Question 1 - Sample Answer # 1

(1) Abe v. Bob

(a) *Collection of* $1000

The issue is what remedy one has to enforce a court order.

First, Abe can file a motion for contempt of court against Bob. A court has the authority to enforce its lawful orders. This includes finding a party who willfully disobeys such orders as being in criminal contempt of court. Thus a party who violates or refuses to obey a court order will be found in contempt. Because this case involves a title to land (an action in partition) and may involve equitable remedies it is certainly in Superior Court (the court in Georgia that has exclusive original jurisdiction over such matters). Under Georgia law, a superior court judge can impose a penalty of - I believe - up to $500 fine and 10 days in jail. The court can order Abe to pay as ordered or face such penalties.

Second, Abe can ask for a judgment in the amount of $1000 and seek to enforce the judgment. Once a claimant has a judgment they can collect from the party as a judgment creditor. A judgment creditor can place a judgment lien on the property of the debtor. Here, Abe can place his lien on Bob's land. Moreover, he could attach Bob's bank accounts to get the money.

(b) *Billboard Remedy*
The issue is how Abe can force Bob to take down a sign on the easement property that is intended to interfere with his commercial sale of the property as residential lots. Abe needs to file injunctive relief. The type of injunction he is seeking is "corrective" because it is intended to correct a situation, a continuing harm by Bob having the sign up on the easement property.

There are three types of injunctive relief relevant here, a temporary restraining order (TRO), a preliminary injunction, and a permanent corrective injunction. As they are both equitable remedies the general requirements are (1) that there is no adequate remedy at law, (2) that injunctive relief is feasible, and (3) that there no defenses.

Here, Abe may suffer economic damages that are too indefinite for him to have a remedy at law, which would be a money judgment. It is too speculative to determine how much money Abe is losing from loss of interest in the lots he is trying to develop. Everyday the sign is up, suggesting the land will be used as a hog parlor or chicken farm, will tell more and more people the area will be an undesirable residential location. Therefore there is no remedy at law that can be accurately remedied by money. Next, injunctive relief is feasible because the court could order the sign taken down and permanently enjoin Bob from putting it back up.

First, Abe needs to get a TRO because the sign is causing immediate continuous harm. A TRO is a special injunction that can be granted ex parte and will be effective for up to 30 days. If Bob is not available (no facts indicate that is so here) OR the harm is immediate justifying an immediate order, the judge can act and order the sign taken down immediately.

Next, Abe needs to establish he is entitled to a preliminary injunction (that will last the duration of the trial). To establish an injunction a party needs to show (1) a likelihood of success on the merits and (2) the balance of hardships favors the plaintiff seeking the injunction. Here, the final injunction will probably be based on a nuisance action. A nuisance is the unreasonable interference with the use and enjoyment of the land of another. Here, locating a hog parlor and chicken farm next to a residential neighborhood, will very likely be found to be a nuisance. Therefore, Abe has met the first element, a likelihood of success on the merits. Next, the balance of hardships favor Abe. As mentioned, Abe is losing commercial value every day. Here it is doubtful that Bob really wants to start a chicken and hog farm and is just harassing Bob.
But clean hands defense Abe will not win if he does not stop his wrongful action (the wire).

(2) Bob v. Abe

Bob has already been granted an easement over Abe's property. The issue is how he can stop Abe from interfering with it.

Bob can also file an injunction (which uses the same elements above (1)(b)) to force Abe to take down the wire and comply with the court order. Moreover, Bob can also move to find Abe in contempt for violating the court order granting him an easement (especially if he continues to violate the injunction which he will surely get). Just because Bob has failed to pay the $1000 does not give Abe the right to a "self-help" remedy of blocking off the easement.
Of course Bob also must come to a court of equity with clean hands, so he must immediately remedy his wrongful activities such as the Billboard and pay the money ordered.

(3) Remedies Against Sheriff

(a) Criminal Contempt of Court

A court, again, has the authority to maintain control over judicial proceedings and not have its authority undermined, especially by an officer of the court and a law enforcement officer. A sheriff who openly suggested a judge's bias could probably be charged with and found guilty of contempt of court. The probably counts as disputing a court proceeding because the sheriff was communicating with a juror during trial and undermining the judge's authority. See (1)(a) for penalties.

(b) Civil Defamation Action by Judge

A judge may be able to bring a civil defamation action against the sheriff. Defamation occurs when (1) a defamatory statement is made (2) of and concerning the plaintiff, that (3) is published to a third party. Here, the sheriff published defamatory per se statements (concerning professional reputation) to Abe concerning the judge (plaintiff).

If it involves a matter of public concern or a public figure, other constitutional factors come into play. Here the judge is a public official, since he is an elected official (superior court judges are elected in Georgia). Therefore he will have an additional burden in a defamation action. First, the plaintiff must prove the falsity of the statement. That is he will have to prove that the sheriff's statements about the judge being biased are untrue. Second, he must show actual malice on the part of the sheriff. This means that the sheriff either knew the statements were untrue or made them with reckless disregard for the truth.

The statements were defamatory per se because they concerned his reputation as a judge (bias) and therefore he will be entitled to presumed damages and possibly punitives.

Question 1 - Sample Answer # 2

1. Abe could seek an injunction and contempt against Bob for the removal of the sign and to pay him the $1,000.

Abe is seeking to have the sign removed and payment of the $1,000.

An injunction is an action in equity to either force or restrain a person from acting. To prove an injunction one must show no adequate remedy at law and likelihood of success on the merits of the case.

There is no remedy at law when monetary damages would not suffice in making a person whole who has been harmed. The court can use the equitable remedy of contempt when a party is not following the court's order. There are two types of contempt, civil and criminal. Criminal contempt is meant to punish and the person in contempt will be forced to pay a fine or go to jail, and coming into line with the order does not make the punishment go away. Civil contempt is jail time or a fine instituted by a court to make a person get in line with the court's order. In order for the court to exercise the power of contempt, the other party must be in violation of the court order. Specific performance is also a remedy.

Abe would be able to get an injunction to get Bob to take down the sign. The presence of the sign wards off potential customers because it advertises they would be living next to a gigantic pig and chicken farm. This lessens the chances that Abe will be able to sell the lots, so he has no adequate remedy at law because Bob is interfering with his property. Money damages would be inadequate because the keeping of the sign is preventing Abe from selling his land. Abe would likely be successful because the sign is causing him harm and it would not be hard to force Bob to take down the sign.

Abe could file a contempt action against Bob to get him to pay the $1,000. The court previously ordered that Bob was to pay $1,000 to Abe when Abe took down the gate. Abe took down the gate but Bob refused to pay him. This puts him in direct contempt of the court's order to pay Abe $1,000. The court in its discretion will decide whether civil or criminal contempt is appropriate.

Based upon the facts, Abe could file an injunction for removing the sign and a contempt action to have Bob pay him the $1,000.

2. Bob should file either an injunction or a contempt action against Abe.

Bob is seeking use and enjoyment of his property.

As per above an injunction is an equitable remedy that is appropriate where there is irreparable harm, inadequate remedy at law, and likelihood of success on the merits. The court's contempt power has been laid out above.

Abe's blocking of the farm road is irreparable harm to Bob, because Bob cannot access his land with the wire across the road. There is no adequate remedy at law because Bob want's to enjoy his property through hunting and fishing, the wire does not allow him to do this. There is most likely success on the merits because Bob cannot actually access his property through the only road that goes to his property. Contempt is appropriate where there is an existing court order and one of the parties does an act in direct contravention with that order. If Abe was ordered to make sure his brother always had access to his land, then Abe would be in contempt. Here, it is unknown whether Abe was ordered to always keep his land clear.

Based upon the facts, Bob should definitely file an injunction and perhaps a contempt action.

3. The Sheriff is subject to the contempt power of the court.

The court also has contempt powers against those who undermine the court's power. A person who makes a statement out of court as to undermine the court's power is in indirect contempt. Indirect contempt occurs when the person acts or speaks outside of the presence of the court that directly effects the court. A person who is found in contempt will be subject to fines and prison time. If the fine exceeds $1,000 or the jail time is in excess of six months, the person in contempt has the right to a jury trial.

The sheriff in this instance stated the judge was in Bob's pocket and that Abe "would never get a fair shake from that stooge." This statement undermines the power of the court by intimating that the judge is biased and would not be fair to Abe. This statement is indirect contempt, but the judge may sanction the sheriff with a fine or jail time.

Based on the facts, a contempt action is appropriate against the Sheriff for undermining the power of the court.

Alternatively, the judge might have a defamation case against the sheriff. For defamation a plaintiff must prove a false statement, of and concerning the plaintiff, that was publicized, that caused damage to the plaintiff.

Question 2 - Sample Answer # 1

1. Abbott's Engagement Letter

Under the Rules of Professional Conduct (Rules), attorneys should always try to avoid conflicts of interest whenever possible. An attorney's duty of loyalty to her client is absolute and of the utmost importance to the profession. In some circumstances, a conflict may prevent an attorney from representing a particular client, and in other circumstances, the attorney may represent the client if she fully discloses to it the conflicted interests, the conflicting parties and obtains express permission to continue the representation. A situation that automatically disqualifies an attorney from representing a client is when that client currently has an adverse claim against another present client. For purposes of representation, a lawyer's law firm is considered to represent a client just as the attorney does because there is a presumption that attorneys of the same firm will discuss various cases and share confidential info about clients, as well as share the services of law firm staff members who may be assigned to several cases. An attorney may continue to represent a client when there is a conflict of interest with another client if the two clients merely have an adverse interest in an unrelated matter.

