceremony, there are enough facts in favor of their intention to enter into a marriage in 2006. Thus, Eric and Kari did mutually intend to enter into a marital relationship and agree to be married in 2006.

Moreover, other relevant conduct also would help a court find that Eric and Kari were married in 2006 from the totality of the circumstances. Their friends started referring to them as a married couple after September of 2006, Eric's grandmother has a cross-stitch wall hanging bearing the names "Eric" and "Kari" and includes the words "United in Love" and the date "September 19, 2006", with the woman wearing a wedding gown and veil and holding a bouquet of flowers and the man dressed formally. Kari stated that Eric's mother and grandmother were upset because they felt that Kari and Eric had deprived them of being there for the wedding in 2006. Kari and Eric have a joint bank account that they opened in December 2006, to which they both have contributed funds and from which they have paid their bills since 2006. They filed joint tax returns every year starting in 2007, and they send annual Christmas cards signed "Love, Mr. and Mrs. Nolan."

Thus, the facts show that Kari and Eric mutually intended to enter into a marriage in September of 2006 and the totality of the circumstances also show that they entered into a marriage in September of 2006.

2. The question is which property is marital property and which property is Eric's or Kari's separate property.

Except when the parties have a valid prenuptial or postnuptial agreement, the court shall determine the respective rights of the parties in their separate or marital property. FR. FAMILY CODE §215. Under FR. FAMILY CODE §200, the term “marital property” means all property acquired by either or both spouses during the marriage. The term “separate property” means: (1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse; (2) compensation for personal injuries; (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse; or (4) property described as separate property by written agreement.

When looking at property acquired in exchange for or in the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse under FR. FAMILY CODE §200(d)(3), any appreciation in the value of separate property due to the contributions or efforts of the nontitled spouse will be considered marital property. *Price v. Price*. This includes any direct contributions to the appreciation, such as when the nontitled spouse makes financial contributions to the property, as well as when the nontitled spouse makes direct nonfinancial contributions, such as by personally maintaining, making improvements to, or renovating a marital residence. *Id.* Moreover, the court in *Bower v. Bower* has held that there is a presumption that property acquired under this category would be roughly equivalent in value at the time between the premarital property and that which was acquired in exchange. However, the court in *Bower v. Bower* held that because premarital property was *replaced* with property greater in quantity and value that was largely produced or paid for through the activities of the marital economic partnership, such as the wife's direct and indirect contributions, the premarital property was not acquired in exchange for or the increase in value of separate property under §200(d)(3), but marital property within its statutory definition. Lastly, the court in *Litman v. Litman* held that the spouse was entitled to appreciation of other spouse's separate property asset even if spouse's contributions were indirect.

a. Which property is marital property and separate property if the parties' marriage was created in 2006?

Here, Kari and Eric have several assets that must be categorized as marital property and separate property. First, if the parties' marriage was created in 2006, then the following will constitute marital property as they were acquired by either or both spouses during the marriage according to the statutory definition of “marital property” under FR. FAMILY CODE §200: (1) the house at 1505 Clark Street, which was bought by Eric in February 2008, (2) the 2024 Toyota Tundra pickup truck, acquired in May 2024, (3) the 2024 Nissan Altima sedan, acquired in January 2024, (4) the First Bank joint checking account acquired in December of 2006, (5) the balance on mortgage for 1505 Clark Street, and (6) the additional photography equipment acquired in October of 2006.

However, the photography equipment acquired in December 2005 by Eric is separate property as it was bought before their marriage in September of 2006. Moreover, the tract of land in Frankfurt Acres, acquired in September of 2001 by Kari, is separate property. Although the tract of land appreciated significantly from \$70,000 in 2001 to \$150,000 in 2026, Kari herself made

significant improvements to the land in Frankfurt Acres with funds she has received as a gift from her mother in 2022. Lastly, there are no facts to suggest that Eric made any financial contributions or direct nonfinancial contributions to the property, such as by personally maintaining, making improvements to, or renovating the property, or indirectly contributing through his services as a homemaker or husband. The land in Frankfurt Acres was not their marital home, and both Eric and Kari were working and contributing to the finances of their joint account. Thus, because Kari purchased the land before their marriage and only contributed to the improvements herself through inherited funds, this is separate property.

b. Which property is marital property and separate property if the parties' marriage was created in 2019?

If the parties married in 2019, then the following would be marital property: the 2024 Toyota Tundra and the 2024 Nissan Altima. However, as stated above, the tract of land in Frankfurt Acres would continue to be separate property for Kari, and the photography equipment and additional photography equipment would be separate property for Eric, as there are no facts to show that Kari contributed directly or indirectly to the appreciation or depreciation of those properties.

