July 2009 Bar Examination Sample Answers

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Question 1 - Sample Answer #1

1. The best interests of the children is the standard to be used in determining custody. Georgia has a statute which lists factors a court may consider in determining what is in the best interests of a child, including a child's relationship with the parent (both custodial and noncustodial), a child's ties to the community where the parent lives, a child's mental, emotional, or physical needs among other factors. A child over the age of 14 may elect to live with a parent and such election creates a presumption that the parent is entitled to custody. The presumption may be rebutted, however by showing that it is not in the best interests of the child to live with that parent. An election by a child between 11 and 13 does not create a presumption but in the court's discretion, it may be considered by the court. Here, because John is over 14, he can elect to live with his dad and to defeat his election, Ms. Jones will need to show that it is not in John's best interest to do so. No facts lead to this conclusion, however. If Jan (12) elected to live with Ms. Jones, the court could consider that but no presumption would arise from that. Mrs. Jones could argue that if the children have a close relationship with each other then it would be in their best interests to remain together.

2. Child Support in Georgia is based on the income of both parents or an income shared model. Ms. Jones should complete a child support worksheet which will determine a presumptive amount of child support. The worksheet considers both parents' incomes (not just the noncustodial parent's), payments for medical insurance or expenses, child care expenses, extracurricular activities. Placing the income into the formula in the child support worksheets yields a presumptive amount of child support for each parent--both parents must contribute to the support of the child but a custodial parent's contributions can be in kind (ex: daily living expenses like rent or clothing) but the worksheet will yield a presumptive amount for each parent. The court has discretion to deviate from the presumptive amount based on additional factors such as parenting time, expenses of travel, etc but deviations are discretionary for the court. If Mrs. Jones has custody of both children then child support will be paid by Mr. Jones to her. If custody is split then each parent will be responsible for providing child support to the other parent based upon their custody of the one child and based upon their income. Thus, if custody is split, if Mr. Jones's income is greater than Mrs. Jones then Mr. Jones may pay more child support because his share for contribution to their support is greater. Each parent may receive credit for the child in her custody. Mrs. Jones should note that neither parent may waive receipt of child support because the right to support belongs to the child, not the parent.

3. The equity in the home is $500,000 ($750,000 current value minus $250,000 outstanding loan). Georgia recognizes marital property as property acquired during the marriage with limited exceptions such as property acquired by only one party through gift or inheritance. Marital

property is subject to equitable division, which is not necessarily equal. Here, the home was purchased during the marriage so it is marital property. John might argue that the $200,000 which he contributed as down payment is not subject to equitable division because that was money he received by inheritance. Ms. Jones could counter this argument, however that John appropriated that money toward marital property when he contributed it to the purchase of the marital residence. The court will likely side with John however, and reduce the amount of marital property in the home to $300,000. John will likely not receive any additional credit on the $200,000 for the increase in the value of the home because that is marital property. Further, John will not receive any additional credit due to payments on the mortgage by him. Although the payments came from his earnings, the earnings occurred during the marriage and thus, they are marital property (not exempt). Therefore, the equity that is subject to equitable division as marital property is probably $300,000.

4. Alimony is discretionary in Georgia--no spouse is automatically entitled. Alimony can be temporary or permanent. Temporary alimony is awarded to maintain a spouse during the pendency of litigation and assist in litigation costs. Temporary alimony ends upon divorce and the court can grant permanent alimony which will continue either until a party remarries, dies or some other limit set by the court (or agreed to by the parties if a settlement agreement is reached). In determining whether to award alimony, the court will consider among other factors, the length of the marriage, whether a party worked outside of the home during the marriage, a party's age, education and training to determine whether the party can acquire employment and whether a party has committed adultery during the marriage. Here, Ms. Jones wants periodic alimony for her support which would likely be permanent. The facts do not indicate how these factors will point for Ms. Jones but if she has limited work experience or education then her likelihood of obtaining alimony increases. Further, if it's periodic then it will continue for a time set by the court (likely until she dies or remarries).

5. Attorney's fees awards are usually discretionary. In determining whether or not a party should be required to pay attorney's fees the court will consider the conduct of the parties. The court will consider whether a party has engaged in vexatious or abusive litigation and if they have, then attorneys fees will likely be awarded upon a motion by a party. Further, if a party engages in conduct that leads to contempt citations then the court can award attorneys fees for litigating the contempt. If it appears that Mrs. Jones has no income or method to pay for her attorneys fees and Mr. Jones has a substantial income, then the court may award attorneys via a temporary alimony award.