For an attorney or firm to continue representing clients with a conflict, the attorney must get an intelligent, voluntary waiver from all interested parties. The waiver must be expressed and signed by the client and show a clear intent that the client understands the precise parties and interests which are in conflict. Here, the engagement letter is written by Linda Litigator, not the client, Acme. It also presumes that Acme is waiving its objections, and purports to cover under the waiver any "possible" conflicts with "clients or future clients." This does not put Acme on notice of which interests may be conflicting or which other clients of Abbott's may have a conflict. Also, the letter purports to waive objection to "future conflicts" which is not allowed under the Rules because it is far too broad and vague to effectuate the client's informed consent.

The deficiencies with the client letter with respect to Acme may be cured by the subsequent email correspondence, but that consent from Abbott does not resolve the conflict because all other clients who may have an adverse interest to Acme must also give voluntary and informed consent to Abbott's representation of Acme. Therefore, the engagement letter is not sufficient to fully comply with Litigator's and Abbott's duties under the Rules for handling conflicts of interest.

2. Abbott's Representation of Acme

When corporate clients are involved, representation of any subsidiary company is considered to be representation of the parent company as well. In this situation, Acme, Inc. is a client of Abbott's, and by taking the Brown case against an Acme

subsidiary, Abbott is representing clients on both sides of a legal dispute, which is strictly prohibited under the Rules. A client's informed permission to represent another party in an action against it cannot cure this serious of a conflict. It does not matter than Abbott's representation of Brown involves a breach of contract claim against Acme and that the representation of Acme involves tort claims. Nor does it matter that a separate office of Abbott is representing each client. A direct conflict where one current client is suing another current client cannot be waived. Even if it could be waived, Abbott has not met its requirements for continued representation in spite of a conflict. Abbott did not consult with Acme Inc. before taking the Brown case, and it is clear that Acme, Inc. does not give its permission.

Another problem with Abbott's representation of the Browns is that we do not know whether the Browns knowingly and intelligently hired Abbott knowing that the firm is counsel to Acme, Inc. Even if a conflict is waivable, all parties with an interest must give the same knowing and voluntary consent. This is a situation where even if the Browns did consent, Acme has not consented and can force Abbott to withdraw for the Browns. Acme is objecting to Abbott's representation of the Browns, and as counsel for Acme, Abbott owes it an absolute duty of loyalty and must follow Abbott's wishes. Therefore, Abbott is disqualified from representing the Browns.

Question 2 - Sample Answer # 2

1) The issue here is whether Abbot's engagement letter with Abbot is appropriate and valid. The rule is that for a law firm to represent a client against a former client they must obtain consent of both the current (new) client as well as the former client. The consent must be given after the attorney or firm has fully disclosed the conflict to its current and former clients and disclosed the potential adverse effects of this representation. They must also tell both clients that they can consult with independent counsel before agreeing to waive the conflict. Further, there is a categorical ban on the law firm taking representation that involves the same transaction or subject matter that was the subject of their representation with the former client or where their previous representation possibly gave them access to information that would be useful in the proposed representation. A final rule that could be applicable here is that any knowledge or conflict obtained by one member of the firm is imputed to the rest of the firm as well. Here the engagement letter drafted by Abbot would violate the rules listed above. Although the caveat that the waiver does not apply to instances where Abbot has obtained proprietary or confidential information does take them out of the categorical ban for representations of this type, the engagement letter attempts to get potential clients to preemptively waive their rights to object. This violates the consent rules that are required before a firm may take representation of a party in a claim adverse to a former client. The former client, in this case Acme, Inc. cannot give their informed waiver of these conflict of interest issues before they happen. They may not realize the full effects of their waiver without being informed of them at the time of the conflict and after the representation has been completed. Waivers such as these are not allowed as they may be used to the detriment of uninformed, naive clients. The limiting language of the caveat is an attempt to limit this potential for abuse by the firm, but for the policy reasons listed above the client cannot prospectively waive their right to object to a conflict of interest. In sum, the engagement letter that waives the client's right to object to a conflict of interest claim that could arise later is not valid and will not be enforceable.

2) The issue is whether Abbot's representation of the Acme, Inc. subsidiary in the Savannah case would cause them to be disqualified from representing the Brown's against a separate subsidiary of Acme, Inc. The rule is that an attorney, and therefore their firm, may not represent a prospective client against a current client in a case where they may have access to confidential information of the current client that could be of the sort of information that could be used against the current client. This is a categorical ban. In this case, Acme, Inc. will be considered a current client of Abbot. This is evidenced by the engagement letter that specifically includes Acme, Inc. in it. This shows that at some level they are involved in the representation of AP. This is also true just from a common sense standpoint since a parent company exercises at least some control over their subsidiaries. Therefore Acme, Inc., the parent, will be considered a current client

of Abbott. The prospective clients, the Browns, have asserted a claim against a subsidiary of this current client. Thus, they are asserting a claim against Acme, Inc. in some respects due to the same reasoning above. Thus, the prospective clients are asserting a claim against a current client. This type of representation can be acceptable if both parties agree after being given informed consent and having the opportunity to consult with independent counsel if the claims bear no relation and there is no possibility of confidential information that could affect the lawsuit. Here however this is not the case. The Brown's claim includes allegations concerning ASL's parent company's business practices. Thus, Acme, Inc.'s business practice is in question. Even though "no confidential information" was passed and no attorney at Abbot had "any direct contact with anyone at Acme, Inc.," there would still be an impermissible conflict of interest since Acme is a current client and the representation involves their business practices. Especially since the questionable business practices probably have to do specifically with Acme's dealings with subsidiaries. Therefore an impermissible conflict exists here. Abbot should decline representing the Browns.

Question 3 - Sample Answer # 1

MEMORANDUM

To: Partner
From: Examinee
Date: July 26, 2011
Re: Rights to and Nature of Claims Arising out of Death of John Smith

Individual Rights to Bring Claims

(a) Mary Smith, as John's surviving spouse, has the right to bring an action for wrongful death and loss of consortium. Wrongful death claims belong to statutory plaintiffs in the following order: 1) spouse, 2) children, 3) parents, 4) decedent's estate and proceeds pass through intestate succession. Since John died leaving a spouse, she becomes the statutory plaintiff to which the wrongful death claim belongs. It does not matter that they were only married for a brief period of time (less than one month), only that Mary was the legal surviving spouse at the time of John's death. Also, as his surviving spouse, Mary can claim loss of consortium for the loss of the companionship and services of her husband due to his untimely death.

(b) Bill Smith, as the executor of John's estate, has the right to bring a survival action. Survival actions are those that account for any damages suffered by decedent prior to his death. Survival actions belong to decedent's estate and proceeds pass through the decedent's will, if there is one. Bill, on behalf of the estate, can sue for the pain and suffering John endured before his passing and for his special damages (medical expenses) incident to the accident. Any proceeds from the survival action will pass through decedent's will into the trust set up for his children. Bill, as trustee, holds legal title of the trust and must deposit any survival damages award into the trust and hold for the benefit of John's three children.

(c) Sue Smith, John's ex-wife and mother of John's children, has no right to either the wrongful death claim or survival claim, since she and John were legally divorced at the time of John's accident and death. The minority of one of the children will not have an effect on Sue's ability to bring the wrongful death claim or survival claim, but she may petition the probate court for years' support on behalf of the minor child, if she is raising the child.

(d) John's children do not have any legal rights to bring the wrongful death or survival actions as a result of John's death. They do, however, have an interest in the proceeds from such claims. Since the proceeds from the wrongful death action pass through intestate succession (in the following order: spouse, children, parents, siblings, grandparents, and so on), the surviving children will share the proceeds with the surviving spouse. The surviving spouse does not

get less than one third share, so Mary will receive 1/3, and the children will divide up the remaining 2/3 of the proceeds amongst them equally. The children also each get an interest in the survival action proceeds. The award from the survival action will be placed in trust, to which the children hold equitable title. Each child will receive the proceeds pursuant to the terms of the trust, as administered by Bill, the trustee.

Claims for and Measure of Damages

First, damages for wrongful death are measured by the full value of the decedent's life from the standpoint of the decedent. The trier of fact will consider many factors to value the life of the decedent, such as loss of enjoyment of life, loss of future earnings, life expectancy based on mortality tables, hobbies enjoyed by decedent, and other similar intangible aspects of life lost. The amount of damages recoverable is left to the enlightened conscience of a fair and impartial jury.

Second, John's spouse, Mary, can seek damages for loss of consortium. Loss of consortium is the loss of companionship, spousal services, intimacy, and any other incidents of the marital relationship. Loss of consortium damages are also determined by the enlightened conscience of a fair and impartial jury.

Finally, general and special damages may be sought by John's estate for the survival action. Since the facts clearly state that John endured severe pain, as evidenced by his screaming from his car after the wreck, and that John was hospitalized for one night prior to dying from his injuries, John sustained both general and special damages prior to passing. The estate will be able to seek pain and suffering for the hours after the crash leading to his death and for the special damages incurred (hospital stay, ambulance, etc.). General damages can be requested in the Complaint and are determined by the enlightened conscience of a fair and impartial jury. Special damages will be proved by presenting hospital bills and ambulance bills and must be plead with particularity in Georgia.

Question 3 - Sample Answer # 2

Memo re: John Smith

(1) Rights of Individuals to bring claim for John's death and the Nature of the Claims

(a) Mary Smith - Mary Smith was lawfully married to John Smith before the date of the accident. Therefore, she is the surviving spouse of the decedent. Mary Smith would have a cause of action for wrongful death and loss of consortium against the driver of the vehicle. Her right to the claim is a statutory right, as she was the lawfully married wife of John Smith at the time of his death. The claim for wrongful death belongs, in order by statute, to the wife, then the children, then the decedent's parents. The nature of the wrongful death claim is the full value of the life of the decedent, from the perspective of the decedent.

