July 2008 Bar Examination Sample Answers

DISCLAIMER
These are actual answers to essay questions that were written by applicants during this bar examination. These answers received a high score from the Examiner who wrote the question. The answers are provided to be helpful to applicants in preparing for a future exam, not to be used to appeal a score received on a prior exam. They may be printed and circulated.

Question 1 - Sample Answer #1

1) The federal district courts of GA or FL could exercise jurisdiction over these claims.Georgia's district courts have diversity jurisdiction over this case. Here we have defendants from FL and GA, since Gator Loggers is a resident of Florida (and possibly GA) and Juan Valdez is domiciled in Georgia. The plaintiffs are completely diverse, as Abe and Bea are from Mississippi, and Cile is from Alabama. Byrd's status as the personal representative of Bea's estate and the legal representative of his minor daughter will not preclude a finding of complete diversity [which is required by federal statute (1332), although the Constitution would require only minimal diversity.]Florida's district courts could also have diversity jurisdiction because, again, there is complete diversity across the "arrow." That means that no plaintiff has the same domicile of any defendant.

Gator Loggers could be sued in GA because Gator Loggers likely meets the minimum contacts standard for the assertion of jurisdiction because it has its main wood yard in Georgia. International Shoe. A corporation is amenable to suit in the state in which it is chartered and where it has its principal place of business. Here, the main wood yard is likely the principal place of business. Further, the transportation of logs from Chula to Valdosta suggests the company not only mills wood in GA, but also harvests it in-state or buys from in-state suppliers, which suggests sufficient contacts, even if the wood yard is not a principal place of business. The GA Long-Arm statute would authorize the assertion of jurisdiction because Gator Loggers, which will be responsible for the acts of Juan Valdez on a respondeat superior theory, has committed a tort in the state of GA. The GA district court could assert personal jurisdiction over Valdez since he is domiciled in GA.
Florida's district courts could assert jurisdiction over Gator Loggers because Gator Loggers is a FL corporation. They could then exercise jurisdiction over Valdez because he is a joint tortfeasor.

2) Federal venue is appropriate in a case based solely upon diversity jurisdiction in a district in which any defendant lives, if the defendants are residents of the same state. If no such jurisdiction exists, venue is proper where a substantial amount of the events giving rise to the litigation occurred. If no jurisdiction satisfies either of the foregoing requirements, then any jurisdiction that can assert personal jurisdiction over a defendant can hear the case.

A corporation is deemed to reside in the district where minimum contacts could be found if the district were a state. If no such district exists, venue over it is proper in the district with the most contacts.

Here, the defendants are likely both from Georgia, since Valdez resides in the state and Gator

Loggers has its principal place of business in Valdosta. If the main wood yard is, in fact, the principal place of business, then venue is proper in the district in which either defendant resides. Here, that probably includes the Southern District of Georgia, which encompasses Valdosta. The main wood yard in the Southern District would meet the minimum contacts test if the Southern District were a state.

If the main wood yard is not a principal place of business, then the defendants are from separate states (FL and GA). In that case, venue is proper in the district around Tifton, where a substantial part of the events occurred (i.e., the wreck). I believe Tifton is also in the Southern District. The plaintiffs will likely be happy that they might go before Judge Alaimo.

3) The plaintiffs must use a method of service "reasonably calculated to give notice" if the defendants do not waive service of process. They probably will waive service, since that will entitle them to 60 days to answer instead of 30 and mean they don't have to pay the costs of service, but if they don't waive it. . .

Regarding Valdez, the plaintiffs will have to effect service upon Valdez personally or by leaving process with a person of suitable age and discretion residing at Valdez's most notorious place of abode. Publication will not suffice unless Valdez cannot be served in any other way. Practically, the plaintiffs will likely have to effect service at Valdez's house in Hahira by serving either Valdez, his spouse, or a child who is old enough.

Regarding Gator Logging, the plaintiffs should serve the person that the corporation has appointed to receive service of process. The secretary of state likely keeps a record of that person. The plaintiffs should use reasonable methods to discover who to serve.

Actual notice with regard to either defendant will not be relevant if the defendant does not waive service. Service must be technically proper. Each defendant is entitled to rest upon the technicalities of service of process if they so desire.

4) The claims should probably be heard in Georgia. The accident was in Georgia, so the evidence will likely be located here - e.g., the skid marks from the crash, the wrecked car, and any witnesses to the crash. Further, the forum is convenient for Byrd, who must represent two of the plaintiffs. It will also be convenient for Valdez, who lives in state, and relatively convenient for Gator Loggers, which appears to conduct lots of business in-state. If a Georgia district court asserts jurisdiction, there is not likely to be any subsequent transfer under the forum non conveniens doctrine.

Question 1 - Sample Answer #2

1. Jurisdiction of Abe, Bea, and Cile's claim requires subjects matter jurisdiction and personal jurisdiction over the defendants.

In Federal District Court, subject matter jurisdiction ("SMJ") is established through federal question or diversity jurisdiction. There is no federal question here because a car accident yields state law tort claims. Diversity jurisdiction requires (1) complete diversity of all plaintiffs from all defendants, and (2) an amount in controversy which exceeds $75,000.

Here, the amount in controversy is not given, so I will assume "serious" and "crippling" injuries meet the amount in controversy requirement. Significantly, each plaintiff's claim must meet the

amount in controversy on its own. There is no aggregation of multiple plaintiffs' claims. However, supplemental jurisdiction may save a claim if the claim arises out of the same transaction or occurrence of proper federal - SMJ claims. Here, even if there is not complete diversity, if one claim is proper, they all are because they all arise out of the same accident.

The plaintiffs' respective citizenships are controlled by their respective domiciles. For an individual, domicile is a residence with an intent to remain. Abe and Bea reside in Mississippi and Cile resides in Alabama. From these facts, none have an intent to move. A corporation's domicile is both its place of incorporation and its principal place of business. Here, Gator Loggers, Inc. is incorporated in Florida and its "main" wood yard is Georgia, its likely principal place of business. Valdez's domicile is irrelevant, as an illegal alien he is not a citizen of any state. Byrd's citizenship is also irrelevant because we look to the represented parties' domiciles (Bea is Miss. and Cile is Alabama). Here, all plaintiffs and all defendants are diverse. Therefore, SMJ in federal court is proper.

Which federal court has jurisdiction turns on personal jurisdiction ("PJ"). PJ is determined in Federal court by the state law rule in which the federal court sits. Georgia PJ rules presumably control here. In GA, PJ over a defendant corporation is valid if the corporation is domiciled here. Domicile is controlled by where the corp. is incorporated and where its registered agent lies. Here, they are both Florida for Gator. There is no indication Gator is authorized to do business in GA, either, in which case GA would retain general jurisdiction over Gator. Gator may be subject to GA's long arm statute. Here, the second arm of the long arm statute supports PJ. It states PJ is proper when a defendant commits a tort in state. Here, Gator committed negligence in state. However, PJ must also satisfy the constitution. Under a state's long arm, due process is satisfied if the defendant creates a minimum contact so that traditional notions of fair play and substantial justice are satisfied. The contact must include purposeful availment of the state's laws and foreseeability that the defendant could be sued in the state. Here, Gator availed itself by driving in GA. Therefore, it's foreseeable it could be sued there. Factors of fair play include convenience and the forum's interest. Here, all parties have GA ties and the evidence lies here. Additionally, GA has a strong interest in protecting its roadways. PJ over Gator is valid.

PJ is also valid over Valdez. An individual is subject to general jurisdiction if he resides in a state or can be served there. Here, Valdez resides in GA and can be served here. This method of PJ traditionally serves due process.

2. Federal venue is determined by (1) where a substantial part of the transaction or occurrence occurred or (2) where all D's reside if they all reside in the same federal district. A corp resides, for venue purposes, where it is subject to PJ. As in #1, Gator is subject to PJ in Florida and Georgia. Valdez resides in Georgia. If both Valdosta and Hahira are in the same district, that district has proper venue. If they reside in different districts, any federal district in Georgia is proper.

Under the other venue provision, the accident occurred in Tifton, GA. Tifton's fed district court would be a proper venue.

3. Service of process ("SOP") in federal court is valid if (1) the defendant is personally served; (2) service is left with a person of suitable age and discretion at the defendant's residence if that person resides therein; (3) under the state's rules in which the fed ct sits. Here, Valdez can be served in GA by any of these methods. In fed ct, a process server must be at least 18, but unlike Georgia state court does not have to be court appointed.

Gator may be served, as a corporation (1) by serving its registered or managing agent personally; or (2) by serving the Secretary of State with a copy of service and certified mail to the corp's registered agent in Florida, or (3) under the Georgia Corporation code by mailing service to the corp's registered agent.

4. The most appropriate federal district court would be the one that encloses Tifton, GA. A court needs SMJ, PJ and venue to hear a case. As discussed above, Tifton's fed ct has all three. When more than one court meets those requirements, venue is transferred by public factors and private factors. Here, the accident occurred in Tifton, so the evidence most likely lies there and that court has an interest in local incidents and protecting nearby roadways. Additionally, Tifton is most convenient for all parties, who can converge there from Miss, Ala, Georgia, and Florida respectively. Last, jurors of Tifton likewise gain by safety on nearby highways, so it makes sense to burden that locality with jury service. That would be the best venue for this action.