Question 1 - Sample Answer #2

1. The standard for custody is the best interests of the children. The court will consider all the relevant factors, such as stability, permanence, the qualifications of each parent. The court can award sole or shared legal and physical custody. Legal custody pertains to decision making and legal rights. Physical custody pertains to the daily parenting and physical control and care of the child. Here, Mrs. J is not likely to get full physical or legal custody because shared custody by both parents is STRONGLY presumed to be in the best interests of the children, absent a showing of proof otherwise. There is no indication here that Mr. J is not a fit parent, so the court will probably award shared custody to both parents. It is presumed that siblings' best interests are served by continuous contact with one another, so it is also not likely that the court would split up the children. The court will consider John's desire to live with Mr. J, because the desires of a child

over 14 can be considered in determining custody, but just as one of several factors. Here, the court will probably award shared legal and physical custody of both children to both parents.

2. Child support in Georgia is based on comprehensive guidelines that take into account many factors, such as the income of the parties, their expenses such as rent, food, and insurance, the costs of education and child care, and all assets of each parent. The incomes and liabilities of each parent are determined on a proportional basis to the amount of time that the children spend with each parent. The right to parental support belongs to the child and can not be waived by either parent. Therefore, the children are entitled to financial support from their parents, even if the parents decide otherwise. If Mrs. J is awarded primary custody of Jan and Mr. J gets primary custody of John, each child would still be entitled to financial support from their non-primary parent. Jan would be entitled to support from Mr. J and John would be entitled to support from Mrs. J. The court would just calculate the rate of support based upon the guideline calculations for the amount of time and cost of each child, versus what each parent has and contributes.

3. Marital property includes all property that the couple acquires during the marriage, excluding gifts and inheritances to one spouse, despite the way the property is titled. Property can be all or partially marital in nature. Here, the home is partially marital property because the home was purchased during the marriage but part of the home is the exclusive property of Mr. J because he contributed the down payment. Georgia follows the equitable division of property rule, so the court will fashion a marital property award, upon the divorce, splitting the marital property between the parties based on the balancing of the equities. Here, Mr. J put down 200k of his own inheritance for the purchase of the home. This money is directly traceable to Mr. J, so that percentage of the home belongs to him personally. The parties purchased the 500k home during the marriage, so the remaining percentage (minus the mortgage) is joint marital property. Even though Mr. J paid down the mortgage, this is marital equity/property, because the money used to pay off the mortgage came from his income which was earned during the marriage. Earned income is marital property. The home is now worth 750k. There is 500k of equity, because there is still a 250k mortgage. This means that the parties get their percentage of the equity. Mr. J gets 2/5 or 40% because of his down payment. In addition, Mrs. J and Mr. J will split the remaining 60% of the equity, which is 300k in total. Mrs. J is entitled to 150k and Mr. J is entitled to an additional 150k. His total share of the home is equal to 350k, or 60% and Mrs. J gets 150k (after the remaining 250k mortgage is paid off).

4. Alimony can be awarded to either spouse as permanent periodic alimony, as rehabilitative alimony, or as temporary alimony. Mrs. J seeks periodic alimony. If awarded, this would be paid to her, probably monthly, for a determinative period of time, or indefinitely, until she enters into another marriage-like relationship. In determining alimony, the court must balance the equities among the parties. The court will look at the needs and assets of each spouse, the length of the marriage, the standard of living they are accustomed to and the skills and earning potential of each spouse. Here, the court should consider the fact that the Jones's have been married for a long time, 16 yrs. It is not clear if Mrs. J has worked outside the home, but it appears that she has not because he paid off the mortgage. The court can consider the fact that Mr. J probably has a much higher income and the fact that he is receiving a much higher percentage of money from the house. The court should also look at what the specific needs are of Mrs. J, such as for housing and transportation, especially if she will be providing for the children. The court can also consider fault when determining alimony. It is not clear from the facts if either party is at fault in causing the need for divorce, but if Mrs. J is at fault, for something such as infidelity, she could be barred from receiving alimony. If Mrs. J wants permanent alimony, she should emphasize her inability to be self-supportive and the fact that she has been a stay at home mom and that Jan is still rather young.