However, the house at 1505 Clark Street purchased by Eric in 2008 and the balance on the mortgage would be marital property. Although only Eric's name is on the mortgage and he made a 20% down payment on the house using his own money that he earned as a photographer, Kari also financially contributed to the house by helping pay the mortgage on the house. Moreover, the house appreciated significantly in value, from \$400,000 in 2008 when it was premarital property to \$800,000 in 2026 when it was premarital property, and Kari helped pay the mortgage on the house and it was their marital residence. Thus, like the court in *Jones v. Cardiff*, who held that although the parties contributed different amounts toward the improvement of the property, any appreciation due to the effort of both spouses will be considered marital property. Thus, because both Kari and Eric contributed to the appreciation of the house by paying off its mortgage, the house at 1505 Clark Street is marital property.

Lastly, the joint checking account will also be marital property as both Kari and Eric contributed financially to the account since 2006.

III. CONCLUSION

In conclusion, Eric and Kari intended to and held themselves out to be married since September in 2006. The analysis of whether their assets are marital or separate property does change depending on whether their marriage was created in 2006 or 2019, as analyzed above. Most notably, if the parties married in 2019, the house at 1505 Clark Street would still be considered marital property even if the house was bought by Eric in 2008. Please let me know if you have any questions.

MPT-1 — Sample Answer 3

Law Offices of Stapleton & Garcia LLP

MEMORANDUM

To: Beverly Garcia

From: Examinee

Re: Kari Otto Matter

Introduction

Please see below a memorandum addressing the following issues: (1) whether the parties marriage was created in 2006 or 2019; (2) if the parties' marriage was created in 2006, which property is marital property and which is Eric's or Kari's separate property; and (3) if the parties' marriage was created in 2019, what effect, if any, would that have on the characterization of property? Per your instructions a separate statement of facts has been omitted.

Were Kari Otto and Eric Nolan married in 2006 or 2019?

Franklin recognizes common law marriages. FR. FAM. CODE Section 211(a). "A common-law marriage may be established by clear and convincing evidence showing the mutual agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement, often referred to as 'holding out.'" *Schwartz v. Darrow* (Fr. Ct. App. 2022)(quoting *Howard v. Howard* (Fr. Sup. Ct. 2015)). To determine whether a common-law marriage exists "[t]he key question is whether the parties mutually intend to enter a marital relationship." *Id.* The burden of proving common-law marriage lies with the person claiming its existence. *Id.* Accordingly, in the matter Kari Otto will bear the burden of proving, by clear and convincing evidence, the existence of a common-law marriage in 2006.

Court's apply a totality of the circumstances test to determine whether the parties intend to enter into a marital relationship. *Id.* Some of the factors court consider in Franklin include: cohabitation, reputation to the community as spouses, maintenance of joint banking and credit accounts, joint ownership of property, jointly paying bills, evidence of joint estate planning, beneficiary designations, symbols of commitment (i.e., anniversary cards); and references to labels for one another. *Id.*

Kari can likely prove by clear and convincing evidence that Kari and Eric intended to enter into a martial relationship and that a common-law marriage existed in 2006. Kari will be able to show that the parties intended to be marry in 2006 because Eric asked Kari to marry him, gave her a diamond ring, and they even obtained a marriage license and went to celebrate afterwards. Eric

will attempt to rebut that there was a marriage in 2006 (as he made clear in his prior statement) by arguing that the ring was just a promise ring and that he was nervous about actually marrying Kari. However, this statement can be rebutted because on Feb. 19, 2026, Eric testified “[y]eah, I intended to marry her.” Eric's arguments can also further be rebutted by the first anniversary card, in which Eric states “I have learned to be a good husband to you.” Accordingly, there is more than enough evidence to show that Kari and Eric intend to marry in 2006.

There are also substantial factors that evidence a common-law marriage under Franklin law. Unlike in *Schwartz v. Darrow*, Eric and Kari have filed their tax returns together since 2006, which weighs tremendously in favor a finding a common law marriage. *Id.* Even though Eric and Kari did not have a marriage ceremony, Eric and Kari have also cohabited together, held themselves out to friends and family as married, and opened a joint bank account together in 2006. Others also believed that Eric and Kari were married in 2006.

Accordingly, considering all pertinent factors, Kari will likely be able to prove by clear and convincing evidence that her and Eric intend to marry in 2006 and have had a valid common-law marriage since 2006.

If the parties' marriage was created in 2006, which property is marital property and which is Eric's or Kari's separate property?

The below section discusses whether Eric and Kari's property would be considered marital or non-marital property, if a court finds that a marriage existed in 2006. Franklin Family Code Section 200, generally defines "marital property" as "all property acquired by either or both spouses during the marriage" unless the property constitutes "separate property" as defined under Section 200(d). FR. FAM. CODE Section 200(d). Section 200(d) defines separate property as “(1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse . . . (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse.” FR. FAM. CODE Section 200(d).