(b) Bill Smith - Bill Smith would have a cause of action for survival claims. This is a function of his being named executor of the decedent's estate. The survival claims are those claims that belong to the decedent, in that they are those claims that the decedent could have brought had he survived. They include pain and suffering, medical expenses, and property damage arising out of the accident. The damages recovered belong to the decedent's estate. Therefore, Bill Smith would be the rightful person to bring the survival claim in his capacity as executor of the estate. As trustee for the children, he would owe a fiduciary duty to the children. However, as there is no showing of mandatory enforceable trustee duties, it is not clear whether the trust would fail. There is simply not enough information.

(c) Sue Smith - Sue Smith would have no claim for the death of her ex-husband. Because she was not his wife at the time of the death, she is not entitled to wrongful death or loss of consortium damages. Additionally, as she has no interest under the decedent's will, she has no right to bring a survival claim.

(d) John's Children - John's children may have a right to the claim for wrongful death. Generally, the claim for wrongful death belongs to the surviving spouse. However, in this instance the surviving spouse is not also a parent of the surviving children. The basic principal behind this is that the surviving spouse would take, and would be able to use the recovery for the benefit of the surviving children. However, there is no such presumption in the case of a surviving spouse who is not also the parent of the decedent's surviving children.

(2) The Claims for damage and measure of damage

First, there is a claim for wrongful death. Wrongful death claims are measured according to the full value of the life of the decedent, from the perspective of the decedent. This would include future income and hedonic damages, and is based

on the principal of compensation - making the plaintiff whole. Hedonic damages are "smell the roses" damages, or the value of the decedent's life that he is missing from the perspective of the decedent.

Next, there would be loss of consortium damages to the surviving spouse, Mary Smith. However, loss of consortium is only recoverable for the period of time that the decedent was alive, but incapable of performing a typical spousal role. The claim for loss of consortium includes that lost value of the decedent's services, companionship, and sexual services, from the perspective of the surviving spouse. In the case at hand, John Smith only survived for one day after the accident. Therefore, the spouse would not likely recover a great deal in this regard, as the amount for loss of consortium would be evaluated on that one day alone. The amount would be left to the "enlightened conscience" of the jury. No damage is recoverable for the loss of consortium of a spouse after that spouse's death.

Further, there would be survival claims. The available claims would include the decedent's pain and suffering before death, medical expenses, and property damage. Essentially, the survival claim would encompass all the claims that the decedent could have made had he survived the accident. The decedent's pain and suffering would be measured by the enlightened conscience of the jury: the plaintiffs would be able to put on objective evidence showing that the decedent was alive and aware of his condition. This would include both physical pain and mental anguish experienced by the decedent during this period. The medical expenses recoverable would be all those that were a direct result of the accident in question.

Finally, there is no claim for punitive damages here for wrongful death. Punitive damages are deemed to be included in the wrongful death recovery, as they are left to the "enlightened conscience of an impartial jury" to determine what the decedent's life was worth "to the decedent" and include hedonic damages. Moreover, there is no suggestion that the accident was willful, intentional, or reckless on the part of the tortfeasor.

Question 3 - Sample Answer # 3

TO: Attorney
FROM: Applicant

1. a) There are two main focus of actions that can be brought with regard to John's death. A wrongful death suit may be brought to recover the value of the life of the decedent from the decedents perspective. This suit must be brough by John's statutory beneficiaries. In Georgia, the statutory beneficiaries in order or priority are the decedent's spouse, children, parents and personal representative.

A cause of action can also be brought on behalf of John for any cause of action he would have been able to bring had he survived. This would include a negligence claim against the tractor trailer driver. If the tractor-trailer driver was an employee acting within the scope of his employment the employer could be found ficariously liable as well. This claim would require the plaintiff to show duty breach, causation and harm and would allow for recovery for damages such as medical expenses and pain and suffering to Georgia, such claims must be brought by the executor of the decedents estate.

Attorney Smith, as John's wife, would be the first in line as a statutory beneficiary, as explained above. Thus, Mary would have priority in bringing a wrongful death claim regarding John's death.

b) As outlined above, a claim for damages brought on behalf of the decedent himself must be brought by the executor of the decedent's estate. Thus Bill, as executor, could file a negligence claim to recover what John would have been able to recover had he survived.

c) Sue Smith may be able to bring a claim on behalf of the minor child. If Mary did not sue for wrongful death, the decedent's children would not be the next priority of statutory beneficiary while Sue, herself, would not e able to file a claim, she may be able to do so on behalf of her minor child who would have a wrongful death claim.

d) As outlined above, Mary would have priority over the children in a claim for wrongful death. If Mary did not file such a claim, John's children may be able to do so. Georgia will not allow two recoveries for one wrongful death, however, so if Mary sues, the children will be barred from doing so.

2. The first claim for damages arising from John's death is for wrongful death. The measure of damages for wrongful death is the value of the decedent's life, from the decedent's perspective. Thus the claimant could recover specific damages, such as lost income and potential income. The claimant could further recover general damages, such as the loss of non-tangible rewards of life (also known as "smell the roses" damages).

The second claim of damages arising from the death is for those claims that John could have brought had he survived. These damages would include specific damages, such as the damage to the car, funeral expenses, hospital bills, during the day he was there, and lost wages, if any, from the time between the wreck and his death. The claim would also allow for general damages, such as the pain and suffering John endured prior to this death. In order to recover for pain and suffering, there must be a showing that the decedent actually suffered pain prior to this death. Here, the fact that John was heard screaming is likely sufficient to allow recovery.

Mary may also be able to sue for loss of consortium. This suit would only apply to the day prior to John's death, as loss of consortium is not actionable after death. This is a claim arising from the loss of services and society of an injured or disabled spouse.

Question 4 - Sample Answer # 1

Part 1

There are a number of ways in which Jack and Anne can allow the three other investors to be shareholders and still retain a controlling interest themselves. First, there is no general rule that stock ownership has to match amount of capital contributed. In fact, as companies grow and wane over time the price of their stock naturally rises and falls along with the fortunes of the company. Often, those who invest early receive a much greater ownership share for a much lower price than those that invest in later stages of a company. Thus, Jack and Anne could simply start-up the company with their $100,000 investment, and then sell less than a majority ownership to the investors for their $400,000 investment. The obvious problem with this solution is that the investors would have to agree to buy their shares at essentially an inflated price. Perhaps, if the investors valued Jack and Anne's contributions as the only employees greatly enough that would be possible, but it seems unlikely.

A more likely option would be to issue non-voting preferred stock to the investors. Thus, the investors could obtain an equitable interest (basically a claim on the corporation's assets) proportionate to their investment while Jack and Anne retain voting control of the corporation by holding all of the common stock. This could also work with the investors getting a combination of common and non-voting preferred stock such that they still owned less than 50% of the common.

A third option would be to convert the corporation into a partnership or limited partnership (with Jack and Anne as general partners) where ownership and control can easily be separated by agreement. Both forms can be accomplished with liability shields, and they would give the benefit of preferred tax treatment. This option does not seem to fit the goals of the parties in this case, however.

Part 2

Unless a corporation's charter called for cumulative voting of directors, shareholders vote their shares for each board seat separately. Furthermore, a majority vote (50% +1) of the voting shares at a shareholder meeting is required to elect a director (as long as quorum is met, i.e. a majority of the outstanding shares attend the meeting). Assuming that all 5 shareholders are voting, any combination of shareholders representing 50% + 1 would have the power to elect the board of directors. Thus, Jack and Anne together could elect the Board. Alternativey, Jack or Anne plus two of the investors could elect the board. The officers could also be elected by a majority of the board members. If all 5 board members (or 4 of the 5) are present at a validly called meeting, it would take 3 votes. If only 3 directors are present then 2 votes would be enough.

Part 3

In Georgia, a proxy must be in writing and signed by the party giving the proxy. If so, the proxy is good for 11 months (unless it states otherwise). Furthermore, a proxy is revocable unless it is coupled with some other interest in the stock. Thus, as long as it is embodied in a writing signed by Jack, Jack is free to give a proxy to Anne. Anne, however, must vote the shares in accordance with Jack's wishes as expressed in the terms of the proxy. Directors, on the other hand, may not give proxies. Neither may they execute a Power of Attorney to allow someone else to vote for them. They have non-delegable fiduciary duty to the company. Their authority is not transferable.

Part 4

Corporation - Most likely the corporation will be liable for the injury caused by the secretary to the same extent that the secretary is liable. The issue is whether or not an employer is liable for the torts of its employees. In Georgia, an employer is liable for torts committed by its employees ***in the scope of their employment***. In general, if the tort is committed by the employee during the direct performance of her employment or during a minor "detour" the employer will be liable. If, however, the employee was off on a major "frolic" then the employer will not be liable. Here, it appears that the tort occurred squarely in the scope of the secretary's employment. Even though she was driving her personal car, she was doing so on company business. She would not have been doing so except on behalf of the corporation. Therefore, it is reasonable that the corporation be held liable for her tort.

Any Shareholder, Director, or Officer- In general, shareholders, directors, and officers will not be liable for torts committed by an employee of their corporation or by the corporation itself. There is an exception to this rule, however, under which a court will ***pierce the corporate veil*** in order to hold shareholders liable. This liability shield is one of the most valuable characteristics of the corporate form. In Georgia, courts will pierce the veil when either (1) the shareholder has abused the privilege of incorporating; or (2) justice requires that the shareholder be held liable. Examples of situations where that is the case are when the corporation is intentionally undercapitalized or when the shareholder commingles his assets with those of the corporation (known as an "alter ego"). It does not appear that anything of that sort is happening here. While Georgia courts are more likely to pierce the corporate veil on behalf of a tort victim, there is no evidence that such a move would be warranted under these facts. Under the facts as given, there would be no difference between Anne and the other shareholders, directors, and officers.