5. If Mrs. J requests atty's fees, the court will look at many factors, such as her need and Mr. J's ability to pay. The court can also consider the fault of the parties and the size and nature of the property and alimony already awarded. If the court feels that Mr. J is to blame for the divorce, or that it would be inequitable to require Mrs. J to pay, the court can order her husband to pay all or a portion of her attorney's fees. Here, there is a good chance, since it appears that she may be unemployed (see above) and because Mr. J is receiving a much higher percentage in the marital home than she is.

Question 1 - Sample Answer #3

1. The standard that the court will use in determining child custody of the children is the best interests of the child standard. In determining the best interests of the child, the court will look at such factors as: the parents' wishes, the child's wishes, providing stability for the child, medical//special needs of the child, and conduct of the parents. It is evident that it is your desire to be awarded primary physical custody of the children (there are two types of custody: legal and physical and custody can be joint or primary/secondary). It has also been explained that your son, John would like to live with his father and your daughter prefers to live with you. A child 14 or older can make an election to live with the parent of their choice. Thus, the court will most likely grant John's election. It has also been expressed that it is your desire for the children to reside in the marital home with you. This would provide them with the stability of staying in the home in which they were raised, staying in the same school system and maintaining the same friendships. It does not appear that there are any special medical, psych or physical needs that the court would need to consider. Nor have I been informed of any parent conduct that would make the court hesitant in awarding custody to that parent (i.e., abuse, alcoholism). With that being said, I believe that the court will award you custody of your daughter, and if your son maintains his desire to live with his father, that his father will be awarded custody of him.

2. In determining the presumptive amount of child support, the court uses a Child Support Worksheet (CSW) which determines the amount of support to be paid based on a sliding scale dependent on income and custody of the children. The CSW also takes into account such other factors as: parenting time, extraordinary medical/educational expenses, medical/dental insurance and child support payments for minor children not of this marriage. Given the facts you have provided, it appears that the child support amount will be largely based on income. If your husband is the primary breadwinner, he will be required to pay you child support, regardless of the fact that custody of the children is shared (you having custody of your daughter and him having custody of your son). Please be aware that subsequent remarriage and/or a substantial change in the circumstances of either party (need and/or ability to pay) could affect the amount of child support in the future. Such substantial changes allow the parties to petition the court for a modification in child support. Lastly, I must mention that the court will only require that child support be paid until the child reaches 18 or graduates from HS, whichever comes last (courts will cap child support at age 20 if not yet graduated). The courts will not require parties to pay college.

3. The courts distinguish between marital property (property acquired during the marriage), separate property (property acquired prior to marriage and/or inheritance/separate assets of the parties), and mixed property (both marital and separate). It would appear as though the house is mixed property as the home was acquired during the marriage but a substantial down payment was made on the residence with your husband's separate assets (inheritance). The home is valued

at $750,000, with a loan balance of $250,000. Thus there is $500,000 in equity in the home. Your husband should receive $200,000 from the equity in the home (reimbursement for the down payment) - this represents his separate property. Thus, the balance of $300,000 would be considered marital property.

4. The court considers several factors when determining an award of alimony. Primarily need and ability to pay are assessed. In assessing need and ability such factors considered include: duration of marriage, education and employment of parties, standard of living, custody of children, future employability, contributions to household (economic and noneconomic) and conduct of parties. In addition, adultery serves as a bar on alimony. You have requested that you be awarded periodic alimony which is a fixed amount of alimony (generally paid on a monthly basis) for a definite amount of time. In your case, your marriage has been quite lengthy (16 years), it is evident by the cost of your home that you are accustomed to a high standard of living, and that it is your desire that you awarded primary physical custody of the children (although it is a highly likely that your husband will be awarded custody of your son). These factors all favor the award of alimony. It is unclear as to whether you are unemployed at this time, but it appears as though your husband is the primary breadwinner and that you have been the primary caretaker for the children. With that being said, it is quite likely that the court will deem your need as being substantial. It also seems likely that the court will deem your husband's ability to pay as substantial, given the fact that he was able to sustain a family of four and pay the mortgage on an expensive home. It is unclear as to whether there was an issue of infidelity which caused the deterioration of the marriage. If not, the court will not consider this factor in determining alimony. With that being said, it is my opinion that it is quite likely that you will be awarded alimony by the court. However, please be aware that subsequent remarriage (bars alimony) and a substantial change of circumstances by either party (i.e., your need or your husband's ability to pay) could affect the determination of alimony in the future. Such substantial changes could be a basis for a modification in the future.