Question 1 - Sample Answer #3

1. A federal district could in GA would have jurisdiction over the claims of Abe (A), Bea (B), and Cile (C), against Juan Valdez (J) and Gator Loggers (G). Exercising such authority in federal court requires subject matter and personal jurisdiction over the parties to the case. The two most common bases for federal subject matter jurisdiction are federal question and diversity cases. No federal question seems to lie on these facts - this appears to be a standard tort action - meaning diversity jurisdiction is the most likely basis for asserting jurisdiction.

Diversity jurisdiction requires that all the parties be completely diverse from each other and that the amount in controversy exceed $75,000. Since an individual died and another faces crippling injuries, amount in controversy is almost certainly satisfied here so long as A, B, and C make a claim for more than $75,000. Complete diversity requires that every plaintiff be completely diverse from every defendant. Strawbridge. For natural persons, this hinges on where these individuals reside, based on physical presence and intent to reside. For corporations, the place of incorporation and the principal place of business are the states of residence. Here, A and B are from Mississippi. C appears to be from Alabama - and although the case is being brought by her legal representative (arguably a citizen of GA), it is the citizenship of the represented (C) rather than the representative that is relevant. Even if Byrd's domicile was relevant, he may not be a GA citizen - his intent to reside in the state is unclear even if he is temporarily stationed here at the air base. G is a FL corporation, both by incorporation and registered office. As long as a state other than GA is its principal place of business, and not its "main wood yard" in Valdosta, G is simply a citizen of FL.

Principal place of business can take into account the place where decisions are made or the place of a corporations primary activities (nerve center test or muscle center test). J is likely a citizen of GA, where he lives, even though he is an illegal alien and therefore not a citizen of the US. On these facts, complete diversity is met, satisfying for federal subject matter jurisdiction. If complete diversity is not met, this action will have to be brought in GA state court, since no federal question appears on these facts. Personal jurisdiction requires a statutory and constitutional analysis. The relevant statutes are those of the state in which the federal court sits - the state of GA. In GA, personal jurisdiction could be established under either the Nonresident Motorist Act or the Long-Arm Statute. The Nonresident Motorist Act allows for suits against nonresidents when an auto accident occurs in the state and would apply on these facts. The GA Long-Arm Statute allows for personal jurisdiction over nonresidents when a tortious act or omission is committed in the state

that leads to tortious injury in the state. Here, tortious negligence apparently occurred in Tifton, GA, and injury occurred on that stretch of road. Even if these bases weren't available, presence in GA by J or G at another time could provide general jurisdiction - if A, B, or C served them at that time. Personal jurisdiction is statutorily satisfied here under multiple bases.

Constitutionally, a defendant must have sufficient minimum contacts with the forum state such that the exercise of jurisdiction over them is foreseeable and fair. International Shoe. Such minimum contacts as doing business in the state of GA and deriving substantial revenue in state would satisfy. Here, the fact that G was hauling logs from one point in GA to its "main wood yard" in the state suggests a pattern of substantial business with the state. Jurisdiction then would be fair because it would be foreseeable and is related to G's conduct in the state.

2. Venue in federal courts can be laid in any district where a substantial part of the claim arose or in a district where the defendants reside. Here, the claim arose in Tifton, GA, where the accident occurred, so venue should be appropriate there. Residence for purposes of venue is construed more broadly than that for diversity. G could be considered a resident of Valdosta (where its main wood yard lies) as well as FL. The federal venue rules are more forgiving than GA's constitutional protections.

3. Service of process can include personally serving the defendant, serving the defendant at their usual place of abode, or sending certified mail that could constitute waiver of service. The purpose of service is to give notice. Under the federal rules, service can be effected by a person of suitable age and discretion, unlike the more stringent requirements of GA service by sheriffs or court appointed personnel. J could be served by substitute service at his abode as well, by leaving service with any individual of suitable age and discretion who resides there. G, as a corporation, could be served by serving one of its managers, secretaries, or its registered agent in GA, or anyone in the corporation exercising enough responsibility that they could be considered an agent of the corporation. This would not include lower level employees. Waiver of service of process could be sent in the mail. Should they not, they will have to pay the reasonable fees associated with effecting service. In very rare cases, service by publication is permitted.

4. The most appropriate forum for this matter considering all matters of jurisdiction and venue would be the federal district court embracing Tifton, GA. This makes sense for the private interests involved, since the claim arose there and the evidence concerning what happened will be most available to the court here. It would also make the most sense in light of public interests - the people of Tifton have the greatest interest that their roads are free from negligence. Considering all the balances, this is the most appropriate forum.

Question 2 - Sample Answer #1

(1) The procedure for forming and organizing a GA corporation begins with the incorporators. Roger, Randy and John would be the initial incorporators. As such, they would need to draft the Articles of Incorporation (AiC). The AiC represent a contract between the corporation and the state, as well as a contract between the corporation and its shareholders. The AiC should include the names and addresses of each incorporator (Roger, Randy, and John), the name and address of the registered agent (must be in GA), and the address of the registered office (need not be in GA). The AiC should also include the number of authorized shares, and a description of the types of shares to be issued. At least one class of shares must have liquidation rights, and at least one

class of shares must have unlimited voting rights. The AiC must also state the corporation's name, including the word "corporation," "company," or "incorporated," or one of their abbreviations. Here, R, R, and J, Inc. would be proper. The AiC may also include a statement of purpose of the corporation, but it is not required. I recommend that RRJ Inc. not use a statement of purpose, because without one, a purpose to undertake all lawful business and unlimited duration as a going concern are assumed. This is good for two reasons. First, it does not open up Roger, Randy and John to ultra vires liability on contracts beyond the scope of a narrow purpose. Second, the trio may desire to expand its area of business without amending the AiC.

Once the AiC are drafted, they must be filed with the Georgia Secretary of State. When the Secretary files the articles, a de jure corporation is formed. Randy, Roger, and John will need to hold an organizational meeting in order to elect the initial directors and adopt bylaws. Bylaws are not required for corporate formation but are a good way to set up the procedures for policy adoption, voting, and meetings. Once these steps are taken, the Georgia corporation is formed and organized. The result is a separate legal entity (governed by GA law) that can undertake contracts, sue and be sued. As a result, directors and owners then have limited liability.

(2) A corporation is not liable on pre-incorporation contracts unless it adopts the contract. Here, John leased the location before the de jure corporation was formed. Thus, John is personally liable on the contract as a promoter, but the corporation is not liable unless and until it adopts the contract. The corporation may only adopt the contract after it is formed, and it may do it expressly or impliedly. It may adopt the contract expressly by signing its name to it, or impliedly by taking the benefit of the contract. In this case, taking the benefit would be moving onto the leased premises. However, even if the corporation adopts the lease, John remains liable as the promoter unless there is a novation. A novation is an agreement by three parties (the original two parties to the contract and the new party wishing to replace one of the old parties to the contract) to change one of the parties to the contract. Here, a novation would replace John with the Corporation as the second party to the contract with the lessor. Regardless of the scenario (adoption and novation, just adoption, or neither adoption/novation) Randy and Roger will not have personal liability on the lease.

(3) Corporation: After incorporation, I would recommend that the corporation expressly adopt the lease and execute a novation to replace John's name with the corporation's name on the lease. This will insulate the individuals from personal liability on the lease and any suits that come about because of it because once the corporation is formed, they have limited liability.

Roger and Randy: It is clear that John had no actual authority to bind the three men and their partnership before the incorporation. There was no express or implied indication from Roger and Randy that they wanted him to enter into the lease. In fact, it was quite the opposite; they told him prior to starting operations they wanted to talk to a lawyer about other possible business formations. Thus, Roger and Randy have no pre-incorp liability on the lease. However, if the issue is only post-incorporation action, Roger and Randy need only to support the adoption/novation discussed above. They will not incur any personal liability on pre-incorporation issues because they did not authorize the contract, and adoption/novation are not retroactive. Thus, upon adoption/novation, Roger and Randy have nothing to worry about. Their liability is limited; only the corporation is liable.

John: John needs to ensure that the corporation executes a novation in addition to adopting the contract he set up with the lessor. If there is not novation, he remains personally liable on the lease, even if there is an adoption by the corporation. Since the main purpose of forming a corporation is the limited liability, he should make certain that the novation is pursued and

executed. If the corporation does not want to adopt the lease, John is out of luck. Even without express authority, he held himself out to be representing himself and the corporation by signing as president, and would likely be estopped from disaffirming the lease.

(4) I would suggest an LLC, LLP or LLLP. An LLC is a limited liability company. It requires filing Articles of Organization with the Secretary of State as an LLC, and paying the required fee. An LLC is run by its members, who have limited liability. Members may be held liable for their own tortious acts, but not for those of other members. An LLP is a Limited Liability Partnership. Filing as an LLP and paying the fee are prerequisites, but partners again have limited liability. Partners may still be liable for their own tortious acts, but are not liable for those of fellow partners. Filing as an LLLP gives the general (managing) partners of an LLP the same limited liability as limited partners, without taking away their management rights.

Question 2 - Sample Answer #2

1. To form a corporation in Georgia several steps must be taken.

First, we need an incorporator, at least one. Here this could be Randy, Roger, or John. The duty of the incorporator is to execute the files and deliver them to the Sec. of State.