Question 4 - Sample Answer # 2

1. Jack (J) and Anne (A) have several options here. First, they could set up separate classes of shares. One class could be voting shares, and another class could be non-voting shares. This means that J and A could both hold shares of the voting class, while the other three investors hold shares of the non-voting class. This would allow J and A to control who gets elected to the Board. Since the Board manages the business of a corporation and appoints the officers, this option would allow J and A to effectively retain their positions on the board and control the corporation. Alternatively, they could allow one class of shares to have more voting power than the other class. This would allow J and A to retain votes that are much more powerful than the shares owned by the other three shareholders.

J and A could also set up a voting trust or a shareholder voting agreement. A voting trust is an actual trust under Georgia law, whereby shareholders transfers legal title to the shares to the trustee, who then votes the shares as directed in the trust agreement. Alternatively a voting agreement could accomplish the same result with less cost. The voting agreement sounds in contract law, and would allow the five shareholders to agree how to vote their shares at the elections.

In either method, all five shareholders could agree that J and A would be elected to the board at every election. However, the only problem with this is that both of these methods have time limits imposed by law. Once the time limit expires, the trust or agreement needs to be renewed to be effective. If not renewed, then the other three shareholders could vote in any way they wish, even forcing J and A out of control.

However, since there are five spots on the Board, J and A collectively having two spots does not give them full control. Another option would be to eliminate the board of directors. This only works in close corporations, and this can be done only by unanimous consent of all the shareholders. By having a separate voting agreement in place to allow J and A to maintain their positions as the three officers, they could assure control. However, this lasts for only 20 years, and must be renewed after that in order to maintain control.

2. If J and A each held 35% of the shares, then absent any cumulative voting regime, J and A could both choose the entire board of directors. A majority of voting shares at a quorum is enough to elect a member to the board of directors. If J and A owned 70% of the total voting stock, then the two of them together effectively retain control of the Board of Directors and the corporation. Alternatively, if J and A get into an argument, J and two of other others would be able to vote someone to the board, since this would result in 55% of the voting stock.

The officers of the corporation could be elected only by the Board. Despite having a majority of the voting power as shareholders, J and A would have the same voting power as the other members of the Board. Therefore, they would only have 2/5 votes. If all five members are present at the board meetings, then they would need one additional investor to agree with J and A in order to elect the officers J and A wish. Otherwise, it depends on the quorum. Quorum is satisfied when a majority of directors are present at the meeting. This means that at least three directors need to be present - J, A and one other investor. If only these three show up, then a majority vote (J and A would satisfy the majority, since there are only three at the meeting) would be sufficient. If four directors are present, then they will still need another investor to vote the way that J and A do.

3. Shareholder proxies are perfectly legal. This allows one shareholder to vote the shares of another shareholder. The only thing J should do is send a notice to the Secretary of the corporation indicating that he wishes to have A vote his shares. The proxy will be valid for a maximum of 11 months, and is fully revocable (even if it says irrevocable) unless the proxy is coupled with an interest. John will have no problem pursuing this option.

There is a problem with having A vote J's shares on the Board. Board member proxies are not allowed under Georgia law. J may be able to alternatively set up a board meeting through a conference call, since they are not required to meet in person, and J could take action that way instead. Alternatively, the Board can take action without a meeting if all of the members agree unanimously and in writing.

4. The company will likely be liable under the doctrine of respondeat superior, meaning a master is responsible for the tortious acts of their servant. As a secretary of the corporation, she was clearly an employee. The only question is whether the employee was acting within the scope of her employment. Here, the facts make it clear that she was clearly within the scope of employment, since she was running a business errand. The fact that she was using a personal vehicle is irrelevant. The company will have no limited liability but may seek indemnity from the secretary.

She will be liable in her personal capacity, because one is always responsible for their own negligent acts. She is not liable as shareholder, director or officer, but she is still liable in her capacity as the one who committed the tort.

No other shareholder, director or officer will have liability as a result of the accident. One of the benefits that the corporation offers is that only the corporation is liable for acts such as these. Officers, directors and shareholders are generally not personally liable for the acts of the corporation. This means that A, J and none of the other shareholders or directors will be personally liable. The only way they can be liable is if a court pierces the veil. This requires that

the members of the corporation abuse the corporate form and fairness requires reaching the shareholders individually. Nothing in the facts makes it seem like any of this is present. However, if there is anything to show that the corporation abused its funds, intentionally undercapitalized, comingled assets or had an alter ego, then piercing may be proper, and the shareholders (not directors or officers, however) can be personally liable. It is worth noting that a court is more willing to pierce the veil for a tort claimant than a contract claimant, which is the case here.

Question 4 - Sample Answer # 3

1) Jack and Anne could propose to the other three shareholders that they reach an agreement whereby 50% or more of the corporation's authorized stock will be issued to Jack and Anne. While Jack and Anne will be contributing only 25% of the capital to the corporation, a corporation can issue stock for any form of consideration, including a promise to provide services. Here, Jack and Anne are going to be the corporation's only employees, as well as its officers. These services make it reasonable for the corporation to issue shares to them in a greater amount than the three other investors, despite the other investors' larger capital contributions.

2) In order to elect the initial board of directors, a simple majority of shareholders is needed. Therefore, Jack and Anne would be able to outvote any of the other investors, even if all three of them voted together, as they would have 70% of the shares to the other investors' 30%.

If all five investors were elected to the Board, and the Bylaws required that a majority of directors constituted a quorum (ie, 3 directors), the officers could be elected by only two directors, as this would be a majority of the directors. So, Jack and Anne alone could vote and elect an officer.

3) It appears to be proper for Jack to give a proxy to Anne to be able to vote his stock in his absence. However, it does not appear to be proper for Jack to give Anne a power of attorney to vote for him on the Board of Directors. A director owes fiduciary duties to the corporation and all of its shareholders. These duties are not delegable to another person, in particular another member of the board, as this would increase Anne's power. Jack will have to attend the board meeting in person (or by video conference) if he wishes to cast his vote as a director. If Jack was unable to attend for an extended period of time, he would have to be replaced by a new director.

4) The secretary would be liable for the damages stemming from the tort that she committed, but may be entitled to indemnification from her employer. The facts state that the accident occurred while the secretary was on a business errand, and there is no indication that she was on a 'frolic' from her work errand. Generally, a principal is liable for the torts that its agents commit in the scope of the agency under the doctrine of respondeat superior. Here, the secretary was an agent of the corporation and committed a negligent tort while in the scope of her employment. Therefore, the corporation will be liable for any potential claims for property damage or personal injuries arising from the accident.

One of the primary reasons for incorporating a business is to limit the liability of the entities owners. Here, the facts indicate that a valid C corporation has been formed. While the corporation will be held liable for any damages resulting from the accident, the liability of Anne, and all the other shareholders, will be limited to

whatever they have invested in the corporation.

Sometimes, a plaintiff will attempt to "pierce the corporate veil" to recover from not only a corporation but also from the shareholders of a corporation directly. The facts do not indicate that the shareholders of this corporation did not respect the corporate entity in any way (ie, by failing to properly capitalize the corporation, or by commingling personal and corporate assets), and thus each shareholder will be entitled to limited liability.

Anne could perhaps be held personally liable for the accident in her role as an officer of the corporation if it was somehow shown that she had intentionally or recklessly encouraged the corporation's agent to commit a tort. Here, the facts indicate that the secretary simply missed a stop sign and hit the bus, so Anne should not be liable for her role as an officer. Anne could be liable as a director if she had breached a fiduciary duty to the corporation, but on the facts this is not the case.

MPT 1 - Sample Answer # 1

Memorandum

TO: Carlotta De Franco

FROM: Applicant

RE: Arbitration Clause for Field Hogs Inc.

1) (a): The initial question presented is whether, under Franklin law, the standard arbitration clause employed by Delmore, DeFranco and Whitfield would cover arbitration of all claims by consumers against Field Hogs Inc. Franklin courts generally favor the use of arbitration clauses to resolve contract disputes and have upheld the use of broadly worded arbitration clauses to resolve contract disputes. *New Home Builders, Inc. v. Lake St. Claire Recreation Association* (Fr. Ct. App. 1999). In *New Home Builders* and in the subsequent case of *Le Blanc v. Sani-John Corporation* (Fr. Ct. App. 2003), the court stated that forceful evidence of intent to exclude a claim from arbitration is required to prevail over a broad contractual arbitration clause. The standard arbitration clause at issue in the instant case is such a broadly worded clause, stating that, "any claim or controversy arising out of or relating to this contract or the breach thereof shall be settled by arbitration." Therefore, absent strong evidence of contrary intent by the parties, the standard arbitration clause should be sufficient to cover all contractual disputes between Field Hogs Inc. and their customers.