5. In determining whether your husband should be required to pay some or all of your attorney's fees, again the court will look at need and ability to pay. They may also take into account the grounds of divorce (i.e., if your husband is at fault they may require him to pay all or a larger portion of your legal fees).

Question 2 - Sample Answer #1

Issuance of a Valid Search Warrant

The 4th amendment protects individual's rights against unwarranted government intrusion into areas where one has a reasonable expectation of privacy. In order to obtain a warrant, law enforcement must apply to a court of competent jurisdiction, where a neutral magistrate must decide whether or not to grant such a search warrant. In Georgia, the court of competent jurisdiction for a felony criminal charge is the Superior Court. The officers must show probable cause in order for a warrant to be issued. The warrant must contain information concerning the area to be searched, and what the search purports to discover. If the neutral, detached magistrate finds these requirements to be sufficient, he may order the search pursuant to a valid warrant.

Violation of Sam's 4th Amendment Rights

The issue is whether a search warrant obtained for the purposes of invading Sam's body to obtain

possible evidence of a crime would be in violation of Sam's 4th amendment right against unreasonable search and seizure. This concerns an individual's right to a reasonable expectation of privacy. The Supreme Court has held on numerous occasions that the reasonable expectation of privacy of an individual should not be disturbed unless the circumstances warrant such an intrusion. A person's body is certainly one area where a reasonable expectation of privacy may be found. Whether the invasion constitutes abortion or blood sampling, this expectation should not be disregarded lightly. Searches for various bodily substances may be issued by the court upon a showing of probable cause depending on circumstances. For instance, a court may attempt to order a DNA sampling of a potential rape suspect, or it may require blood sampling of a person suspected of DUI if arrested on such a charge and upon refusal to take a breath test. In the latter instance, a driver impliedly consents to such a search by obtaining a Georgia driver's license. The former case is more problematic. Forcibly obtaining evidence from a suspect's body requires a showing that the evidence is likely to be proven as what it is purported to be. Here, the district attorney (DA) and the police are attempting to use the search warrant as a "fishing expedition" to obtain evidence against Sam. Without probable cause to believe that the bullet inside Sam is a bullet that came from Glen's gun, a search warrant attempting to invade Sam's body should not be granted.

The DA will argue that the bullet came to be inside Sam as a result of the gunfight. However, the facts do not support this conclusion. If Sam was shot during the gunfight, a wound would have been discovered upon arrest, not while awaiting trial. The fact that it was not discovered for so long compounds the evidence that the bullet was inside Sam for a period of time before the actual attack. Unless the DA can produce facts showing that Sam received this wond during the assault, he should not be allowed to force the invasion of Sam's body in hopes to discover a piece of relevant evidence. The DA will also argue that the search was reasonable, since the operation to remove the bullet would be a low risk operation using local anesthesia. This argument discounts the inherent danger that exists during any surgical operation. By forcing Sam to undergo surgery to remove this bullet, which is not harmful to Sam in any way given the facts, the DA would be subjecting Sam to a possibility of death while undergoing surgery. Sam's life should not be subjected to the suspicions of the DA. The DA may also try and argue that Sam is entitled to less protection concerning a reasonable expectation of privacy, since he is incarcerated. While the Supreme Court has held that a person who is incarcerated enjoys fewer liberties than one who is not, the search must still be reasonable. If prison officers believed that Sam was hiding a weapon, an invasive search of the body may be warranted. However this is not the case. Sam is under no such suspicion of harboring weapons within his body. The bullet's only value is the possible relevance it may hold in the DA's impending case against Sam. As such, the DA's arguments should not be validated by issuing a warrant to compel Sam to undergo surgery to remove the bullet from his body.

Violation of Sam's 5th Amendment Rights

A criminal defendant's 5th amendment rights include the right against self-incrimination. This is a weaker argument than a 4th amendment claim, but should be raised nonetheless. The issue under this constitutional provision is whether Sam's right against self-incrimination would be violated by forcing him to undergo an unnecessary surgery. Although the privilege mainly applies to testimonial protection, it also applies to the defendant's right to refrain from speaking, or taking action that may prove to incriminate himself. Here, Sam would be entitled to a right of ***inaction*** - namely not submitting to a surgery that may illicit incriminating evidence. If Sam were forced to undergo surgery as per a valid search warrant, his right against self-incrimination may be violated. Therefore, the surgery would violate Sam's rights.