Real-Property & Improvements

Real Property acquired before marriage is non-marital property. FR. FAM. CODE Section 200(d)(1). The natural appreciation of the value of that property is considered non-marital property so long as the appreciation is not due to the contributions or efforts of the other spouse. FR. FAM. CODE Section 200(d)(3); *see also Jones v. Cardiff* (Fr. Sup. Ct. 2023). A contribution by a spouse can be either monetary or non-monetary (i.e., physically making improvements via renovations). See *Jones v. Cardiff* (Fr. Sup. Ct. 2023)(citing *Price v. Price* (Fr. Sup. Ct. 2001).

Land in Frankfurt Acres & Shed on Land in Frankfurt Acres \$70,000.00 (now worth \$150,000.00)

The Land in Frankfurt Acres was acquired by Kari prior to the marriage, thus constitutes “nonmarital” property. Additionally, the improvements to the land and natural appreciation in

the value of the Property are also likely considered non-marital property because there is no evidence that Eric personally (shed was installed by a contractor) or his finances contributed to the appreciation in value of the Property. Eric May attempt to argue that shed placed on the land during the marriage improved the value of the Property. However, this shed was installed using funds that Kari received as a gift from her mother, which is considered non-marital property under Franklin Code. See FR. FAM. CODE Section 200(d)(1) (separate property means “property acquired by bequest, devise, descent, or **gift** from a party other than the spouse”)(emphasis added). Accordingly, the full value of the property at Frankfurt Acres is likely non-marital property.

Bungalow at 1505 Clark Street (Purchase Price 400,000.00; now worth \$800,000.00 with mortgage balance of \$50,000.00)

Because the home was purchased in 2008 using money that was likely acquired during the marriage, the home and any increases in value would be considered marital property as well as the mortgage balance.

Photography Equipment Purchased in 2005 & Other Photography Equipment Purchased in 2006

In *Bower v. Bower* (Fr. Ct. App. 2014), the court of appeals held that a heard of cows could be equitably distributed in considered what was marital vs. non-marital property. The court is likely to do the same here.

The photography equipment was purchased prior to 2006, thus it will be considered non-marital property under Franklin Code. Further, the property appreciated in value only natural – there was no activity that caused the increase in value. Thus, the photography equipment purchased in 2005 and appreciation are considered non-marital property.

Because property acquired during marriage is considered marital property under Franklin, the photography equipment purchased in 2006 and the increase in value (which is solely to due natural appreciation) will be considered marital property. FR. FAM. CODE Section 200.

2024 Toyota Tundra (Kari's Vehicle) & 2024 Nissan Altima (Eric's Vehicle)

Regardless of title, property acquired during marriage is considered marital property under Franklin, thus both vehicles and any depreciation or appreciation associated with them will be considered marital property. FR. FAM. CODE Section 200.

Joint Bank Account w/\$120,000.00

Here the joint bank account is owned jointly and both spouses have contributed to it since it was created in 2006. Thus, it would be considered marital property. FR. FAM. CODE Section 200.

If the parties' marriage was created in 2019, what effect, if any, would that have on the characterization of property?

The below section discusses whether Eric and Kari's property would be considered marital or non-marital property, if a court finds that a marriage did not exist until 2019. If would be no change in the categorization of the property, I indicate so briefly below.

Land in Frankfurt Acres \$70,000.00 (now worth \$150,000.00) & Shed on Land in Frankfurt Acres

No change in categorization because property was considered non-marital even in 2006.

Bungalow at 1505 Clark Street (Purchase Price 400,000.00; now worth \$800,000.00 with mortgage balance of \$50,000.00)

If there was no marriage until 2019, the bungalow would not be considered marital property. However, to the extent that Kari contributed to the increase in value of the house since 2019 (i.e., making payments with money earned during the marriage or making physical improvements (either by monetary contribution or physically), that appreciation would be considered marital property.

Photography Equipment Purchased in 2005 & Other Photography Equipment Purchased in 2006

If there was not a marriage until 2019, then the photography equipment (all acquired marriage and all increases in value due to natural appreciation) would be considered non-marital property.

2024 Toyota Tundra (Kari's Vehicle) & 2024 Nissan Altima (Eric's Vehicle)

No change because both were acquired after 2019 with marital funds.

Joint Bank Account w/\$120,000.00

Likely, no change here. Unless it was clear that there were funds in the account (which were never spent) that pre-existed the marriage.