The Franklin Courts have distinguished claims that are not contractual in nature, but that arise in tort, and they have been more hesitant to compel arbitration of tort claims based on contractual arbitration clauses. *Norway Farms Dairy and Drovers Union* (Fr. Ct. App. 2001). In that case, the court stated that the court must assume that contractual arbitration clauses were not intended to include tort claims absent a "clear explicit statement in a contract directing an arbitrator to hear tort claims by one party against another." In interpreting an arbitration clause that contained identical "arising out of or relating to" language to that used by the firm's standard arbitration clause, the court indicated that claims "arising out of relating to" a contract must raise some issue, the resolution of which depends on the construction of the contract itself. The court went on to elaborate that duties which the defendant generally owes to others beyond the contracting parties would not be deemed to "arise out of" a contract for the purposes of interpreting an arbitration clause. *Le Blanc* (2003). Our office memorandum indicates that Field Hogs has faced a number of different tort claims in recent consumer litigation. In the *Majeski* and *Johan* cases, plaintiffs asserted negligence and strict liability claims that would be unlikely to be interpreted as "arising out of" a contractual relationship since they are premised on the breach of duties owed to society at large and not just to contracting parties. Thus, these claims would not be covered under the terms of the standard warranty by

Franklin law. Other claims, such as the claims for breach of warranty that were also asserted in the *Majeski and Johan* cases arise from breaches of duty that are contractual in nature, and thus would be covered by the terms of the standard warranty under Franklin law.

Although the terms of the standard warranty would not cover all possible claims by consumers against Field Hogs Inc., the court in *Le Blanc* explicitly rejected the position taken by the Olympia Court of Appeals in *Willis v. Redibuilt Mobile Home Inc.* (Olympia Ct. App. 1995), that consumer tort claims exist completely independently of an underlying consumer sales contract and may never be included in an arbitration clause. Therefore, it is possible that Field Hogs Inc. may succeed in covering consumer tort claims under an arbitration provision that explicitly states an intent to include tort claims.

1) (b): The second question presented is whether the allocation of arbitration costs contained in the firm's arbitration clause would be enforceable against consumers under Franklin law. Franklin law permits courts to refuse to enforce an arbitration agreement to the same extent that grounds exist for the non-enforcement of any contract, including such grounds as duress, fraud, and unconcionability. *Howard v. Omega Funding Corporation* (Fr. S. Ct. 2004). To be invalidated due to unconscionability, a contract clause must be both procedurally and substantively unconscionable. *Id*. Franklin courts have held that the issue of arbitration cost is a matter of substantive and not procedural unconscionability. *Georges v. Forestdale Bank*, (Fr. Ct. App. 1993).

The issue of substantive unconscionability with regard to provisions that allocate the cost of arbitration is unsettled under Franklin law. A key inquiry is whether the clause allocating arbitration costs has a chilling effect on a consumer's willingness to pursue their remedies under the contract. *Ready Cash Loan Inc. v. Morton* (Fr. Ct. App. 1999). In *Georges*, the court upheld a provision requiring the customer to pay a small initial fee with the remainder of cost to be born by the seller as not having such an effect. In *Ready Cash*, the court invalidated a 25/75 percent split of costs that favored the consumer because of the uncertainty involved in the expansion of costs as arbitration proceeded. The court also invalidated a provision that allowed the arbitrator to award costs as likewise being too uncertain. *Athens v. Franklin Tribune* (Fr. Ct. App. 2000). The firm's standard arbitration provision adopts the cost provision of the National Arbitration Organization, which requires the consumer to pay an intital administrative fee of $2000 and half of the arbitrator's fees with a limit of $750 if the dispute is below $75,000 and without any limit if the disputed amount is above $75,000. Given that arbitrators receive $1,000 per day for hearings plus $200 per hour for additional time spent on pre and post hearing matters, this cost structure demonstrates a substantial amount of uncertainty from the consumer's perspective for claims that are above $75,000. It is likely that the provision regarding such claims would be invalidated for substantive unconscionability. The

provision regarding claims under $75,000 is less likely to be invalidated because the consumer's expense is capped at $750, but Franklin courts may find the existence of a chilling effect based on the large up-front payment of $2,000.

2) The final question presented is what the terms of an arbitration clause for Field Hog's consumer sales contracts should be in order to address the concerns voiced by the client and be enforceable under Franklin law. The proposed provision should be re drafted as follows: "Any claim or controversy arising out of or relating to this contract or the breach thereof shall be settled by arbitration. It is the expressed intention of the parties that any tort claims pertaining to the subject matter of this transaction will also be settled by arbitration. The costs of arbitration are to be divided as follows: The consumer shall bear the initial $1,000 of expenses, regardless of claim amount, and Field Hogs Inc. shall bear the rest." The terms of this revised arbitration clause would address the concerns expressed by our client with enforceability, particularly regarding tort claims. Although the cost provision would not achieve the 50/50 split that our client desires, it is unlikely that any provision containing such a division of costs would be held valid by Franklin courts as discussed above. Our client has expressed a desire beyond all else to avoid litigation expenses over the validity of the arbitration clause, and given existing Franklin case law, this provision would be most likely to achieve that result.

MPT 1 - Sample Answer # 2

To: Carlotta DeFranko
From: Applicant
Date: July 26th, 2011
Re: Arbitration Clause for Field Hogs, Inc.

Firm's Clause Coverage of All Potential Claims by Consumers against Field Hogs

The issue is whether the firm's standard clause would cover all potential claims by consumers against Field Hogs, Inc. under Franklin law. The Franklin Court of Appeals has stated that "absent a clear explicit statement in a contract directing an arbitrator to hear tort claims by one party against another, it must be assumed the parties did not intend to withdraw such disputes from judicial authority". *Norway Farms v. Dairy and Drovers Union* (Fr. Ct. App. 2001). Based on the previous claims brought against Field Hogs, Inc. in the past seven years, it is clear that Field Hogs' consumers bring tort claims against them, as they were sued for negligence, breach of warranty and strict liability issues in 2004, 2005, 2008 and 2010 (Office Memo, Summary of Tort Litigation Against Field Hogs). Since Field Hogs wishes to protect themselves against similar claims in the future by compelling arbitration, it is vital that they have an arbitration clause that covers tort claims. Franklin courts "generally favor arbitration as a mode of resolution". *LeBlanc v. Sani-John Corporation* (Fr. Ct. App. 2003). The *LeBlanc* court indicates that "parties should clearly and explicitly express an intent to require the arbitration of claims sounding in tort...courts should strictly construe any clause that purports to compel arbitration of tort claims". *Id.* The firm's clause indicates that "Any claim or controversy arising out of or relating to this contract or the breach thereof shall be settled by arbitration." (Delmore, De Franco, and Whitfield, LLC- Standard Commercial Arbitration Clause). This clause is very similar to the clause in *LeBlanc*, which states "Any controversy or claim arising out of or relating to this agreement, or breach thereof, shall be settled by arbitration". However, the court in *LeBlanc* contended that in *LeBlanc*, "the arbitration clause contains no explicit reference to tort claims but requires arbitration only of those disputes "arising out of or relating to this agreement, or the breach thereof"'. The court further states "In our view, for the dispute to 'arise out of or relate to' the contract, the dispute must raise some issue the resolution of which requires construction of the contract itself." *LeBlanc.* This indicates that the firm's arbitration clause, which is nearly identical to the arbitration clause litigated in *LeBlanc*, "covers only contract-related claims" and "would not apply [to tort issues]". *LeBlanc*. Therefore, the firm's arbitration clause is not specific enough to require the arbitration of claims sounding in tort, so it is not specific enough to cover all potential claims by consumers against Field Hogs, under Franklin law.

Enforceability of Firm's Clause's Allocation of Arbitration Costs against Consumers

The issue is whether the firm's clause's allocation of arbitration costs would be enforceable against consumers under Franklin law. The Franklin Supreme Court states that the enforceability of an arbitration agreement, including the allocation of arbitration costs, turns on whether the clause is substantively unconscionable. *Howard v. Omega Funding Corp.* (Franklin Supreme Ct. 2004). A clause is substantively unconscionable if the terms of the contract are oppressive and one-sided, and if those costs exceed those that a litigant would bear in pursuing identical claims through litigation. *Id.* The case at bar allowed either party to elect binding arbitration, while Field Hogs intends to bind not only the consumer, but themselves also, to compulsory arbitration. The Franklin Court of Appeals held "the relatively minimal cost of the initial fee [on the consumer] did not render the clause substantively unenforceable." *Georges v. Forestdale Bank* (Fr. Ct. App. 1993). in 1998, in *Ready Cash Loan, INc. v. Morton)*, the Franklin Court of Appeals invalidated a clause that limited "the consumer to paying 25 percent of the total costs of arbitration and required the lender to pay 75 percent", because of the "chilling effect on the [consumer], given the potential expansion of costs involved in disputing substantial claims". The same court also invalidated an arbitration clause in 2000 which "permitted the arbitrator to award costs", because the provision "potentially allocate[d] all the costs to the consumer, serving as a greater deterrent to potential disputes". *Athens v. Franklin Tribune* (Fr. Ct. App. 2000). Again, in 2003, the Franklin Court of Appeals invalidated as a matter of substantive unconscionability a clause which was silent as to the allocation of arbitration costs, because of the "potential chilling effect of unknown and potentially prohibitive costs". *Scotburg v. A-1 Auto Sales and Service, Inc.* (Fr. Ct. App. 2003). For a court to find an arbitration clause is not "one-sided and oppressive", that clause must provide the consumer with a viable option for pursuing their claim, where the costs will not be above the costs of pursuing identical claims through litigation, and where the "unknown and potentially prohibitive costs" do not result in a "chilling effect" on consumers who wish to bring claims. *Howard v. Omega Funding Corp. (Franklin Supreme Ct. 2004).*

The firm's clause requires arbitration to "occur in accordance with the rules and procedures for arbitration promulgated by the National Arbitration Organization". (Standard Commercial Arbitration Clause). The National Arbitration Organization rules indicate that for claims and counterclaims that are less than $75,000, the consumer would be responsible for 50% of the arbitrator's fees, up to $750, plus a one-time $2,000 administrative fee. Under Franklin law, this amount will probably be upheld as not substantively unconscionable, because it is far less than an individual would incur bringing an identical claim in litigation, and the amount is fully predictable. However, the National Arbitration Organization rules provide for the consumer to pay 50% of the arbitrator's fees, with no cap, if the claim is equal to or in excess of $75,000. The courts would likely find this to be substantively unconscionable, as the more the plaintiff alleges in damages, the

more likely they are to reach the $75,000 threshold. The costs for arbitrators, noted as $1,000/day for each day of hearing plus an additional $200/hour for time spent on pre-and post-hearing matters, would likely be considered "unknown and potentially prohibitive" and to have a "chilling effect" on a consumer's ability to bring a claim. *Scotburg v. A-1 Auto Sales and Service, Inc.* (Fr. Ct. App. 2003). There is also a substantial possibility that these costs could "exceed those that a litigant would bear in pursuing identical claims through litigation", so the court would likely find the $75,000 threshold to be too high a burden for consumers, and therefore the clause would be held to be substantively unconscionable, and therefore invalid. *Howard v. Omega Funding Corp. (Franklin Supreme Ct. 2004).*

Draft of Arbitration Clause for Field Hogs, Inc.