14th Amendment's Due Process Clause - Right to Privacy

The weakest of the arguments against the issuance of the search warrant would be grounded in

the due process clause of the U.S. Constitution, applied to the states through the 14th amendment. The Supreme Court has designated numerous categories of instances that constitute the "umbrella" of rights protected under the Constitution. Although the rights of a criminal defendant in this manner have not been challenged in such a way, it is plausible to argue that forcing a surgery in this case would unduly burden one of the rights to privacy. Such a right may be equated to the right to die by not receiving lifesaving care, or the right to live by providing such care. The court cannot force a person to make this choice, and so therefore Sam should not be forced to undergo a surgery that may put his life at risk.

Question 2 - Sample Answer #2

Fourth Amendment

Sam has a fourth amendment right under the US Constitution (and a corresponding right under the GA Constitution) to be protected against unreasonable searches and seizures which includes an invasive search of his body. The 4th amendment right is incorporated and applied to the states through the 14th amendment. At issue is Sam's reasonable expectation of privacy in his body and whether the government's interest is substantial enough to invade that zone of protection. The fourth amendment has been interpreted as allowing the state to invade a person's constitutionally protected zone only if it meets a certain standard--the standard is different depending on how intrusive the invasion is. For example, an officer only needs a reasonable suspicion that criminal activity is afoot in order to pat down (frisk) a suspect to check for dangerous weapons. However, if an officer wants to search a suspect's home, he will need a properly executed search warrant supported by probable cause that states with particularity the places to be searched and what is being searched for. Warrants, however, are not always needed to execute searches. For example, once a person is arrested, the police may make a search of the person's body incident to the arrest. Such a search is to be confined to the person and his wingspan and is for the purpose of protecting the officer (searching for weapons) and preventing the destruction of evidence. The state may also collect other types of physical evidence from the arrestee without a warrant, such as scrape his fingernails for DNA of a victim, take clothes off his body that have bloodstains, collect gunpowder residue from his hands; the exception pertains to evidence that will dissipate if not collected. Here, the state is not simply "frisking" Sam or collecting evidence upon his arrest, but seeking to subject him to an invasive medical procedure to remove something from his body. As the Supreme Court has acknowledged that we have a diminished expectation of privacy in our cars and a heightened expectation of privacy in our homes, it is only logical to assume that we have an even further heightened expectation of privacy in our own bodies. This physical evidence from Sam is not of the same type as spit or a handwriting sample--something people hold out to the world that can be collected by police without a warrant. The district attorney will argue that the procedure is minimally invasive and the bullet is close to the surface of the skin. However local anesthesia would still need to be used and Sam would still need to undergo surgery. While courts have issued search warrants for blood samples for DNA purposes, they have been reluctant to extend this to procedures that require anesthesia which are clearly more invasive. The government's interest in obtaining this evidence would have to be extremely high, and the facts do not support that type of argument. Certainly the district attorney has other circumstantial evidence with which to proceed. Under Justice Harlan's opinion in ***Katz***, an individual's expectation of privacy must be reasonable and one which society is prepared to recognize as legitimate. Surely, society recognizes a person's interest in his own bodily integrity as a protected interest which will be invaded only upon a showing of extremely compelling government interest.

Although the facts do not specify how the x-ray was obtained, if it was ordered and obtained by the state without Sam's consent then the x-ray itself could be a fourth amendment violation and the physical evidence discovered by it (the presence of the bullet) would be excluded as fruit of the poisonous tree. While clearly less intrusive than surgery, taking an x-ray is still an invasion of the body. The government would need to show there was another reason for the x-ray--such as the health of Sam was in danger and his treatment required it. If found to be a 4th amendment violation, the state could try to argue that the bullet was discovered through an independent source or would have been discovered (inevitable discovery doctrine). If Sam was treated in a hospital following the attack, for example, the state could prove the existence of the bullet through the treating physician's testimony as it would not be covered by physician-patient privilege.

Fifth Amendment
Additionally, Sam could argue that he has a fifth amendment right under the US Constitution not to incriminate himself. The 5th amendment is also incorporated and applied to the states through the 14th amendment. Consenting to a medical procedure that results in incriminating evidence being obtained would be a form of self incrimination. Therefore, Sam has a right not to consent both under the 5th amendment and the Supreme Court decision in ***Cruzan*** which guarantees a person the right to refuse medical treatment.