Secondly, in the Articles of Incorporation certain formalities must be met as these Articles form a contract with the newly formed corporation, the state, and shareholders. (1) The name of the corporation must be in the Articles and it must contain the name, plus certain magic words. Here the entity is to be called R, R & J, Inc. This "Inc." on the end of the name satisfies the requirement. (2) Next, the name of the incorporators must be in the Articles. Here, this depends on who the three want to be an incorporator. (3) Next the Articles must contain the name of the registered Agent and the registered office, must be in GA. One of these three can be the agent or someone will need to be appointed. They will also need to set up a location in GA to serve as their office. Finally, since the three seem to want to stay in GA the registered office probably can also be their principle place of business.

Next is the matter of a business contract. I would advise against limiting the business to any purpose. This will enable the corp. to function for any lawful purpose as implied by law.

Next, the Articles need to indicate the authorized stock of the corp., if any, (this is the stock the corp. is authorized to issue). Also, the law requires that at least one class of stock be given unlimited voting rights and one class needs to be able to receive all the assets of the corporation upon dissolution.

Finally, the incorporator(s) need to deliver these Articles to the Sec. of State, along with a form asking the Sec. to publish the Articles, and the fees.

At this point the directors, if any, named in the Articles would meet, adopt bylaws, and elect officers. If the directors are not named in the Articles then the incorporator(s) whoever they are could do this as well. At this point a de jure corporation, or presumption of a corp. at law is recognized.

(2) Roger and Randy, as long as they were not held out as "partners" in obtaining the lease will

not be held personally liable on the lease. First, they did not sign the lease and second the purpose of incorporation is to limit personal liability. Shareholders are not personally liable for the actions of the corporation, though the corp. might.

John might be liable because he signed the lease personally before the corporation was formed. John may be held liable as incorporator on the lease even though he tried to sign in an official capacity.

(3) a. Corporation: I would recommend that the corporation decide what it wants to do with the lease. The corp. may want the office space and in that event they should adopt the lease. The corporation should also probably notify the lessor that they are not adopting the lease should they decide they don't want the lease. Concern should be had for a potential corp. by estoppel claim by the lessor. This might work since John was carrying on business as if he was a corp. officer.

b. John and Randy as discussed above will not be personally liable so they need not do anything.

c. John probably needs to convince the corp. (Randy & Roger) to adopt the lease first, thus making the corp. liable. Next, Randy should push for a novation, or an agreement between all interested parties to excuse John from whatever potential liability he might have personally.

(4) In the effort to avoid personal liability I recommend either forming a Limited Liability Company (LLC) or a Limited Liability Partnership (LLP).

In an LLP partners are shielded from personal liability on debts of the corp. and from the torts of the other partners. The partner however remains personally liable for any torts they commit. This is a great way to not have to jump through all the hoops of incorporation and still remain protected. Again the only people liable are partners for their own torts and the LLP itself. Filing with the Superior Court Clerk of all counties and fee paying is the prerequisite.

In addition, a LLC is also a wise choice to avoid personal liability. The LLC can choose to be formed under a corporate or partnership style. In any event, again the personal liability of its members is limited. Only the LLC is liable on contracts and only the partner who committed the tortious act is liable, not the other partners. And again, formation is easier than incorporation. Filing with the Sec. of State and paying the appropriate fees is all that is necessary. An excellent way to limit liability.

Question 2 - Sample Answer #3

1. In order to form a Corporation in the state of Georgia there first must be one or more incorporators. Here the incorporators would be Roger, Randy, and John. Another corporation can act as an incorporator as well.

Next, the incorporators must prepare the Articles of Incorporation. The Articles of Incorporation are a contract with the state. The Articles must contain the names and addresses of the incorporators, the name and address of the registered agent for the corporation, and the address of the place of business of the corporation. The Articles of Incorporation may include the names of the initial directors of the corporation.

Next the incorporators must file the Articles of Incorporation with the Secretary of State. They must pay the required fees and request permission to publish the intent to incorporate.

After formation there must be an organizational meeting. At this meeting the directors can be named if they were not named in the Articles, the corporation can adopt bylaws, which are the rules of operation for the corporation, and issue stock. The corporation must hold annual meetings and make required filings with the Secretary of State periodically to remain valid. The name must contain "Incorporated."

According to the facts of the question, John entered into the lease prior to incorporation. John was acting as a promoter in this instance. Promoters act as agents of the corporation. However, the promoter is liable personally on all contracts entered into prior to the formation of the corporation. The corporation may adopt the contract after formation. Adoption does not relieve the promoter from being personally liable on the contract. In order to relieve John from personal liability on the lease there must be a novation. A novation is really a new contract, and requires that all of the parties agree to substitute a third party, the corporation, for the promoter, John. The lessor would have to agree to the novation as well. So without a novation the corporation would not be liable, except on a theory of corporation by estoppel. This theory basically serves to protect innocent third parties who deal with what they think is the corporation. Here John signed as the corporation president, so the lessor could argue corporation by estoppel. Randy and Roger are not personally liable on the lease. Their investment in the corporation could be subject to liability if the corporation adopts or there is a novation on the lease.

(3) a. If the corporation desires to benefit from the lease, they should adopt the lease. However, as mentioned above, if John wants to cease from being personally liable, then the parties must enter into a novation, where all parties agree to substitute the corporation for John, as promoter. The lessor must agree to make the novation valid and relieve John from personal liability.

(b) Roger and Randy are not personally liable but may become liable as shareholders if the corporation adopts the lease or if there is a novation. They would only be liable to the amount of their investment.

(c) John is personally liable as a promoter on the contract. In order to be released from liability there must be a novation of the lease.

4. There are several entities that would provide for limited liability. The Limited partnership provides for the limited partner to be free from personal liability. However there would have to be at least one general partner who would be subject to unlimited personal liability.

Another form would be the Limited Liability Partnership. All partners in this form are liable for their own torts but not for the torts or contracts of the partnership. Also this provides for taxation as a partnership instead of double taxation in the corporate form.

Finally, the best choice would probably be the Limited Liability Company. This form protects its members from personal liability. It can be taxed as a partnership or as a corporation. It can be managed by its members or by a manager. The members would still be liable for any torts committed by them which were outside the scope of the business.

Also, they could choose to run the corporation as a close corporation with less than fifty shareholders. In a close corporation the shareholders can manage the corporation. The shareholders can also elect to forgo some of the corporate formalities such as the annual

meeting.

Question 3 - Sample Answer #1

To: Partner

From: Applicant

Re: Ben Duped's action against Big Mack Motors, Inc.

1. An ***express warranty*** is applicable to these facts. When the sales person represented to Duped that the automobile had never been wrecked, this creates an express warranty. This was a statement of fact about the car not just sales-talk by the sales person. The sales person was affirmatively representing to Duped that the automobile had not been wrecked even though the sales person had actual knowledge otherwise.

2. The "as is" provision of the Sales Agreement is good to disclaim the implied warranty of merchantability. The warranty of merchantability is implied in sales of goods by merchants who regularly sell goods of the kind. It warrants that the goods sold are suitable for ordinary use of goods of their kind. Without the "as is" provision, it would be implied in the Sales Agreement that Big Mack Motors warranted that the car it sold Duped was suitable for ordinary use as a used automobile. The "as is" provision takes this warranty out of the agreement between the parties and means that Big Mack doesn't warrant to Duped that the auto is good for any particular use. An "as is" provision can disaffirm all warranties except an express warranty. In this case, therefore, the provision did NOT disaffirm the sales person's guarantee that the car had not been in a wreck.

3. A tort action for fraud and deceit is not precluded by the UCC. Article 2 of the UCC governs contracts for sales of goods and supercedes the common law that governs such contracts when provisions of the UCC conflict with the common law. When the UCC is silent as to a matter, however, the common law still governs that matter while the UCC still governs the remainder of a contract for the sale of goods.

4. The merger and disclaimer clauses do not prevent reliance by Duped on the alleged fraudulent misrepresentation. The ***parol evidence*** rule states that courts cannot consider evidence of any oral or written communications between parties to a contract that was made before or at the time the contract was executed if the contract is a final written agreement between the two parties. A final written agreement contains all the material terms of the deal and the court will look to whether the parties intended for the written agreement to be final. A merger clause such as the one in this question creates a presumption that the parties intended the written agreement to be a final agreement and to include all the terms of the agreement. Under the ***parol evidence*** rule, therefore, if such a clause is in the contract, the court cannot consider evidence of prior communications such as the sales person's representation that the automobile had never been wrecked because this express warranty is not the final sales agreement that the parties presumably intended to include all the terms of their deal.

There is an exception to the ***parol evidence*** rule that allows a party to always introduce evidence of fraud, deceit, or duress. Duped can introduce evidence of the sales person's warranty

to show that he was fraudulently induced to buy the automobile. A sales person is probably not required to disclose that the car had been in a wreck, but he may not affirmatively make statements about the car that he knows are not true in order to induce Duped to buy the car. Duped can introduce evidence that he relied on the sales person's express warranty, which was a fraudulent misrepresentation, and would not have entered into the sales agreement to buy the car if the sales person's false statement had not been made.

Under the UCC, a buyer of goods is generally not permitted to unilaterally rescind a contract. When however, as in this contract, one of the parties was fraudulently induced to enter the contract, the contract is voidable by the fraudulently induced party. Duped, therefore, can unilaterally rescind this sales agreement.

5. An action for fraud and deceit based upon the facts of this case exists. To prove fraudulent misrepresentation, Duped must show that (1) the sales person made a misrepresentation of the material fact, (2) that the sales person knew the representation was false, (3) that the sales person made the misrepresentation with the intent to induce or deceive Duped, (4) that Duped reasonably relied on the sales person's representation, and (5) that Duped suffered a loss or other damages because of his reliance on the sales person's misrepresentations.