MPT-2 — Sample Answer 1

MEMORANDUM

To: Maria Delatorre, City Attorney

From: Examinee

Date: February 24, 2026

Re: Measure 15

Introduction

This memorandum analyzes issues of the City's initial denial of Franklin Defenders of the Earth's (FDE) permission to fly the Earth Day flag above the United States flag during FDE's otherwise authorized demonstration in City Hall Plaza. It addresses (1) issues arising under the U.S. Flag Code (4 U.S.C. § 1 et seq.), (2) issues arising under Franklin law (including the effect, if any, of a responsive ballot initiative FDE launched), and (3) issues of free speech arising under the First Amendment to the U.S. Constitution.

After analyzing these issues, the memorandum concludes and provides advice to the City about whether it must adopt the initiative.

1. Flag Code

The first issue is whether the U.S. Flag Code bars the flying of the Earth Flag above the U.S. flag.

The flag code contains various provisions addressed to how to treat the U.S. flag in relation to other flags and pennants. 4 U.S.C. § 7. Several of the flag code provisions discuss how one "should" treat the flag, 4 U.S.C. §§ 7, 7(c), (e)(f), which shows the provisions are permissive rather than mandatory, *Walker's Treatise on Legislation* § 201(h). Among these permissive provisions are that the U.S. flag be displayed at the center of a group, 4 U.S.C. § 7, at the center and highest of a group of flags including states, localities, or societies, 4 U.S.C. § 7(c), and that, with such flags, the U.S. flag should be "hoisted first and lowered last," 4 U.S.C. § 7(f). All of this suggests that these display provisions are not mandatory and therefore not a bar to flying the Earth Day flag above the U.S. flag as FDE notified the City it intended to do.

Nonetheless, the final sentence of one subsection addressing the display of the U.S. flag is mandatory rather than permissive. Referring to "flags of States, cities, or localities, or pennants of societies," that provisions states that "[n]o such flag may be placed above the flag of the United states." 4 U.S.C. § 7(f) (emphasis added). This categorical negative "[n]o," combined with

the permissive “may,” indicates that it is absolutely not permissible for the “pennants of societies” to be “placed above the flag of the United States.”

The balance of other authority in the flag code suggests that these provisions are not meant to be mandatory. And indeed, non-mandatory sections apply to similar subject matter as the seemingly mandatory provision identified above, which undermines the notion that any of these provisions are meant to bind anyone rather than provide guidance. For all those reasons, the most well-grounded interpretation of the Flag Code is that it does not prohibit the FDE from flying the Earth Day flag above the U.S. flag, though it does discourage it.

2. Franklin Law on the Flag and Measure 15

The next issue is (A) whether the law of the State of Franklin bars the flying of the Earth Day flag above the U.S. flag and (B) whether Measure 15 is enforceable.

A. Franklin Law on Flags

Franklin statutes provide that “[a]t all times the national flag shall be placed in the position of first honor,” Fr. State Gov't Code § 436, and that “[n]o other flag or pennant shall be placed above ... the flag of the United States of America,” Fr. Military & Veterans' Code § 617. These provisions are mandatory, not permissive. *Walker's* § 201(h).

Here, because the FDE seeks to fly the Earth Day flag “above the United States flag on the center flagpole atop the City Hall building itself,” the plain language of the statutes prohibit what FDE seeks to do.

B. Enforceability of Measure 15

The people of the City passed a ballot initiative that purports to require the City Council to adopt an ordinance that makes it “the official policy and practice of the City of Whitney on Earth Day (April 22) to fly the Earth Flag at the top of the tallest city-owned flagpole on City Hall, above” all other flags, including the U.S. flag.

State law adopted by the Franklin Legislature may preempt local law of a city or county, even if the local law originated with a ballot initiative. *Mastai v. Ross* (citing *Mancini*). This is because the Legislature has the full legislative power. Fr. Const. art. 4, § 1; *Mancini*.

Preemption applies only when the Legislature has “either fully occupied the field or so fully covered it as to indicate a paramount state concern” when it comes to a particular issue. *Id.* (first citing *In re Hubbell*; and then citing *Jefferson School Bd.*).

Here, the Legislature has completely occupied the field on the issue of the display of the U.S. flag relative to other flags because it has a statute that directly unambiguously speaks to the precise

question at issue. Therefore, state law preempts this ballot initiative and any local ordinance that similarly contradicts the clear mandate of Franklin law as enacted by the Legislature.

3. The First Amendment and FDE

The next issue is whether the First Amendment to the U.S. Constitution requires that FDE be permitted to fly the Earth Flag in a superior place of honor and position than the U.S. flag. The key distinction here is whether FDE's attempt to fly the Earth Flag from City Hall itself would constitute government speech (and thus not warrant First Amendment protection) or private speech (and thus enjoy First Amendment protection). *Shurtleff v. City of Boston*.