Any claim, dispute, or controversy arising from or related to the sale of Field Hogs, Inc. consumer products, whether arising in contract, tort, or otherwise, shall be subject to binding arbitration in accordance with the rules and procedures for arbitration promulgated by the National Arbitration Organization. The consumer's liability for arbitration expenses shall be in accordance with the National Arbitration Organization's Procedures for Consumer-Related Disputes, with an overall maximum of $3,000 for arbitrator's fees, with the balance to be paid by Field Hogs, Inc. The overall maximum shall not apply to the one-time administrative fee outlined in the National Arbitration Organization's procedures related to Administrative Fees.

The above arbitration clause should be effective in court, and not held substantively unconscionable, which will help Field Hogs achieve their goal of compelling arbitration. Since Hewlett believes that arbitration is more likely to yield favorable results for Field Hogs, Inc., and that professional arbitrators are "more predictable than juries", the assurance that the court will not find the clause invalid should be favorable. While Hewlett expressed a desire to split the costs down the middle with the consumer, the court is not likely to look favorably upon that, since Field Hogs, Inc. is considered to be in a more powerful position than the consumer. For this reason, and also to make the costs more predictable for consumers, the draft of the clause limits the consumer's liability for arbitrator's fees to $3000, even in the case of claims exceeding $75,000. This will result in a more enforceable clause, which is more predictable for the corporation overall. Hewlett's statement that avoiding jury trials was the most important thing was the motivating factor for the draft, and the express inclusion of tort claims should cover most claims that would be brought by consumers.

MPT 1 - Sample Answer # 3

To: Carlotta DeFranco
From: Examinee
Date: July 26, 2011
RE: Arbitration Clause for Field Hogs, Inc.

This memo will first consider our firm's Standard Commercial Arbitration Clause (which incorporates procedures of the National Arbitration Organization) and decides that the clause would NOT be suitable for our client, Field Hogs, Inc. This memo will then suggest a new clause which would better effectuate our client's goals.

(1) The Firm's Standard Commercial Arbitration Clause

(a) Coverage of Claims

The firm's standard clause would not satisfactorily cover all potential claims under Franklin Law against Field Hogs. The courts of Franklin have expressly encouraged the use of arbitration to resolve disputes sounding in contract, while the issue of arbitration of tort claims remains unsettled. (See *LeBlanc v. Sani-John*). The primary issue in construing arbitration clauses is whether the clause covers only contract-based claims or also tort-based claims.

Even though the language in our firm's standard clause is broadly written, purporting to cover "any claim or controversy arising out of or relating to this contract or breach thereof," similar language has been held by Franklin courts to only cover contracts claims. A tort might "relate to" a contract in the plain sense of the phrase, but Franklin courts require more. In *LeBlanc*, the Franklin Court of Appeals suggested that for an arbitration clause to cover tort claims, the clause must (1) "clearly and explicitly express" (2) "an intent to require the arbitration" (3) "of claims sounding in tort." The *LeBlanc* court also disagreed with non-binding precedents from Olympia courts that public policy would bar any attempt to require arbitration for tort claims. The *LeBlanc* court suggested that a complete bar on torts would be going too far. It should be noted that the LeBlanc case dealt with a factual circumstance where the arbitration clause only expressly covered contracts claims. Thus, the language in the opinion regarding tort claims may be regarded as dicta. However, without any other cases on point, the Court of Appeals' suggestions in *LeBlanc* remain the best indicator of how to proceed with arbitration clause language in our jurisdiction.

Looking at the Field Hogs, Inc. history of tort litigation, and keeping in mind the goals of the client, it is clear that the firm's standard arbitration clause will not be sufficient for our client's purposes. Our firm should provide a new clause to the client which clearly expresses intent to require arbitration of tort claims. Though it is not certain that even a clause with this heightened standard will be upheld, it

will better protect the client than our firm's standard clause.

(b) Allocation of Costs

The National Arbitration Organization procedures are incorporated into our firm's standard clause. The Organization's provisions as to allocation of costs are potentially subject to disputes as to enforceability in Franklin courts.

Franklin courts have been sensitive to the position of consumer litigants with regard to arbitration costs. The general concerns are whether allocation of costs to the litigant create a "chilling effect" by discouraging pursuit of rights, and whether the cost allocation method provides for too much uncertainty. (See *Howard v. Omega Funding Corp.*).

In construing cost allocation provisions, courts will use contract principles, including possible defenses that would render a contract unenforceable. In *Howard*, the Franklin Supreme Court considered whether an arbitration clause was unconscionable. The court used a two part test, considering (1) procedural unconscionability, and (2) substantive unconscionability. With regard to the first part, the question is whether the parties each had reasonable opportunity to negotiate. The defendant in *Howard* conceded this part. In a case based on allocation of costs our client may also concede procedural unconscionability, on the assumption that a lawn equipment consumer will not have the opportunity at point of sale to negotiate what is in essence a "take it or leave it" standard clause. However, the plaintiff would also need to demonstrate the second part.

With regard to substantive unconscionability, the court will decide whether contract terms are "oppressive and one-sided" (*Howard*). In reviewing cases on allocation of arbitration costs, the Howard court picked out several points from different factual scenarios:

- A minimal initial fee is not substantively unconscionable. (*Georges v. Forestdale*)

- A clause allocating 25% to consumer litigant, 75% to company was invalid because of the "chilling effect" on litigants. (*Ready Cash Loan v. Morton*)

- A clause permitting the arbitrator discretion to award costs was unconscionable. (*Athens v. Franklin Tribune*).

- A clause completely silent on cost allocation is unenforceable because of uncertainty. (*Scotburg v. A-1 Auto Sales*).

The *Howard* court noted that these cases "provide no clear framework" for the facts in *Howard*, and the court suggested a new practical test, which is to determine how much a litigant would spend in arbitration, and if that amount is

more than a litigant "would bear in pursuing identical claims through litigation," the clause will not be enforced.

The best approach regarding our client Field Hogs is to create an allocation of costs provision that avoids any of the problems outlined in the several cases above. Even though the Franklin Supreme Court did not expressly rule out certain methods of allocation, a "better safe than sorry" approach is appropriate for our client. Field Hogs's main goals are to create certainty through arbitration and to keep disputes private. In order to reach these goals, it is a must that the arbitration clause not be subject to a potential claim for unenforceability. Thus, it is better for our client to spend a potentially disproportionate amount on the arbitration process itself, in order to preserve the arbitration requirement. Looking at the National Arbitration Organization Procedures, one can see that a consumer litigant with a large or complex claim may be "chilled" or discouraged from pursuing her rights because of the potentially large fees and the requirement of placing a deposit. The clause our firm provides to the client should allocate to the consumer litigant ONLY a small initial fee. By limiting the fees, this will create certainty and should help any court to reach a favorable decision for our client based on the Howard court's comparison test. The clause should be upheld based on the costs issue because a small and certain initial fee will clearly be less than almost any traditional litigation cost.

(2) Draft of Arbitration Clause for Field Hogs, Inc.

"Any claim or controversy arising out of or relating to this contract or the breach thereof shall be settled by private arbitration. Any claim or controversy in tort arising out of alleged injuries or damages caused by the product sold under this contract shall be settled by private arbitration, including, but not limited to, such claims as for negligence, failure to warn, joint liability, or strict products liability. Arbitration shall occur in accordance with the rules and procedures for arbitration promulgated by the National Arbitration Organization, except with regard to fees. Any person bringing a claim pursuant to this contract or relating to alleged injuries caused by the product sold herein shall be responsible for a one-time initial administrative fee of $750."

The above clause addresses the problem points raised regarding general enforceability of arbitration clauses: (1) whether tort claims will be covered, and (2) whether allocation of costs will render the clause unenforceable. The above clause follows the most recent law of our jurisdiction in a cautious manner that is most likely to render the clause enforceable. This will help effectuate the client's goals of predictability and privacy, by keeping the matter in arbitration and out of traditional public litigation. And though our client may have to bear the burden of additional costs for the arbitration procedures, the client will come out ahead in the long run by avoiding any potentially large jury awards to litigants.

MPT 2 - Sample Answer # 1

TO: Bert H. Ballentine
FROM: Examinee
DATE: July 26, 2011
RE: Social Networking Inquiry

MEMORANDUM

Ethics and professional conduct will be compromised under the proposed course of action in the negligence action. The conduct is prohibited under the Franklin Rules of Professional Conduct as well as case law adjudicating similar circumstances. The Franklin State Bar Association Professional Guidance Committee should be advised that the proposed course of conduct is prohibited under Franklin law.