A misrepresentation is material if it would cause a reasonable person to rely on it in making a decision. A reasonable person buying a car would want to know whether the car had been in an accident because of the permanent damage that an accident does to a car's ability to perform and value. The facts state that the sales person in this case knew that the car had been in a wreck and therefore that his representation to Duped was not true. The sales person, because of the nature of his job as someone who wants to sell cars (and who was probably paid on commission based on the number of cars he sold), presumably made this representation intending to induce Duped to buy the car. He also probably wanted to deceive Duped into thinking that the car had not been in a wreck because it is likely that Duped would not have bought that car or paid as much for it had Duped known that the car had been in a wreck. It was reasonable for Duped to rely on the sales person's representation because the sales person was in a position to have superior knowledge about the car and a consumer is reasonable in relying on an express warranty by the seller of the car. Duped suffered a loss because he paid for a car that he thought had not been in an accident. Cars that have been in accidents are worth less than cars that have not and therefore Duped suffered a loss because he paid more for the car than he otherwise would have if the sales person had not made the fraudulent misrepresentation.

Question 3 - Sample Answer #2

1. Applicable Warranties

The Georgia Uniform Commercial Code (UCC) controls to the sale of goods. The transaction between Ben Duped and Big Mack Motors for a used automobile was a sale of a good. Under the UCC a good is any tangible and moveable item. A used car is a tangible and moveable item; thus, it is a good. When a merchant seller sells a good he is always liable for any express warranties that he makes regarding the good and is sometimes liable for any implied warranties that arise from a sale. A merchant seller is one who deals in goods of the like. Here, Big Mack is a merchant seller because it is their ordinary business to sell cars. Therefore, Big Mack is liable for any express warranties made during the sale.

Any statement of puffery or salesmanship does not constitute an express warranty. The sales person's statement that the car was not involved in any previous accidents went beyond mere puffery and was an outright representation of fact; thus, it was an express warranty.

In general any merchant seller also impliedly warrants that the goods they are selling are merchantable, which means that it is fit for its normal purpose. Thus, a used car must be fit for its intended purpose: to be able to be driven. Other implied warranties can arise where the buyer has a particular purpose for a good and the seller knew or should have known of such purpose; however, Duped had no such special purpose therefore only the implied warranty of merchantability was created.

2. "as is" Clause

Under the UCC, any "as is" provision in the Sales Agreement by a merchant seller effectively eliminates any implied warranty that was created through the sale but has no effect on any express warranties. This provision must be conspicuous in the Sales Agreement in order to notify the buyer of its existence. Therefore, the implied warranty of merchantability of the used car was destroyed by the "as is" clause but the salesman's express warranty is still valid.

3. Tort action allowed?

The UCC does not limit the remedies available to a buyer for any activity in connection with the sale of goods. Therefore, Duped is allowed to file an action for fraud and deceit against Big Mack Motors. Under Georgia law, however, one must elect between a fraud action and a breach of contract action which includes the breach of any warranties.

4. Merger Clause Effect

A merger clause is a clause that asserts that a particular writing is the entire agreement and that no other terms can be added to that particular writing through parol evidence. Here the clause that states "[n]o other agreement, promise, or understanding will be recognized" is a valid merger clause that purports to assert the Sales Agreement is integrated.

The parol evidence rule, which is codified in the UCC, prohibits the use of any parol evidence in order to contradict or add any terms to a merger or integrated document. Parol evidence is any oral or written evidence that is contemporaneous or prior to any written contract. Therefore, Big Mack Motors will attempt to exclude any statements by its salesman as parol evidence. However, the parol evidence rule does not apply to any statements that tend to establish a defense to the formation of a valid contract. A valid contract requires an offer, acceptance, meeting of the minds, and if for the sale of goods $500 or more a writing. Here, there was no meeting of the minds because Duped relied on the salesman's statement that the car was never in a wreck. Therefore, the proffered evidence can be introduced because it establishes a defense to the formation of the contract.

5. Fraud Action

Fraud requires (1) a material misrepresentation; (2) scienter; (3) intent to induce; (4) actual inducement; (5) justifiable reliance; and (6) damages. A representation is material if a reasonable person in the same situation as Duped would have thought it was important to their decision of whether to purchase a car. Here, Big Mack Motors salesman made a material representation

because the fact that a car was not involved in an accident is important to a consumer in determining whether or not to buy that car. Scienter is the knowledge or reckless indifference that a statement was false. Here, the facts indicate that the salesman knew the car had been involved in a wreck. Further, the salesman made the statement with the intent to induce Duped to buy the car. The salesman's intent can be inferred from the fact that he knew that statement was false and that he stood to gain from inducing such a purchase. Duped must also prove that he would not have purchased the car "but for" the misrepresentation by the salesman. Here, it is likely that he would not have bought the car if he knew it was involved in a wreck. Also, Duped must have been reasonable in relying on the misrepresentation. Here, the salesman was in a position of superior knowledge about the car's history and it is generally reasonable for a buyer of a car to rely on the factual assertions made by a salesman about a particular car. However, with the advent of internet based car history reports, Duped might have been unreasonable in not at least requesting such a report. Finally, Duped can establish damages in the amount he paid for the car. Thus, all the elements of fraud have been established and Duped would have a valid claim. If however, there is evidence that the salesman was only negligent in his misrepresentation, then Duped could sue for negligent misrepresentation instead of fraud.

Duped can also seek to hold Big Mack Motors vicariously liable via the doctrine of respondeat superior. Under this theory, an employer is jointly and severally liable for the torts committed by its employees within the course and scope of their employment. Here, the salesman's misrepresentation was in the course of his employment because it involved the sale of Big Mack Motor's car. Thus, Big Mack Motors can be held liable as well.

Question 3 - Sample Answer #3

Memorandum

To: Partner

From: Applicant

Re: Duped v. Big Mack Motors

1. Duped Probably has a Claim for Breach of Express Warranty

Pursuant to Georgia contract law, a representation about the quality of a product that becomes the "basis of the bargain" creates an express warranty. However, it is imperative to note that Georgia Courts are quick to draw a conceptual difference in a representation that becomes the "basis of a bargain" and a statement of mere "puffery." In that regard, "puffery" contemplates mere "sales talk" designed to promote the item or service being offered. The statement of the Big Mack Motor salesperson in the instant case, "that the automobile had never been wrecked" will probably be deemed an express warranty as opposed to mere sales talk. This is so particularly in light of the fact that the prior accident history of a vehicle is undoubtedly one of the issues of utmost concern with nearly, if not all, car buyers.

2. The "As Is" provision probably has no effect on the warranty

The "as is" provision in the instant case will probably not affect the applicability of the warrant in

the instant case for two particular reasons. First, while the UCC makes abundantly clear that the implied warranties of merchantability, fitness for particular purpose, and title can be nullified by a conspicuous disclaimer, the UCC makes equally clear that "express warranties" cannot be disclaimed. In the case at bar, it is likely that Big Mack Motors will argue that the purpose and effect of the "as is" clause is to disclaim any applicable warranties. However, if the representation regarding the vehicle history is construed to be an express warranty, any arguments that the "as is" clause disclaimed such representation will be unavailing.

An alternative rationale that Duped can attempt to rely on to combat the applicability of the "as is" would be to direct the court's attention to the general proposition that an "as is" clause will not protect the seller from "active concealment." Concededly, this maxim is typically used in the arena of property law. Nevertheless, the rationale and the policy underpinnings for the rule are equally applicable to the sale of personal property. Namely, that a seller should not profit from his own, intentional, fraudulent concealment. In the instant case, Duped probably can mount a persuasive argument to the extent that the Big Mack salesperson's representation that the car had never been wrecked is tantamount to the active concealment of the true condition of the car.

3. A Tort Action Sounding in Fraud in not Precluded by the Uniform Commercial Code

The UCC offers a wide variety of remedies for breaches of contract in the arena of goods. However, the UCC indicates that the remedies specifically provided for in the code are not exclusive, but rather are cumulative with remedies provided by other fields of law. Against that backdrop, so long as Duped receives only "one satisfaction" in regards to his claims against Big Mack, he should have no problem proceeding on a tort theory that is enunciated by law outside of the UCC.

4. Merger of the Sales Agreement Probably Does Not Prevent Reliance of the Misrepresentation

Even if a court determines that the presence of the "merger" clause lends itself to a finding that the contract between Duped and Big Mack was totally integrated, Duped will probably be able to direct the court's attention to the alleged pre-contract statement. That being said, the Parol Evidence Rule operates to bar extrinsic evidence of a written or oral agreement occurring before, and not embodied in the written contact, as well as oral statements made contemporaneously with the execution of the contract.

Nevertheless, Georgia courts have carved out several exceptions to the Parol Evidence Rule and will allow admission of evidence of pre-contractual discussions. Of particular import in the matter at bar, Georgia courts have consistently allowed evidence of pre-contractual oral statements where such evidence is necessary to establish a claim for fraud. Therefore, despite the harsh tendencies of the Parol Evidence Rule, Duped's case appears well suited to fall into the "fraud exception" and he will probably be permitted to introduce the sales person's representation.