The First Amendment's free speech protections "do[] not prevent the government from declining to express a view." *Id.* But when the government provides a forum for public speech, the First Amendment's protections may come in and prevent the government from "discriminating against speakers based on their viewpoint." *Id.* Apprehending the line between government speech and private speech in a government-provided public forum is not a "mechanical" undertaking. *Id.* Rather, it looks to factors such as "the history of the expression at issue; the public's likely perception as to who (the government or the private person) is speaking, and the extent to which the government has actively shaped or controlled the expression." *Id.* For example in *Shurtleff*, the Supreme Court said that the fact that the City of Boston permitted demonstrators to raise their own flags on the Plaza flag poles tended to show that that act "would not be perceived as government speech." *Id.* In those circumstances, the Court noted, the city had not actively controlled the flag raisings at all. *Id.*

Here, raising the flag on the flagpole on City Hall (not the City Hall Plaza) would be government speech not subject to any First Amendment protection. The flagpole that FDE wants to use (and that it addressed in the initiative and related proposed ordinance) seeks to put the Earth Flag on the high flagpole on city hall itself, not on the flagpole in the plaza. The City Hall flagpole is not part of the designated public forum where FDE (or anyone else) has or may obtain a permit to demonstrate. Unlike in *Shurtleff*, the City here exercises complete control over this flagpole as a matter of policy and practice, and similarly there is no history of demonstrators' using this particular flagpole for their own purposes. The City here maintains total control over the display on that flagpole, which means the history of this expression and the perception of permitting the Earth Flag there would be government, not private, speech.

For all those reasons, the First Amendment does not require that FDE be permitted to raise the Earth Flag there.

Conclusions and Recommendations

In conclusion, both state and federal law show that the City need not adopt the ordinance included in Measure 15.

Federal law is favorable that the U.S. flag should take a place a preeminence contrary to what the proposed ordinance would achieve. But most (though arguably not all) the provisions in the relevant federal law are permissive rather than mandatory.

State law is directly on point that the proposed ordinance would contravene state law. And hierarchy of authority is equally clear: in this contest, state law wins and prohibits the ordinance from being enforced.

Finally, nothing in the First Amendment requires a different result. The display on City Hall itself that FDE seeks would be government speech, not private speech. For that reason, the First Amendment does not apply, and the City may decline to hoist the Earth Flag over the U.S. flag without concern of running afoul of the Bill of Rights. In short, the City is perfectly within bounds to continue to control the flagpole on its own building as it does routinely and as a matter of policy.

I recommend that the City clarify its regulations to make clear that even flagpoles on the plaza (not on City Hall itself) are full and completely controlled by the City and thus anything to be put on them would be government speech subject to its control without First Amendment protection. I would also recommend that the City adopt its own provisions requiring display on City-controlled flagpoles of flags in accordance with the U.S. Flag Code, which would eliminate the issue of any Flag Code permissiveness.

MPT-2 — Sample Answer 2

Memorandum

To: Maria Delatorre, City Attorney

From: Examinee

Date: February 24, 2026

Re: Measure 15

Does the United State Flag Code bar the flying of the Earth Flag above the United States flag?

The first issue is whether the United States Flag Code bars the flying of the Earth flag above the United States flag. Under Section 7 of the United States Flag code, sections (c) and (e) state that at (c), “no other flag should be placed above.....the flag of the USA, except during church services.....” and at section (e), “the flag of the United States should be at the center and highest point of the group of number of flags of States or localities or penants of socities, and continues at (f) “that no flag should be placed above the United States flag.”

Therefore, the issue becomes whether the Flag Code by its terms bars the flying of the Earth Flag above the United States Flag despite the ballot measure. Under Walker's principles of statutory intpretation the subissue becomes whether the flag code bars such a flying of a higher flag using the term “shall or must” as mandatory or “should or may” as precatory or not mandatory. Here, as stated in the subsections of Section 7 above, the Flag Code at all times uses the terms should or may (permissive) rather than the precatory terms of “must or shall” As such, while the City of Whitney would be requested to not allow a flag to fly above the USA flag, that request is permissive according to Walker’s treatsie, and not mandatory. In other words, another flag could fly above the USA flag under the Flag Code and the Flag Code does not explicitly bar the FDE flag from flying above the USA flag.

In short, the ballot measure states the FDE flag should be flown “above the United States flag.” However, while it appears the Measure 15 violates the provisions of the Flag Code, the language used in the Flag Code is precatory to bar the flying of the FDE flag above the United States flag. Therefore, the Flag Code does not explicitly bar the flying of the FDE flag above the US flag, as the language included in the flag code is "should or may" and simply a request rather than mandatory requirement of federal law. Therefore, under the US Flag Code, the City of Whitney City Council would likely have to adopt the ordinance and the Flag Code would not bar the flying of the Earth Flag above the USA Flag.

Does Franklin state law bar the flying of the Earth Flag above the United States flag? Is Measure 15 enforceable under Franklin State law?