According to the Columbia Supreme Court in *In re Hartson Brant, Attorney*, there are three approaches to analyzing the immediate circumstances under the Rules of Professional Conduct. Although Columbia law is not conclusive in Franklin, it is persuasive law that applies identical Rules of conduct enacted in Franklin. While the Columbia Supreme Court favors the third approach (i.e., the status-based analysis), the proposed course of conduct would fail to conform to the Rules of Conduct under all three. Each approach is as follows:

1. Strict Application of the Rules:

According to the Olympia Supreme Court in *In the Matter of Devonia Rose, Attorney-Respondent*, an attorney cannot compromise her integrity, and that of the profession, regardless of the cause. *In the Matter of Devonia Rose* (2004). The court strictly applies Rule 8.4 (identical to that of Franklin), which states "it is professional misconduct for a lawyer to ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." *Id.* The attorney in question in *Devonia Rose*, offered to impersonate a public defender so as to allow police to actively question the defendant. Such impersonation was in direct violation of Rule 8.4. *Id.* The defendant believed that Rose was an actual public defender and went along with the questioning, which subjected the defendant to trial, conviction, and the death penalty. *Id.* Rose asserted that her actions were justified under the circumstances. The court denied this assertion and reprimanded Rose under the Professional Rules of Conduct. *Id.*

According to the Franklin Rules of Conduct, Rule 4.1 provides that "in the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person." Lawyers in Franklin are required to be truthful when dealing with others on a client's behalf. Furthermore, misrepresentations may occur through partially true but misleading statements. Ms. Nelson is withholding information from the defendant. She is proposing

conduct that would conceal her identity in an effort to extract information. Under Rule 8.4, which mirrors that of Columbia's Rule 5.3, "it is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through acts of another." This rule is applicable to those not licensed to practice law or conduct the activity of the misrepresenting party. *In the Matter of Devonia Rose* (2004). Accordingly, by rules of imputation, a lawyer may not solicit others to do what she cannot do. Applying the strict language of the Rules, as the Olympia Supreme Court did, Ms. Nelson would engage in misrepresentations by concealing her identity to the defendant and her affiliation with the case to extract relevant information for trial. Thus, neither Ms. Nelson nor her assistant may engage in the course of conduct given that the misrepresentation of the affiliation with the adverse party would be unethical and in violation of the rules of conduct.

2. Conduct-based Analysis:

According to the Columbia Supreme Court in *In re Hartson Brant, Attorney*, the conduct-based analysis "requires the assessment of four factors: (1) the directness of the lawyer's involvement in the deception; (2) the significance and depth of the deception; (3) the necessity of the deception and the existence of alternative means to discover the evidence; and (4) the relationship with any other of the Rules of Professional Conduct, that is, whether the conduct if otherwise illegal or unethical." *Hartson* (2007).

As to the first requirement, Ms. Nelson is directly involved in the deception. Although social networking pages are open to the public, they are only accessible after receiving permission from the owner. Ms. Nelson, as indicated above, is responsible for the actions of those assisting in her misrepresentations. The second requirement is met as the significance of the misrepresentation exposes a witness against her will, thus violating constitutional rights. This is not a "no harm, no foul" approach; rather, it is in direct contradiction to the stated exceptions noted in *Hartson* as well as public policy favoring protection of constitutional rights. It involves a crucial misrepresentation that could change the outcome of the case. Third, the information could be sought through alternative means. Yes, the witness' testimony may be critical to the case, however, it may be obtained through standard discovery tools such as a subpoena. Finally, this course of conduct directly relates to Rules 4.1 and 8.4 of the Franklin Rules of Professional Conduct. This is a case of first impression for the state of Franklin, but there is persuasive case law applying identical rules of law. Thus, there are multiple courts (i.e., Columbia and Olympia) that have interpreted the applicable law. The proposed course of conduct does not satisfy the 4-step test. Thus, it violates the Rules of Professional Conduct under the conduct-based analysis.

3. Status-Based Analysis:

According to the Columbia Supreme Court in *In re Hartson Brant, Attorney*, the

status-based analysis focuses on the importance and nature of the role that the attorney plays in advancing the interests of justice. Misrepresentations that do not go to the core of the integrity of the profession, and that are necessary to ensure justice in cases of civil rights violations, intellectual property infringement, or crime prevention do not violate the Rules of Professional Conduct. *Hartson* (2007). Justice is preserved by preventing imminent danger, rooting out corruption and organized crime. *Id.* The misrepresentation is specific to the attorney's purpose and role during litigation. Such misrepresentations in cases such as those listed, are necessary to achieve justice and do not reflect on the lawyer's fitness to practice. *Id.* In other words, justice is done without compromising the integrity of the profession. However, attorneys are always answerable for offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice. *Id.*

Ms. Nelson is inquiring as to ethical considerations in a negligence action. There is no status-based protection for actions taken in violation of the Rules of Professional Conduct. She does not fall within any exception listed in the paragraph above. The evidence is not needed to prevent imminent danger or crime, it does not involve a civil rights violation, and it does not involve an intellectual property dispute. As explained in the paragraphs above, the proposed conduct is misconduct on its face. It violates the specific language of the Franklin Rules of Professional Conduct. Moreover, it involves dishonesty and breach of trust with the defendant. Thus, Ms. Nelson is answerable for the offense of her and her assistant.

The proposed conduct does not conform to any of the three approaches applied by the Olympia or Columbia Supreme Courts. As indicated above, it is not a harmless misrepresentation, as some may argue. It would violate the defendant's constitutional rights and change the course of the trial. Franklin rules hold attorneys accountable for any such misconduct. Condonation of this type of behavior and ethical violation would be a negative mark on the integrity of the legal profession and could encourage others to engage in similar conduct. Thus, this is not a "no harm, no foul" situation; it is a harmful proposal that could subject Ms. Nelson to sanctions. Ms. Nelson should abandon the proposed course of conduct and adopt an ethical approach to obtaining the information from the defendant.

MPT 2 - Sample Answer # 2

Professional Guidance Committee - Memorandum re Nelson inquiry
Melinda Nelson's proposed course of conduct would violate the Rules of Professional Conduct. Because this is an issue of first impression here, I have looked to the nearby jurisdictions for guidance and have discovered that there are three different approaches to determining whether the conduct of Ms. Nelson (MN) would violate the Rules: a strict compliance analysis, a conduct-based analysis, and a status-based analysis. Under any of the three analyses, MN's conduct constitutes a violation of the Rules.

1. The first approach is strict compliance with the Rules. Under this approach, MN certainly is in violation.

The Rules require a lawyer to be truthful in dealing with others, which prohibits incorporating or affirming false statements by other persons and prohibits partially true statements that may be misleading. 4.1 CMNT. Misconduct occurs where a lawyer knowingly assists or induces another to violate the Rules, or does so through the acts of another. 8.4. Lawyers cannot engage in dishonesty, deceit or misrepresentation and are subject to discipline when they request or instruct an agent to do so on their behalf. 8.4, CMT. Lawyers should be held in violation for conduct reflecting lack of characteristics relevant to law practice, which includes dishonesty and breach of trust.

The Olympia Supreme Court has applied these rules using the strict compliance approach in Rose, where a deputy D.A. impersonated a public defender, engaged in conduct that led the defendant to believe she was his lawyer, and failed to correct those misrepresentations. She claimed she did so for justice, justified by the peaceful resolution of a potentially dangerous hostage situation. Nonetheless, the Olympia court strictly applied the rules and suspended the D.A. for one month, even while noting her public safety intent. The court cited the rules and stated that "even a noble motive does not warrant departure from the rules." Rose. The court noted that she had other options available, therefore the misrepresentation was not truly "necessary." Ethics for lawyers, the court wrote, "leaves no room for deception. [DA] cannot compromise her integrity, and that of our profession, regardless of the cause."

In this case, MN is proposing to, with knowledge and approval, to ask a non-attorney agent to seek information from an unrepresented nonparty that MN would not be able to obtain were she truthful. The agent would not inform the nonparty of her purposes for soliciting social network site approval; she would not reveal any affiliation with MN. MN would be sponsoring a partially true but misleading statement or omission, 4.1, and would be engaging in some kind of deceit through the acts of another. Applying the strict compliance standard, MN would be in violation regardless of her motive - to find information she believes the witness is lying about for impeachment purposes. Motive is irrelevant.

Lawyers must adhere to "the highest moral and ethical standards, which apply regardless of motive." In Rose, the DA was in violation by engaging in deceitful conduct and by failing to correct known misrepresentations, inducing reliance of the unknowing party. The same is true here.

2. MN also would be in violation of the conduct-based analysis. The conduct-based analysis has four factors: 1) directness of lawyer's involvement in deception, (2) depth and significance of deception, (3) necessity of deception and lack of alternatives, and (4) other illegality from the conduct. This is sort of a totality of the circumstances rule based on what the lawyer does. A minor deception with no significant harm to deceived party might be OK under 2, while a lawyer who uses deception to get information he or she could obtain through standard discovery tools would be more likely a violation under 3. See Brant (Columbia S. Ct).