5. Duped Probably Does Not Have a Viable Action for Fraud

While Duped can likely prove most of the elements of fraud, he probably will not prevail on a fraud claim. In order to assert a colorable fraud claim, the plaintiff must show that (1) the defendant made a false, affirmative material misrepresentation; (2) that the defendant knew that the statement was false; (3) that the defendant intended that the plaintiff would rely on the false statement; (4) that the plaintiff justifiably relied on the false statement; and (5) that such reliance was to the plaintiff's detriment. In the instant case, there is no doubt that there was an affirmative false statement regarding a fact material to the relationship between the plaintiff and

the defendant. Moreover, if the salesperson knew of the falsity, Duped will probably be able to show intent to defraud. Additionally, Duped will probably be able to show that he suffered damages from the misrepresentation, i.e., that he paid more for the car because of the representation. Nevertheless, while Duped likely will be able to carry his burden of showing a majority of the elements, he will probably not be able to show reasonable reliance. In a majority of jurisdictions around the state, the plaintiff can establish this element merely by showing that he relied on a representation of a person having superior knowledge of the underlying subject matter. However, Georgia is not as plaintiff friendly in this respect as its precedent teaches that a plaintiff cannot reasonably rely when he had a sufficient opportunity to inspect for himself, and the inspection would have disclosed the defect. Since, Duped could have probably easily taken the car to a mechanic for inspection, he probably will not . . . .

Question 4 - Sample Answer #1

1. The GRPC allows for the representation of multiple parties to the same matter if the attorney is able to advise each party and the parties' interests do not conflict with each other in the subject of the representation. Larry Lawyer (Lawyer) is prohibited from representing parties in the same matter who have competing interests or where confidential info from one party may be material to the representation of the other party but would damage the person who supplied the info. Here the facts state that John & Bill inherited equal, undivided interest in Whiteacre, therefore they share identical interest in the land. Further, John and Bill are in agreement that the land be harvested and they will both receive the same benefit if a correct boundary line is determined. Lawyer may, under GRPC, accept the joint representation of John and Bill in the action to have the boundary line determined. This arrangement will be permissible as long as John & Bill's interests are not in conflict with each other.

2. A lawyer, under GRPC, may not accept as part of his compensation any stake in subject of the litigation. By accepting a deed in the property, Lawyer would essentially be an owner of Whiteacre and would therefore be a party to the action. This is not permitted under GRPC. However, Lawyer may accept a note with a security in the property to ensure payment. It is probably unwise as if Lawyer needed to collect on the note, he would have to bring an action to partition Whiteacre which would be adverse to the interest of Bill, the other party. A better arrangement would be for John to get a loan from the bank using either the timber or the land as security and use those funds to pay Lawyer.

3. When the settlement offer of $50,000 was made John was adamantly opposed to it and Bill is adamant that it should be accepted. At this point Lawyer should determine if the two points of view can be reconciled while protecting the separate interest of each party. If this is not possible, the parties have conflicting interests and Lawyer cannot represent either party and he must withdraw from representing both. However, he may continue to represent one of the parties if the other party is informed of the conflict, given the opportunity to consult outside counsel, and consents to the continued representation of the other party.

4. Under GRPC a lawyer may not represent a party that is adverse to a current client or that is adverse to a prior client and the subject of the litigation is the same or the lawyer obtained information in the course of the representation of the prior client that may be used against that client in the current matter. The recency of the representation of the prior client is also relevant in determining whether a conflict exists. Here Lawyer represented Roger 3 years ago connected with

Roger's electrical supply business. The issue was a warranty claim brought by one of Roger's customers. Lawyer is not prohibited under GRPC from representing John & Bill despite Lawyer's prior representation of Roger. The subject matter of the prior representation is entirely unrelated to the current matter and it is unlikely that Lawyer has any info that could be adverse to Roger in the current litigation. Lawyer would know if he is able to proceed in his representation of John & Bill if he knows he does not possess attorney/client protected info from Roger that would, if presented, help John & Bill. Assuming Lawyer has no such info he may ethically represent John and Bill in the instant matter despite Roger's objection.

Question 4 - Sample Answer #2

1. Larry Lawyer may represent two clients so long as the clients' interests are not adverse to each other and he gets their informed consent as to the dual representation. Informed consent is important as the lawyer-client relationship carries with it particular privileges and particular obligations or duties lawyers owe to their clients. Certainly if John and Bill had divided interests in the land with one brother having more land near the disputed boundary, Larry may have some difficulty representing them jointly because one brother might be willing to settle for less than the other brother. However, because both brothers have an undivided interest, both are equally interested in the disputed boundary. Larry Lawyer should be careful and obtain waivers of confidentiality so that he can be sure to share information with both brothers regarding their claim and avoid the possibility of breaching the duty of confidentiality to one or the other.

2. Larry may not accept a fractional share of John's undivided interest in Whiteacre to cover the expenses because that would make Larry interested in the outcome of the case. GRPC prohibit attorneys from accepting interests (other than contingency fees) during litigation that would make them interested in the case. Because the outcome of the litigation could enlarge Whiteacre's borders, yield more timber, or both, the value of Larry's fractional interest in Whiteacre could substantially increase depending on the outcome of the claim. He may not accept the undivided interest as payment of legal fees.

Larry may accept notes from John, even those secured by a security deed on John's undivided interest in Whiteacre, as payment for current and future fees arising out of the litigation. The notes, unlike the fractional share of John's interest in Whiteacre, represent sums certain (the first one $15,000 with the later ones to be determined as fees arise). They do not grant Larry an interest in the property that could increase or decrease depending on the outcome on the claim. Even though they are secured by a security deed, the most Larry could obtain from the note(s) is the amount printed on their face. Even if the value of Whiteacre does in fact increase or decrease with litigation, Larry is not interested in the outcome, because his notes are merely secured by the property which he can sell as a creditor in order to obtain the money for the fees.

3. Under the GRPC, clients have the ultimate authority in determining when to settle and what amount is appropriate for settlement. Here, both John and Bill have that authority in terms of their claim. Where the interests of the party become adverse or diverge from each other, the lawyer that represented both parties may need to withdraw from representation. Because the options available to the brothers include dividing their interests in order to reach settlement such that their interests may now be adverse to each other, Larry will likely need to withdraw from representing either brother. Larry's access to any confidential communication during his joint representation of the brothers should only strengthen his resolve to withdraw from the

representation of either party because of the potential for conflicts it creates between his current client and former client.

However, under the rules, Larry could pursue individual representation of one of the brothers so long as he obtained informed consent from the brother he was no longer going to represent and such representation would not violate any of the duties Larry still owes to the brother as a former client.

4. While the GRPC prohibit representing one client against a former client in a matter relating to the former representation, lawyers are not prohibited from representing current clients against former clients where the claim is substantially different and unrelated to the former representation. The policy behind the rules is to allow Georgians to have the lawyers of their choosing and in many small towns such choosing would be meaningless if a former client could preclude an attorney from representing someone else against them in a matter unrelated to former representation. However, representation of a new client against a former one must not make use of confidential information or knowledge gained during the representation of the former client.

Here, Larry defended Roger in a breach of warranty claim stemming from Roger's electrical supply business. The subject matter of the former representation, defense against breach of warranty, is substantially different from the matter of a disputed boundary line. Unless Larry gained significant insight into the current matter from his representation of Roger three years ago in the breach of warranty claim, it is likely that Larry can represent the brothers.

MPT I Sample Answer #1

To: Charles Petrilla

From: Applicant

Date: July 29, 2008

Re: Bohmer Custody Case

1. FRANKLIN UCCJEA §16-102(7) ESTABLISHES THAT FRANKLIN WAS THE HOME-STATE JURISDICTION AT THE TIME OF FILING

A Franklin court has jurisdiction to make an initial child custody determination only if Franklin is the child's home-state on the date of the commencement of the proceeding, or was the home-state of the child within 6 months before the commencement of the proceeding and the child is absent from Franklin but a parent continues to live in Franklin. See UCCJEA §§16-102(7); 16-201(a)(1). Franklin is considered the "home-state" of a child if the child has lived with a parent for at least 6 months immediately before the commencement of a child custody proceeding. When calculating the home-state requirement, any period of temporary absence of the child or parent(s) is considered part of and included in the relevant 6 month period. ***Id.*** An absence from Franklin is no longer "temporary" once the absent person has formed the intent to reside permanently in another state and is in fact doing so. ***In re: Marriage of Mills.***

Applying the above standard, Franklin had home-state jurisdiction when Alex Bohmer filed for custody in Franklin District Court on 6-30-2008. On 12-1-07, Carrie, the Bohmer's child, went to visit her grandparents in the state of Columbia. Although she has remained there ever since, the original intention was for Carrie to just visit. Therefore, 12-1-07 cannot be used as the starting point for Carrie's permanent residence in Columbia. Instead, only when the intent for Carrie to remain permanently in Columbia does the 6 month time period begin. Furthermore, UCCJEA requires that the child live with a parent in the home-state for at least 6 months. Here, although Jessica Bohmer has remained in Columbia since 2-2-08, she did not decide to remain there permanently until approximately three months later. Therefore, the 6-month time period when Jessica and Carrie resided in Columbia began at the end of Feb. 2008. Since Franklin was Carrie's home-state within 6 months before Alex filed on 6-30-08 and Alex continues to live in Franklin, the Franklin court, pursuant to UCCJEA §16-201(a)(1) could properly exercise jurisdiction over an initial child custody determination even though Carrie was absent from the state at the time of filing.