The second issue is whether Franklin State law bars the flying of the Earth Flag above the United States flag. Here, different from the US Flag code the requests appears to mandatory. Again following the terms of Walkers Treastie for Statutory intrepreation set forth above, the question terms on the use of mandatory or permissive words. Here, the Franklin Code sections at 436 and 617 states that at 436 "the national flag shall be placed in the position of first honor" and at 617 "no other flag shall be placed above the flag of the USA." Therefore, here, different than the analysis above, the use of the word shall in the Franklin state law makes the law mandatory. In other words, any flag going above the USA flag would be in direct violation of Franklin State laws mandatory requirements (as opposed to permissive requests in the Flag Code per Walker's Treasties defitnions). Therefore, Franklin State law bars the flying of the Earth Flag above the USA Flag.

The next issue then becomes if the ballot measure passed by the city of Whitney's voters is validly preempted by the state law of Franklin mandating no flag be above the US flag as set forth above. Under the Franklin State Constitution Article 4, Section 1, the legislative power of the state is vested in the general assembly, but the people reserved the right to initiate and referendum. Therefore, the next issue becomes whether the ballot measure by the voters of the City of Whitney is a valid initiative or referendum to overrule the Franklin assemblies mandatory flag rules set forth in Section 436 and 617. Under Mastai, the voters of a city may not preempt the laws of the state as a whole. Therefore, as the this was a initiative of a county as in Mastai citing Macinie, the city or local regualtion itself can not be in direct contradict or contary to the laws of the state legislature. Here, that is exactly the case, and such Franklin state law preempts and validly bars the flying of the FDE flag above the USA flag.

Does the First Amendment of the United States Constitution require that FDE be allowed to fly the Earth Flag above the United States flag?

The third issue is whether the First Amendment of the United States Constitution requires that FDE be allowed to fly the Earth Flag above the United States flag. The threshold issue to this larger issue of the First Amendment follows the analysis of *Shurtleff v City of Boston*. In *Shurtleff*, the Court stated that First Amendment Free Speech Clause does not prevent the government from declining to express a view (i.e., the first issue is to determine whether the speech at issue is governmental speech or private speech to determine the limitations or rights of the speaker under the First Amendment. The court continued that while the line can blur when the government invites people to speak in a program (as it becomes unclear who whether the speech is that of the government or of private speakers expressions in a public forum), the Court must analyze the context of the case including the history of the expression at issue, the public perceptions as to who would be speaking (government or private person), and the extent to which the government actively shaped or controlled the expression.

In *Shurtleff*, the Court found considering the factors set forth above, and the fact that the city of Boston had frequently allowed groups to hold ceremonies on the plaza, which they hoisted their flag, the flags flying on the plaza were not always governemental based flags, that public perception could not be assumed to deem that the hoisting of the flag would be governmental

speech, but rather associated with the group then hosting an event at the plaza. In short, the past behavior of the City of Boston in allowing other flags to be raised presented the case that Boston was not using the flags to solely speak for itself, and thus the flag raising program could not be governmental speech. Therefore, Boston's refusal to allow the Shurtleff group to raise its flag, violated the First Amendment's Free Speech Clause.

Here, the facts of the FDE flag and the City of Whitney greatly resemble the Court's facts and likely analysis in Shurtleff. The first issue will be to determine whether the speech at issue can be classified as governmental speech or private speech to determine the First Amendment's rights and potential limitations.

In short, here, Whitney as also frequently treated the plaza as a public forum for events like Shurtleff, flies flags above its city hall like Boston in Shurtleff initially seem to resemble the decision in Shurtleff that the flag raising was public speech on private grounds in the city plaza of Boston (as opposed to Whitney here).

However, unlike Shurtleff, there is no evidence that the City of Whitney frequently allowed other groups to raise the flags when hosting public events. Of note, the key in Shurtleff according to the Court was that the Boston had let other groups raise a flag, and thus would lead the public to know that not all flags flying represent a message of the government, or governmental speech. Alternatively, here, it appears, that only the governmental flags fly over city hall at any point. Moreover, while the City of Whitney allows groups to hold events in the plaza, they have to come along with the flags above city hall by allowing any group to do so (or in other words forfeit the government's right to speak for itself via its flags). Therefore, according to the factors set forth in Shurtleff, it appears that the City of Whitney can present the history of the expression at issue (flag raising) and past control of the expression at issue to point towards the government speaking for itself. Additionally, as no other flags have even flown above City Hall in Whitney other than governmental flags as mentioned above, it is likely that the public could perceive that a new flag would be the government's speech (much different from the facts of Shurtleff when many flags were raised to represent all sorts of messages according to the Court).