Applying these factors to MN, I note that MN seeks to affirmatively ask the non-attorney agent to engage in the potentially deceptive and dishonest conduct to gain information she otherwise could not get. The non-agent apparently would not have sought the non-party's permission to enter her profile without the lawyer's involvement, which makes it substantial for the conduct-based analysis prong 1 test. Her involvement is, in fact, what is at issue here. The prong 2 depth and significance of deception factor may not appear at first glance to be as strong against MN, but it is important to note the potential significance and depth at issue. With approval by deception, the agent could gain access to a wealth of critical information for MN, that could be all appearances end the matter entirely and immediately. MN says as much in her letter. It also allows for substantially more information to flow to MN than she otherwise is entitled to under discovery tools. Regarding the prong 3 necessity/alternative factor, there is no indication that MN could not otherwise obtain some of the relevant information by other sources, i.e., other depositions and requests to other persons involved. A little more investigation might easily reveal some of the same information without the deception being necessary. Also, the interests in this case (trip-and-fall negligence claim), probably do not rise to the level of the kind of public harm that justified the conduct in Rose yet was still considered insufficient. The prong 4 other illegality/impropriety factor here may not be as strong, although it is important to note the nonparty is not represented by counsel and that there may be requirements under the social networking site that access cannot be used for certain purposes (like deception). In short, because MN would be directly involved in the deception by ordering it specifically, because the deception could potentially be very significant for the case and lead to a wealth of relevant information, and because there probably are other means available to get some of the sought-after info, MN's proposed conduct likely violates this conduct-based analysis.

3. MN's conduct also would violate the status-based analysis adopted by Columbia, which essentially balances harms. Under this test, a lawyer's

deceptive conduct will violate the Rules unless it does not go to the core of the integrity of the profession, and is necessary to ensure justice in certain cases. Specially, the Columbia court in Brant states that this test applies to civil rights violations, intellectual property infringement, or crime prevention. Applying this test to overturn a Rules violation for a lawyer who engaged in deception to obtain evidence against a civil rights race-discrimination violator, the court stressed that it limited its reading of permissible actions under this test only to these circumstances and extend it to no others. This seems to indicate that the justice at issue, the one for which the deception is justified, must be specific to certain harms and probably substantial. The court also notes that the test applies differently to different actors, which means there is no clear standard. This inquiry also requires that the deception be relevant to the fitness to practice law, that it go to the core of integrity.

The MN inquiry involves trip-and-fall negligence and the discovery of potential information that may (or may not) be relevant from an unrepresented nonparty. It does not involve civil rights, infringement or crime prevention. Also, I submit that affirmatively asking agents of attorneys to seek out information that otherwise would not be obtainable under the truth does reflect poorly on the core of the integrity of the profession, which is supposed to hold to the highest standards. The knowledge and justified potential concern of lay persons that attorneys could within the rules engage in this kind of conduct without their knowledge is precisely the kind of thing the rules are meant to protect. Because MN's case does not meet the sufficient interests of justice of the certain crimes for which this test is allowed, and because this conduct would in fact reflect poorly on the core of the integrity of the profession, MN's conduct would violate this test as well. MN's conduct may seem harmless, it may seem justified, but the Rules of Professional Conduct set a high standard. No deception, no misrepresentations, not even through non-attorney agents, especially if it could reflect poorly on the profession. MN's proposal violates the rules, it violates a balancing test (per se weighing the profession's integrity), and it violates a status test because of type of case. Therefore, I submit that we should advise MN not to engage in this activity, and I propose we begin preparing a rule or comment addressing such violations for future adoption.

MPT 2 - Sample Answer # 3

MEMORANDUM

TO: Bert H. Ballentine
FROM: Examinee
DATE: July 26, 2011
RE: Social Networking Inquiry

Mr. Ballentine and Fellow Committee Members:

Upon careful review of Franklin's Rules of Professional Conduct (FRPC) and applicable case law from neighboring jurisdictions (as this is a case of first impression under Franklin's Rules), I am of strong opinion that the proposed course of conduct by Ms. Melinda Nelson would violate the FRPC. The relevant case law sets forth three approaches to resolving this type of issue and under each approach, Ms. Nelson's proposed conduct would be in violation of the FRPC.

1. Applying the Plain Language of the Franklin Rules of Professional Conduct, Ms. Nelson's Proposed Conduct is a Clear Violation of Such Rules

Pursuant to FRPC 4.1(a), a lawyer must not knowingly make a false statement of material fact or law to a third-person. Comments to this Rule reveal that a misrepresentation can occur when a lawyer incorporates or affirms a statement of another person that the lawyer knows is false or by partially misleading statements which are the equivalent of affirmative false statements. Additionally, FRPC 8.4 (a) and (c) state that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist another to do so, or do so through the acts of another; and to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The Comments to Rule 8.4 indicate that while there are many kinds of illegal conduct which adversely reflect on one's fitness to practice law, only certain offenses indicating a lack of characteristics relevant to law practice, such as dishonesty and breach of trust, violate the rules.

In the case at hand, Ms. Nelson's proposed conduct violates both FRCP 4.1(a) and 8.4(c). In an attempt to obtain crucial testimony for her client, Ms. Nelson wishes to fraudulently obtain access to a witnesses' private Facebook account. Further, she attempts to engage in this fraudulent conduct by means of her assistant, whose name will not be revealed to the witness. In this day in age when technology is advancing and social networking sites are plentiful, it is crucial that one act with honesty and integrity when dealing with such online sites. Although Ms. Nelson indicates that her assistant would only state truthful information to the witness, the whole purpose and reasoning behind seeking

access to the Facebook page would remain unknown to the witness, thus inducing her to reveal her private information by means of dishonesty.

In the Olympia Supreme Court case of *In the Matter of Devonia Rose*, a Chief Deputy District Attorney misrepresented herself as a public defender in order to alleviate a hostage scenario. The Court noted that although Rose's act of deception may have been "justified" under the circumstances, "even a noble motive does not warrant departure from the Rules." In our case, while some members of the Committee reason that it may be "worthwhile to expose a lying witness" or that harmless misrepresentation should be allowed in the pursuit of justice, the court in *in the Matter of Devonia Rose* specifically held that an attorney has a responsibility to enforce the law and this responsibility "does not grant them license to ignore those laws or the Rules of Professional Conduct." Additionally, an important part of the court's analysis appeared to be the fact that Rose has options other than acting deceptively. Similarly, in our case, Ms. Nelson is not justified in creating such deception to access a witnesses's private Facebook account. Although her motive may be noble, in that she wants to reveal the truth for her client's case, this motive does not eliminate a violation of the Rules. Further, Ms. Nelson even indicated that she *may* be able to obtain access to the Facebook account simply by asking the witness. Therefore, it seems that she has other methods than to engage in acts of deception. It's important to note that even though Ms. Nelson herself is not doing the deception, Rule 5.3(c)(1) states that a lawyer shall be responsible for conduct of a non-lawyer that would be a violation of the rules if such conduct is ordered or ratified with the knowledge of the lawyer.

2. Ms. Nelson's Proposed Conduct Constitutes a Violation of the Franklin Rules of Professional Conduct under a Conduct-Based Analysis

The Columbia Supreme Court in *In re Hartson Brant* set out two tests, one of which the court refers to as a "conduct-based analysis." This four-part test requires an assessment of: (1) the directness of the lawyer's involvement in the deception, (2) the significance and depth of the deception, (3) the necessity of the deception and existence of alternative means to discover the evidence and (4) whether the conduct is otherwise illegal or unethical.

In regards to the first factor, as mentioned above Ms. Nelson's conduct is not directly involved, however she would specifically be directing the action of her assistant, which results in a violation under Rule 5.3. As to the second factor, the significance of the deception is great. Although the Committee may argue that there is little if any harm posed to the witness, her Facebook account contains many private things. One's Facebook page may include personal contact information, private pictures, notes, and the like. The whole purpose behind Facebook privacy settings is to withhold your personal information from others and only share information with those that you may know. As to the third factor, Ms. Nelson's inquiry could be obtained through other means, such as asking the

witness directly if she may access all or part of her Facebook account (which Ms. Nelson's letter indicates she has yet to do) or seek the court's permission in allowing Ms. Nelson to re-depose the witness in order to seek relevant information.

3. Ms. Nelson's Proposed Conduct Constitutes a Violation of the Franklin Rules of Professional Conduct under a Status-Based Analysis

In addition to the four-part conduct-based analysis, the court in *In re Hartson Brant* set forth a status-based analysis which focuses on the "importance and nature of the role that the attorney plays in advancing the interests of justice." Under this test, the Committee may argue that Ms. Nelson's proposed conduct does little harm to the witness and merely aids the interests of justice. However, Ms. Nelson's proposed conduct is the type which goes directly to the integrity of the legal profession. Every lawyer has a duty to uphold the laws and Rules of Professional Conduct and a proposed action which would allow an attorney, by means of her assistant, to dishonestly and deceitfully obtain a witnesses's Facebook information, to be used against her in a court of law, falls more in line with entrapment than it does with advancing the interests of justice. In *Hartson Brant* the General Counsel of the Columbia Fair Housing Association engaged in a "sting" operation to expose discrimination against minorities. The Court ultimately held that Brant's misrepresentation was one which seeks justice, without comprising the integrity of the profession. The Court, however, carefully limited its holding to situations involving imminent danger to public safety, rooting out corruption or organized crime, and investigating the violation of intellectual property rights. None of these limited situations are applicable in our case. Ms. Nelson's conduct is not necessary to ensure justice. This is not an action to ensure justice in the case of civil rights violations (as in *Hartson Brant*) nor is it a case involving crime or intellectual property rights. Therefore, even under such a status based test, Ms. Nelson's proposed conduct would be a violation of the FRPC.

Based upon the above tests, case law and Franklin Rules of Professional Conduct, Ms. Nelson's proposed conduct is not permissible. Although it is true, as many in the Committee may argue, that access to the witnesses' Facebook could reveal crucial information to Ms. Nelson's case and can serve to impeach the witness at trial, this does not justify a violation of the Rules. Every lawyer takes an oath upon being sworn in to uphold the law and the Rules of Professional Conduct and such deviation from the Rules should not be permitted in this instance.