2. JESSICA BOHMER IS LIKELY TO SUCCEED IF SHE FILES A MOTION TO DECLINE JURISDICTION UNDER THE UCCJEA'S INCONVENIENT FORUM PROVISION

Franklin UCCJEA§16-207 sets forth 6 specific factors to be considered by the court when determining whether it is an inconvenient forum and that a court of another state is a more appropriate forum. ***In re: Marriage of Brickman and Young.*** All of these factors must be considered although the court should give more weight to some when making its determination. If Jessica files a motion to decline jurisdiction under the inconvenient forum provision of the Franklin UCCJEA, the Franklin court, upon weighing these factors, is likely to grant her motion so that the proceedings may be filed in Columbia, a more appropriate forum.

The first factor to be considered, whether domestic violence has occurred and is likely to continue and which State could best protect the parties and the child, is given the most weight. When domestic violence has occurred, the issue is which forum can provide greater safety. In this case, Alex has abused Jessica since 2001, when she was still pregnant with Carrie. This abuse has continued until at least 5-30-06 and Alex, who owns a gun, has continued to make threats toward Jessica as late as this summer. These facts establish a history of abuse which is likely to continue, since Jessica has the support of her family in Columbia and is away from Alex's immediate reach, there is little doubt that Columbia is safer for her and Carrie. The second factor to be considered is the length of time the child has resided outside of the state. Here, Carrie has been outside Franklin for nearly 8 months. The facts that she is very young, barely 6 years old, and has made friends and been enrolled in school in Columbia supports the fact that this is a long enough time where Carrie has lost her connections with Franklin and formed new connections with Columbia. The third factor is the distance between the court in Franklin and the court in the state that would assume jurisdiction (Columbia). The drive between the two courts is about 1.5 hours each way. Although it is a shorter distance than that in ***Brickman***, in both cases the noncustodial parent is at a better position to travel since they do not have to accommodate for child care. Also, in this case, the inconvenience to Alex is lessened by the shorter drive. The fourth factor considered is the relative financial circumstances of the parties. Here, Jessica makes approximately $10,000 annually while Alex earns approximately $55,000. This is a disparity very close to that found to weight in favor of transferring jurisdiction to the court of the lower earning spouse in ***Brickman.*** The fifth factor considered by the court is the traditional bases for determining venue and inquiries about the nature and location of the evidence required to resolve the pending litigation, including the child's testimony. Like in ***Brickman,*** the court to which the case would be transferred to is a more convenient forum for the child to testify. Additionally, although some of

the records involved may be located in Franklin these would be easily transported to Columbia. The last factor the Franklin court would weigh is the familiarity of the court of each state with the facts and issues in the pending litigation. Here, Franklin is more familiar since the restraining order was granted by it while Columbia's involvement was limited to issuing the marriage certificate. However, ***Brickman*** found that transfer was still warranted even when the Franklin court was substantially more involved. Upon weighing these 6 factors, giving special weight to safety, the case should be transferred to Columbia.

MPT I Sample Answer #2

TO: Charles Petrilla

FROM: Applicant

RE: Jessica Bohmer/Interstate Custody Case

This memorandum addresses the jurisdiction issues in the Jessica Bohmer case.

1. Which state was the "home-state" jurisdiction under the UCCJEA at the time of filing?

The state of Franklin was probably Carrie's "home-state" for jurisdictional purposes at the time Alex Bohmer filed his child custody petition. The Franklin UCCJEA grants jurisdiction to "a court of this State" where Franklin is either "the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent continues to live in this state." (Franklin UCCJEA 16-201(a)(1)) Home state is defined under the UCCJEA, section 16-102(7), as the "State in which a child lived with a parent for at least six consecutive months immediately before the commencement of child custody proceeding." Franklin was Carrie's home state within six months before the commencement of the proceeding ***and*** Alex Bohmer continues to live in Franklin, thus Franklin can properly claim jurisdiction as Carrie's home state. Whether the absence was temporary or not is irrelevant but under Mills it was not a temporary absence.

It appears that Carrie had lived in Columbia for just under five months at the time Alex Bohmer filed his petition, thus Columbia was not Carrie's "home state" under the UCCJEA, unless the "more appropriate forum" section (16-201(a)(2)) applies, which is addressed below.

2. Since Franklin will likely have subject matter jurisdiction over the matter, the likelihood of success of a Motion to Decline Jurisdiction is paramount. According to In re Marriage of Brickman and Young, a Franklin court, applying UCCJEA section 16-207, ***may*** "decline to exercise jurisdiction over child custody proceedings when the court determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum in which to make the child custody determination." The permissive nature of the inconvenient forum statute aside, the issue is governed by six specific statutory factors, which are addressed individually with reference to the specific facts of Jessica Bohmer's situation below. For purposes of analyzing the relevance of the factors, the Brickman court notes that some facts weigh more heavily than others, but ***all*** factors must be considered by the court.

Whether domestic violence has occurred and is likely to continue in the future and which State could best protect the parties and the child is the most important factor to be considered. The fact that Alex Bohmer has a history of committing acts of violence against Jessica Bohmer, which can be shown both by testimony and the civil protection order, weighs heavily in favor of holding the custody hearing in Columbia. Brickman directs the court to consider "whether the parties are located in different states ***because*** one party is the victim of domestic violence," which in this instance seems to be the case. Whether Jessica decided to stay in Columbia for reasons other than Alex's propensity to violence is probably not as important as the fact that she left the state because of a specific instance of violence coupled with a pattern of previous violence. The courts of Franklin also recognize that domestic violence is a high recidivist crime, and thus explicitly authorize their courts to decline jurisdiction in favor of proceedings in another state to protect the child and the party fleeing the violence. Alex Bohmer might try to offer evidence of his having sought psychological counseling as a "mitigating" factor here, but the weight of the evidence will still likely come down in Jessica's (and Columbia's) favor.

The length of time Carrie has resided outside Franklin is about 22 months in total. The court will certainly consider the fact that Carrie has significant family connections in Columbia, but because Franklin has been Carrie's residence for a solid majority of her life, this factor probably weighs in favor of Franklin retaining jurisdiction.

The distance between the courts, the third factor in this case, is apparently a 1.5 hour drive, which does not appear to impose a substantial burden on either party. The Brickman court appears to endorse a position that the non-custodial parent is generally in a better position to travel, however, so this factor may weigh in favor of Columbia's jurisdiction.

The fourth factor, relative financial circumstances, weighs heavily in Jessica and Columbia's favor. Jessica's ability to adequately protect her interests (and Carrie's interests) may be seriously affected by requiring her to travel back and forth to Franklin with limited financial resources.

The fifth factor concerns the traditional bases for determining venue, including the nature and location of evidence. Much of the testimony in this case will come from Jessica and her family, and Carrie, and any records of Carrie's education, etc. in Franklin are easily transported.

The final factor is the familiarity of the court with the case. The fact that the Franklin court issued the prior protection order weighs in favor of the Franklin court's exercise of jurisdiction. Brickman indicates that the Franklin courts will give consideration to an out of state court's ability to familiarize itself with the litigation, and further that unless the out of state court appears to be an "inappropriate" forum, this factor is not dispositive.

Considering all the statutory factors and the precedential weight given to them in prior Franklin case law, it appears to be highly likely that the Motion to Decline Jurisdiction will succeed. If Franklin does, in fact, grant the eventual motion, it will be necessary for Jessica Bohmer to file for custody hearings in Columbia as soon as possible.

MPT 1 Sample Answer #3

TO: Charles Petrilla

FROM: Applicant

RE: Bohmer/Interstate Custody Case

First, you wanted to know whether Franklin or Columbia was the home-state jurisdiction under the Franklin Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) at the time of filing of the current custody case in Franklin. I believe that Franklin will have home state jurisdiction under Franklin's UCCJEA.

Section 16-201(1) says that a state will have jurisdiction if it "is the home state of the child on the date of the commencement of the proceedings, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent continues to live in this state." Section 16-102 defines home state as "the state in which a child lived with a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." It also states that "a period of temporary absence of any of the mentioned persons is part of the period."

Carrie has been in Columbia with her grandparents since December 1, 2007, meaning that she had lived in Columbia for 7 consecutive months before the custody proceeding was filed on June 30, 2008. However, she has not lived with a parent that whole time. Before that she had lived in Franklin with her parents for two and a half years, since June 2004.

When Carrie came to Columbia in December 2007, she came with the intent to stay there temporarily. The Mills case said that intent is significant in whether absence from a state is temporary and that absence is no longer temporary once an intent to reside elsewhere permanently has been formed. In this case, Jessica came to Columbia on February 2, 2008, but she did not form the intent for her and Carrie to stay there permanently until three weeks later, on February 23, 2008. Therefore, Carrie can be considered having resided in Franklin until February 23, 2008.

Carrie's permanent residence transferred on February 23rd instead of in December 2007 when she first came to Columbia, less than six months before the custody proceeding was filed. She is currently absent from the state because she resides in Columbia now. Carrie's father, Alex, continues to live in Franklin. Therefore, under section 16-201(1), Franklin has UCCJEA jurisdiction because Franklin was Carrie's home state within six months before the proceeding, she is absent from Franklin now, and her father continues to live there.

Second: Whether a motion to decline jurisdiction under the Inconvenient Forum provision will be successful.