Moreover, the City of Whitney allowed all its events subject to the "standard regulations and safety measures." Specifically, one of those standard regulations set forth in the City Services of Administration regulations 4.2 sets forth that City Hall Plaza is open for these sorts of events (however, that City Hall, where the flags are raised, is not a part of the plaza where the events are allowed. Therefore, it appears that all groups who have used the Whitney plaza to speak, have been subject to this regulation, and as such the government may have even clearly expressed its desire to speak for itself via its flags in doing so and stated that the hall itself is not a part of the events. Again, the City of Whitney could point to the past control of the expression at issue and the history thereof to point toward the government speaking for itself under the Shurtleff factors.

Along the same lines, the City of Whitney would be able to support its analysis by its statutes setting forth the requirements of the USA flag as compared to other flags resembles the

governmental speech that was found in Walker vs Tex Div Sons of Conferderates at it is the City of Whitney exercising direct control over the messages conveyed on its flag poles.

Additionally, the ballot measure itself appears to classify the flag raising as governmental speech stating that it will be the Official policy and practice of the City of Whitney to fly the FDE flag above the USA flag. Therefore, those words of the ballot measure would clearly point to governmental speech via official policy and practice rather than the private speech of FDE itself in a public forum like in Shurtleff.

Therefore, when applying the analysis of Shurtleff to the facts of the City of Whitney and FDE here, it appears that the City of Whitney has not yet forfeited its "right to speak for itself" via the flags raised above City Hall, and can classify the flags above city hall as governmental speech as the history of the expression at issue, the public perception that it would be the government speaking, and the governments active control of the expression in the past all point to the flags above Whitney's city hall being governmental speech. As such, according to Shurtleff, the government has a right to decline to speak, and the First Amendment does not gurantee equal time for all views. Therefore, the Freedom of Speech Clause of the First Amendment likely does not require that FDE be allowed to fly its flag over city hall (and above the american flag), and therefore the City Council will not be in violation of the First Amendment by refusing to adopt Measure 15 requiring it do so.

Overall Conclusion

In short, when considering the analysis in the three grammatical paragraphs above, while the United States Flag Code merely request that it is not allowed a flag to be flown above the United States, it is likely the Ballot Measure 15 is be validly preempted under state law (which mandates no flag to go above the USA flag) according Franklin Governmental Code and Mastai, and that the First Amendment Freedom of Speech is not violated by the City of Whitney's refusal to allow the FDE flag to be raised followng Shurteff, as the City of Whitney has classified the flags as governmental speech, the City Council will not be required to adopt the ordinance known as Measure 15 requiring it to allow the FDE to go above the USA flag.

MPT-2 — Sample Answer 3

Memorandum

To: Maria. Delatorre, City Attorney

From: Examine

Re: Measure 15

Date: February 24, 2026

Introduction

This memorandum will address whether the City of Whitney must comply with the Measure 15 ballot initiative that Franklin Defenders of the Earth (FDE) proposed to the city council to adopt an ordinance requiring that the Earth Flag to be flown above the United States Flag every April 22 for Earth Day. Furthermore, the memorandum will also address if the United State Code or the Franklin State Law bar the flying of the flag, and if so will doing so violate the first amendment of the constitution.

Discussion

I. The United State Flag Code 4 USC 1, does not bar the flying of the earth flag above the United States Flag.

Under the United States Flag Code (4 USC 1), states that no other flag or pennant should be placed above or, if on the same level, to the right of the flag of the United States of America, with some exceptions including church services. Furthermore, the US Flag Code states that the flag of the United States of America should be at the center and at the highest point of the group when a number of flags of states or pennants of societies are grouped together. In addition, when other flags of pennants of societies are flown on the same halyard as the flag of the United States, the US flag should always be at the peak. The US flag should be hoisted first and lowered last, with no other flag may be placed above the United States Flag. However, under the Walker's Treaties of Legislation, words such as "should" or "may" makes the legislation permissive, but not mandatory.

Here, the FDE is attempting to pass an ordinance that allows for the flying of the Earth Flag to be above the United States Flag. Utilizing the Walker Treaty, the words "may" and "should" are sprinkled throughout the Flag Code. As the treaty states these words "should" or "may" could mean that the legislation of the City of Whitney allows for the FDE to fly the Earth Flag over the United States flag because it does not give a mandatory requirements that words such as "shall" and "must" would utilize. Therefore, due to the language listed in the code, the United States

Flag Code does not bar the flying of other flags above the United States Flags, but it does give legislation the discretion of whether or not they are allowed to.

II. Franklin State Law Bars the Flying of the Earth Flag above the United States Flag, and Measure 15 is most likely preempted by Franklin State Law.