Discussion:

A motion to decline for inconvenient forum is likely to be successful. In determining whether another state should exercise jurisdiction, a court considers the following factors: (1) Whether domestic violence has occurred and is likely to continue in the future, and which state could best protect the parties and the child, (2) length of time the child has resided outside Franklin, (3) distance between the court in Franklin and the state that would assume jurisdiction, (4) relative financial circumstances of parties, (5) nature and location of evidence required to resolve pending litigation, including testimony of child and (6) familiarity of court of each state with the facts and issues in pending litigation.

While some factors weigh more heavily than others, all factors must be considered by the court. The first factor is extremely important and tends to have a lot of weight on the court's ultimate decision. In the case In re: Marriage of Brickman and Young, the Franklin Supreme Court held that when a court finds that domestic violence has occurred or that a party has fled the state to avoid further violence, this factor should be given greater weight than any other individual factor when determining jurisdictional issues under the UCCJEA. In that case, the father was abusive during wife's pregnancy, exhibited obsessive and controlling behavior, perpetrated serious injuries on her, and made no showing that his potential for future violence had ended. Several of these facts exist in the case at bar. When Jessica was pregnant, Alex was physically and emotionally abusive. He pushed her down stairs, slapped her, and tried to choke her. These are serious injuries that should be sufficient to warrant grave concern. The worst incident on Jessica's birthday was so harmful that Jessica almost lost consciousness. In addition to the abusive behavior, his letter also shows signs of obsessive and controlling behavior. Here, he's threatening to make her sorry for leaving. This may be used to show that it is likely that the violence will continue. The fact that he signed up for therapy and is seeking to resolve matters without resorting to abuse may be used by Alex to show he has changed, but since we don't know if he attended therapy or have the therapist's notes, we could possibly still prevail.

As stated in the first issue, the child has spent a majority of her life in Franklin. Some evidence that may help us on the second factor is the fact that Carrie is enrolled in school, Jessica's parents are in Columbia, and since Carrie has witnessed Alex be abusive to her mother, her sense of well-being and security is better in Columbia. Alex may argue that her friends, school, and community contacts are in Franklin making it the more convenient state. This factor could go either way.

The third factor, distance between courts, may also help Jessica. Columbia is an hour and a half away and as the custodial parent, Jessica would have to bring Carrie or arrange for her care. Although Alex may argue that the distance is not very long, unlike the eight hours in the Young case, it nonetheless creates a transportation inconvenience.

The fourth factor also weighs in favor of transfer to Columbia jurisdiction. In the Young case, the husband made over $41,000 in comparison to the wife's $6,500 income. This was enough for the court to conclude that the wife's choice of Columbia should be granted. In this case, Jessica makes $10,000 in comparison to Alex's $55,000. Considering that she would have a lot more expense if also asked to travel, this should lean toward Columbia exercising jurisdiction.

The fifth factor, location of evidence, is debatable. This factor examines where the parties are located, Carrie's health and child records, witnesses, etc. Since Carrie has lived in Franklin most of her life, her records are still there. Although the parties, Jessica and Carrie, are in Columbia, Alex may bring a successful argument that the pertinent evidence outside of location of parties weighs in favor of Franklin.

Additionally, other factors like the location of the protective order, marriage license, and other litigation concerning marriage (6^{th} factor) favor Franklin courts. However, Franklin may conclude similar to the holding in Young, that Columbia will have an opportunity to become familiar with case by virtue of Jessica applying for legal services in Columbia.

Conclusion: Weighing all these factors and giving additional weight to the first factor, like the Franklin Supreme Court, Franklin Court will likely transfer jurisdiction to Columbia.

MPT II Sample Answer #1

To: Tania Miller

From: Applicant

Re: Williams v. Biggs d/b/a A-1

Williams alleges that Biggs fraudulently induced him to repair his transmission, when in fact his transmission did not need repair. According to the Foster case, to allege fraud, a complaint must contain five elements: 1. a material misrepresentation of fact by the defendant, 2. made with knowledge of its falsity, 3. made with intent to deceive or induce reliance, 4. reasonable reliance by the plaintiff upon the misrepresentation, and 5. loss by the plaintiff as a proximate result of the misrepresentation. Biggs made four statements to Williams that might support a cause of action for fraud:

Biggs "found a notification from Dodge about a defect causing the gears to grind down"

This statement of fact is actionable. According to Foster, a representation is material if a reasonable person would consider it important in deciding to enter into the transaction. Before Biggs told Williams this, Williams had no intention of replacing his transmission, but this statement from Biggs led him to believe something was wrong with the transmission. Therefore, it was reasonable to consider this statement in deciding whether to enter the transaction. Secondly, Biggs knew the statement was false when he made it because Mission Dodge confirmed that Dodge had never issued such a notification. Knowing the statement was false, Biggs could only have made it to deceive Williams and induce him to get a new transmission. Williams has no expertise in auto repair and was in a crunch because he wanted to leave for vacation the next day and therefore did not feel he could shop around for other opinions. Biggs, on the other hand, is employed in auto repair and thus has superior knowledge and skill to that of Williams. Therefore, it was reasonable for Williams to rely. Because of this reliance, Williams suffered monetary damage.

"Your transmission is going to fail, and soon!"

This is a statement of opinion but is still actionable. Opinions are normally not actionable. However, according to Madison there is an exception to this rule when the opinion relates to a subject in which the parties do not have equal knowledge or means of obtaining the truth. Madison, quoting Novotny, states that where the party with superior knowledge has a design to mislead and positively asserts a matter which might "in another form be a mere opinion," the statement can be actionable if it was false. This statement meets the required elements of fraud for the same reasons stated above and because Biggs must have known that the statement was false, that the transmission was not going to fail, because he simply removed the transmission and put the same one back in (while telling Williams he was getting a different transmission). And as discussed above, Biggs, being in the auto-repair business, has superior knowledge. Therefore, this statement is actionable.

"It would also help if we installed an extra cooler to keep it from running hot"

This is also an opinion, but is not actionable. While it meets all of the other requirements, it did

not actually induce reliance on William's part because he told Biggs he did not think it needed an extra cooler because the manufacturer would have installed one if it did. Because Williams did not rely on Bigg's statement, Biggs did not put in an extra cooler and therefore Williams did not suffer any damage from this statement. Thus, the statement is not actionable for fraud.

"I guarantee the job"

This is an unfulfilled promise to perform, but is not actionable. Rogers holds that an unfulfilled promise to perform, when the party has no intent to perform, can be actionable if all of the other elements of fraud are met. In Rogers, the promise was made before the plaintiff relied, thus the promise induced reliance. Here, however, the promise was not made until after the work was performed. Biggs did not make this statement until after Williams had already agreed to the work and paid the bill. Therefore, Williams could not have relied on this statement in deciding to have the work done.

Complaint for Fraud:

Statement 1:

1. On June 5, 2008, Robert Williams took his dodge minivan to A-1 to have the oil changed and fluid inspected. After inspection, Aaron Biggs, the owner and operative of A-1 told Williams that he had "found a notification from Dodge about a defect causing the gears to grind down."

2. Dodge never issued such a notification, thus Biggs was aware the statement was false.

3. Biggs made this statement to induce Williams to pay A-1 to repair or replace his transmission.

4. Williams, who has no expertise in automotive repair, reasonably relied on Bigg's superior knowledge of automotive repair and authorized the transmission replacement.

5. Williams paid A-1 $1,887 for their work. But, as a result, Williams car, which had been running fine, began to leak transmission oil. A-1 refused to guarantee their work and Williams was forced to take his car to Mission Dodge. Mission Dodge charged Williams $128 to repair the leak caused by A-1's improper installation.

Statement 2:

1. After lying to Williams about the Dodge notification, Biggs stated "your transmission is going to fail, and soon!" Although this is an opinion, it is an opinion positively asserted by one with superior knowledge of the facts underlying the opinion, with intent to deceive. Therefore, under the Madison rule, this statement is actionable even though it is not a statement of fact.

2. Biggs knew this statement was false because he had his mechanic drive the car, the car was running fine before being brought in, and Biggs did not actually replace the transmission, he simply took it out and re-installed it.

3. Biggs made this statement to induce Williams to pay A-1 to repair or replace his transmission.

4. Williams, who has no expertise in automotive repair, reasonably relied on Bigg's superior knowledge of automotive repair and authorized the transmission replacement.

5. Williams suffered monetary damage totaling $2,015 for A-1's faulty work and Dodge's repairs.

MPT II Sample Answer #2

To: Tania Miller

From: Applicant

Re: Williams v. Biggs

According to ***Foster***, a "complaint for fraud must allege the following elements: (1) a material misrepresentation of fact by the defendant, (2) made with knowledge of its falsity, (3) made with intent to deceive or induce reliance, (4) reasonable reliance by the plaintiff upon the misrepresentation, and (5) loss by the plaintiff as a proximate result of the misrepresentation.

1. Biggs had "found a notification from Dodge about a defect causing the gears to grind down."

This statement is actionable for fraud. According to Mission Dodge, this was false. Thus, Biggs made a material misrepresentation of fact. He arguably knew this was false, unless someone informed him falsely. As the owner of an automotive repair shop, Biggs presumably was in a position to receive accurate repair notifications from Dodge. Therefore, the misrepresentation was made with knowledge of its falsity. He likely made the statement with intent to deceive or induce reliance, for unless he was misinformed about the notification, there is no other plausible explanation for this statement. Williams clearly suffered a loss as a proximate result of the misrepresentation: he paid $1,887 to A-1 and $128 to Mission Dodge to repair damage A-1 caused. Like the false statement in ***Foster*** that a headboard was at the store's warehouse and would be delivered, Bigg's statement is an outright lie. In ***Foster*** and this case, fraud is evident.