A. It is mandatory under Franklin State Law that no flag is flown higher than Flag of the United States of America Under the Franklin State Government code (436), the code states that where the national and state flags are displayed, they shall be the same size, and the national flag shall be above the state flag, and the state flag shall be hung in such a manner to not interfere with any part of the national flag. It also states that at all times the flag must be placed in the position of first honor. Furthermore, code 617 of the Franklin state government code states that no other flag or pennant shall be placed above, or if on the same level to the right of the flag of the United States except for church services.

Here, FDE is attempting to showcase mandatory language in which no other flag may be flown over the United States Flag. Under the Walker, Treaties, words such as “shall” and “must” showcases that the actions set forth in the legislation is mandatory for those to follow. Therefore, there is a definiteness to the government code in which they do not want any thing to be flown over the United States Flag, because if they wanted variation in the law they would have added words such as “should” and “may”, and we do not see that in the language of the code.

B. Measure 15 is preempted by the Franklin State Constitution because it seems as though Franklin Law is attempting to occupy the field of flag placements within the State of Franklin.

The court in *Hubbell*, held “that if the subject matter has been so fully covered by general law as to clearly indicate that it has become exclusively a matter of state concern”, or as in *Jefferson School Board* states, “it the subject matter has been partially covered by general law couched in such terms to indicate a paramount state concern that will not tolerate further local action.” The court in *Mastai* held that whether the state law attempted to either fully occupy the field or fully cover the field to indicate a state concern is sufficient enough to showcase preemption on the state government on local ordinances.

Here, it could be showcased that the Franklin government intended to fully occupy how flags should be flown when in conjunction with the United States flag because there is no language that states otherwise in the Franklin State Code. In *Mastai v. Ross*, the defendant appealed that an ordinance should be held valid arguing that the city is an distinct, individual entity and not a political subdivision of the state. However, the court in *Mastai*, states that no matter the source of the local regulation, whether by initiative in a city or county, it cannot be contrary to the laws adopted by the state legislature. Because the City of Whitney is inferior to the rules of the State of Franklin code the new ordinance would most likely be shut down and the Earth Flag would not be allowed to fly above the United States Flag.

FDE may try to argue that since they got a vote of in favor of the Earth Flag being above the United States flag being 55% to 45%, that the ordinance should be passed because the state constitution, states that the legislative power of the state is vested in the Franklin Legislature, which consists of the Senate and Assembly, but the people reserve the right of powers of initiative and referendum. However, this would most likely fail because as stated above, no local ordinances cannot be contrary to the laws of the state legislation and this would be attempting to preempt the state and that is not allowed under the Franklin rules of law.

III. The First Amendment does not require that the City of Whitney must allow the FDE to fly the earth flag over the United States Flag.

Under the constitution, the first amendment prevents the government from discriminating against speakers based on their viewpoint, except in circumstances in which the government wants to speak for itself, then the first amendment does not allow airtime for all views. The Supreme court, conducted a holistic inquiry to determine whether the government intends to speak for itself or regulate private expression, by looking at whether there is a history of expression at issue, the public's likely perception as to who (the government or a private person) is speaking, and to what extent to which the government has actively shaped or controlled the expression.

In *Pleasant Grove City*, the court has held that messages of permanent monuments in public parks constituted government speech, even if privately funded. Even, items designed by private groups can also amount to public speech when the state that issues the space "maintains direct control over the message conveyed" by actively reviewing and rejecting over dozens of proposals. (Walker). However, in *Shurtleff*, where the history of expression includes that flags hanging are not permanent and others have been allowed to hang their flag, it will not be noted as governmental speech especially when perceived by the public. The court further explain that the defendant city did not actively control the flag raising and messages being sent because if they wanted to control it they could have made it clear by not allowing other flags to be represented.

Here, the court would look at whether or not the City Hall where the flags are located are a public forum in which other societies have hung there flag and whether or not the City of Whitney is attempting to relay government speech and the history of that speech that has been conveyed. The City Service Administration states that "no event shall occur on or in City Hall itself and that City hall is not a party of the City Hall Plaza There court will most likely reason that since the city hall is not open for public events that it is restrictive on the kinds of flags that are flown above it and would be protected government speech. While, we have no history on whether they allowed others to fly their flags above city hall FDE would bare the burden of proving otherwise. Therefore, the City of Whitney will not violate the first amendment by not allowing FDE to fly their flag.

FDE might try to argue that under the establishment clause they should be allowed to but there are no facts that indicate they are a religious organization therefore that will most likely fail.

Conclusion

In conclusion under the United States Flag Law, the FDE would argue that they are allowed to fly their flag under this provision, but this will most likely fail because it grants permissive not mandatory intake, and the Franklin State Constitution prohibits the flying the flag above the United States Flag. Measure 15 is preempted by State Law and not allowing the flag to fly does not violate the first amendment, so the City of Whitney can decline the ordinance.