2. "Your transmission is going to fail, and soon!"

This statement is actionable for fraud. Based on the repair work that the Dodge dealership performed and their statement that Dodge had not circulated any notification about transmission problems in 2003 minivans, this statement is a material misrepresentation; however, it appears to be an opinion. ***Madison*** dealt with the question of "whether a statement that is an expression of opinion may be actionable as fraud. . .where the party making the misrepresentation has special knowledge of the facts underlying the opinion, or 'is possessed of superior knowledge respecting such matters with a design to deceive and mislead,' the positive assertion of a matter, which stated in another form might be a mere opinion, may be actionable if the statement was false." In that case, the defendant told the plaintiff that she "would surely see 60 to 70 percent of the dormant buds growing and producing trees." However, the defendant allegedly "knew that the dormant buds were poorly handled and would almost certainly not grow properly." The court found that the pleadings had satisfied the essential elements of fraud, and reversed and remanded the dismissal. The ***Madison*** defendant was an expert in horticulture, just as Biggs is an expert in automotive repair. Both parties expressed opinions about future happenings based upon their knowledge of their respective fields. Thus, this opinion meets the first element for fraud. The remaining elements are also met: Biggs ostensibly knew the statement was false; he was trying to deceive Williams, who is not an expert in automotive repair, and/or induce his reliance upon his

judgment that the transmission needed to be replaced or repaired; Williams relied on this statement reasonably; and Williams suffered loss as a proximate result of the misrepresentation.

3. "It would also help if we installed an extra cooler to keep it from running hot."

This statement is not actionable for fraud. While it was a misrepresentation probably made with knowledge of its falsity, Williams did not rely on the misrepresentation and he suffered no loss as a proximate result of the misrepresentation. Obviously, he suffered losses, but they were from reliance upon other misrepresentations. He was not fooled into believing this statement.

4. "I guarantee the job."

This statement is not actionable for fraud. As above in statement 3, there was a misrepresentation probably made with knowledge of its falsity. Williams did not rely on the misrepresentation and he suffered no loss as a proximate result of this misrepresentation. He did not allow the repair shop to "fix" his transmission because he believed that A-1 was guaranteeing the job; he had already paid for the "work" and was leaving the shop when Biggs told him this. Furthermore, this oral assertion was negated by the fact that "No Guarantee" was stamped on the invoice.

Cause of Action-Statement 1

1. When making the statement that he had "found a notification from Dodge about a defect causing the gears to grind down," Biggs made a material misrepresentation of fact because there was in fact no such notification from Dodge.

2. As he was in a position to receive accurate notifications, Biggs made this statement with knowledge of its falsity.

3. Biggs intended to deceive Williams or induce his reliance, for he wanted Williams to pay for the unnecessary work on his car.

4. Since Williams is not an expert in automotive repair, he reasonably relied upon this misrepresentation and paid A-1 to perform work on his minivan's transmission.

5. As a result of the statement that there was a notification from Dodge, Williams suffered damages totaling $2,015 when he paid $1,887 to A-1 and $128 to Mission Dodge to repair the damage A-1 cause to his transmission.

Cause of Action-Statement 2

1. When stating, "Your transmission is going to fail, and soon." Biggs made a material misrepresentation of a fact because Biggs knew that there was nothing wrong with the transmission and his automotive expertise would imply that he had such knowledge.

2. As an expert in automotive repair, Biggs made this statement with knowledge of its falsity.

3. As he wanted Williams to pay for fake repairs, Biggs intended to deceive Williams and induce his reliance.

4. As a non-expert in automotive repairs, Williams reasonably relied on Bigg's statement.

5. Believing that his transmission was about to go out, Williams paid for repairs and thus suffered losses totaling $2,015 when he paid $1,887 to A-1 and $128 to Mission Dodge.

MPT II Sample Answer 3

To: Tania Miller

From: Associate

Re: Williams v. Biggs d/b/a A-1 Automotive Center - statements potentially actionable as fraud

This memorandum addresses the 4 statements believed to be fraud and a cause of action pleading for those actionable as fraud. Each statement will be taken in turn.

I. Statement: "I found a notification from Dodge about a defect causing the gears to grind down." The issue is whether this statement constitutes fraud. In order to be fraud, a material misrepresentation of fact must be made by the defendant Biggs; Biggs must have made the statement with knowledge of its falsity; Biggs must have made the statement with the intent to deceive Williams or induce his reliance on it; Williams must have reasonably relied on the statement (misrepresentation); and Williams must have suffered a loss as a proximate result of Bigg's misrepresentation. Foster v. Panera F.C.O.A. (2003). From the facts here, Bigg's statement regarding the Dodge notice is a material misrepresentation of fact. A representation is material if a reasonable person would consider it important in deciding to enter into the transaction. Id. Here, Williams had no intent to get his transmission fixed or even looked at, he came in for an oil change. When told about the notice from Dodge, he was surprised as the car was running fine. However, given that Biggs told him about the notice from Dodge, he reasonably assumed the transmission needed fixing and went back to A-1 to look at the transmission and ultimately allowed Biggs to replace the transmission. Biggs made the statement regarding the Dodge notice knowing it to be false, as Williams later learned there was never a notice from Dodge. The facts indicate that Biggs made the statement intending to deceive Williams and get him to rely on it. When Williams returned to A-1, he already had the transmission out of the car. Additionally, it appeared the "test driver" and Biggs were planning to take Mr. Williams by their actions after the test drive. Finally, Williams did, in fact, rely on the statement in allowing Biggs to replace the transmission, as any reasonable person would do when their manufacturer sends a defect notice, and Williams suffered loss in that he had to delay his vacation, was without his car, and had to pay Mission to fix the transmission. Therefore, this statement does meet the elements for fraud. I recommend the following cause of action pleading:

1. When telling Williams that Dodge had issued a notification involving a defective transmission, Biggs made a material misrepresentation of fact.

2. Biggs made the misrepresentation knowing it to be false as Williams later learned there was never any notice from Dodge at all.

3. Biggs made the misrepresentative statement intending Williams to rely on it and allow A-1 and Biggs to fix the transmission.

4. Williams reasonably relied on Biggs' statement by allowing him and A-1 to replace the

transmission.

5. Williams suffered a loss directly caused by Biggs' misrepresentation when he delayed his vacation to replace the transmission and was without his car.

II. Statement: "Your transmission is going to fail soon!"

In utilizing the elements of fraud discussed above, the issue with this statement will turn on whether it is a misrepresentation of fact or just an opinion by Biggs. Biggs will argue that this is not fraud because he merely stated his opinion, which can not be a statement of fact. Generally, fraud cannot be predicated upon the expression of an opinion, which is understood to be only an estimate or judgment, but if the opinion relates to a subject where the parties do not have equal knowledge or means of ascertaining the truth, the party with the special knowledge of facts underlying the opinion or possession of superior knowledge with a design to deceive will be held as to making an actionable statement of fact. Madison v. Brooks, F.C.O.A. (1977).

Here, as in Madison, Biggs had such superior knowledge about cars and transmissions when compared to Williams. (Williams never worked on transmissions before). Additionally, Biggs had a design to deceive, he wanted Williams to let A-1 replace the transmission. Here, a court will find Biggs made a material misrepresentation of fact; that he made it knowing it to be false (he knew there was no issue with the transmission because he put it back in William's car) with the intent to get Williams to rely on it; and Williams did, in fact, rely on it and allowed A-1 to replace the transmission causing him to delay his vacation, be without a car, and have to get it fixed later by Mission. I recommend the following cause of action pleading:

1. Biggs made a material misrepresentation of fact when he told Williams his transmission would fail because he had superior knowledge to know that it was not true.

2. Biggs made the statement knowing it not to be true because he later put the same transmission back in William's car.

3. Biggs made the statement with the intent to get Williams to rely on it because he already had the transmission out of the car when Williams arrived at the shop.

4. Williams reasonably relied on the statement as Biggs was in the profession of fixing cars and would know whether a transmission was about to fail.

5. Williams suffered a loss as a result of the false statement when he delayed his vacation, was without his car, and eventually had to pay for A-1's faulty installation of his transmission.

III Statement: "It would also help if we installed an extra cooler to keep it from running hot."

Based on the elements of fraud discussed above, it doesn't appear this statement is actionable. It may be a misrepresentation of fact, knowingly made false by Biggs, but Williams never relied on the statement as he told Biggs if Dodge thought one was necessary, they would have installed it. This is not actionable.

IV Statement: "I guarantee the job."

The issue here is whether Bigg's unfilled promise to "guarantee" the job is actionable as fraud. If Biggs intended to follow through on the promise when made it would not be, but if he had no

plans to perform, he made a misrepresentation of fact, his presentation, and that can support an action for fraud. Rogers v. Statewide Insurance Co. F.C.O.A. (1995). Here, Biggs had no intention of guaranteeing the job when he made the promise, unlike the facts in Rogers, because he stamped "no guarantee" on the receipt. All other elements are met. Cause of action pleading: 1. Biggs made a material misrepresentation of fact when he said he guaranteed the job, but he, in fact, had no present intention to do so. 2. Biggs made the statement knowing it to be false because he stamped "no guarantee" on the receipt.