Question 2 - Sample Answer #3

Fourth Amendment to the Federal Constitution Incorporated as applied to Georgia under the Fourteenth Amendment

Under the Fourth Amendment to the United States Constitution, a search warrant is not properly issued unless there is probable cause. Probable cause is defined as a fair probability (less than a preponderance of the evidence), considering he totality of the circumstances. Here, I will argue that there is no probable cause to believe that the bullet lodged in Sam's back is from Glen's gun, nor from the gunfight at all, such that there is no basis for a search warrant. This argument is not likely to prevail over the DA's argument that there ***is*** probable cause because normally people do not have bullets lodged in their back, such that this bullet is very likely due to the gun fight with Glen. All the DA has to establish is that there is a "fair probability" that the bullet is evidence of a crime to establish probable cause here. Here, he can likely do this.

The Fourth Amendment the United States Constitution also prohibits unreasonable searches and seizures. I will argue that the proposed warrant's authorization to invade Sam's body to obtain the bullet violates his Fourth Amendment rights against unreasonable searches and seizures. The Fourth Amendment's protection against illegal searches and seizures only applies when there is an invasion of the defendant's reasonable expectation of privacy. Without such an invasion, the defendant has no standing to assert a violation of the Fourth Amendment, and there is no "search" for purposes of the Fourth Amendment. Thus, I will argue that one has a reasonable expectation of privacy in one's body such that a physical intrusion into one's body by the state constitutes an invasion of one's reasonable expectation of privacy. This argument is likely to prevail, thus Sam will likely have standing to assert his Fourth Amendment rights have been violated and there has been a "search" for Fourth Amendment Purposes. Despite this, the argument that the search here is unreasonable is not likely to succeed. Here, the bullet is close to the skin of Sam's back and may be removed with mere local anesthesia--not a very invasive

procedure, relatively speaking, the DA likely successfully argues. It should be noted that without a warrant here, there could be no search in the first place because a government search requires a warrant, unless an exception applies. Here, no exception to the warrant requirement applies.

Georgia's Constitution also requires that warrants issue for searches and prohibits unreasonable searches and seizures, thus I may assert these provisions as well in defending the issuance of the search warrant.

Fifth Amendment to the Federal Constitution Incorporated as applied to Georgia under the Fourteenth Amendment

The Fifth Amendment to the United States Constitution provides a privilege against self-compelled incrimination. I can argue that this proposed course of conduct pursuant to the proposed search warrant violates Sam's privilege against self-compelled incrimination. The privilege, as the DA will argue, however, only covers things ***communicative*** in nature, such as verbal testimony in court, and not physical things, such as bullets. Indeed, the Supreme Court has held that the removal of blood from a defendant's body for purposes of determining blood alcohol content for purposes of DUI prosecution not within the scope of the privilege against self-compelled incrimination. Thus, the DA likely can defeat this Fifth Amendment argument.

Georgia's Constitution also provides a privilege against self-compelled incrimination. However, the Georgia privilege is not limited to communicative things. Thus, this is a solid argument for me here because Sam would be forced to provide the state potentially incriminating evidence (the bullet, which would prove Sam was at the scene of the killings). However, the DA would argue the bullet is not incriminating because all it would prove is that Sam was shot, not that he shot anyone else. However, this is not too persuasive since the bullet would place Sam at the scene itself where the killings took place. Therefore, the evidence is likely to be considered incriminating.

Fourteenth Amendment to the Federal Constitution

The Fourteenth Amendment to the United States Constitution prohibits the states, such as Georgia, from depriving any citizen life, liberty, or property without due process of law. I can argue that the proposed course of conduct pursuant to the proposed warrant would violate the Due Process clause. In a criminal case such as this, the Due Process clause prohibits police procedures that are unconscionable--those that "shock to the conscience." The Supreme Court has held that pumping a suspect's stomach for purposes of obtaining evidence for a criminal prosecution is unconscionable, such that it violates the Due Process Clause. I will argue therefore that this proposed surgical removal in unconscionable, and therefore prohibited by the Fourteenth Amendment. The DA will argue that the proposed surgical procedure is not unconscionable because the evidence pertains to a serious, violent crime, and the invasiveness of the procedure is minimal--local anesthesia and a slight surgical removal near the skin.

Question 3 - Sample Answer #1

1. Assumption of risk is a complete bar to recovery on tort claims. Whether Thirllorama will be able to successfully assert assumption of risk as a defense to John's negligence action will mainly revolve around what kinds of risks were present and whether they were of the kind assumed.

John willingly participated in a rattlesnake roundup. He is an experienced rattlesnake handler and is presumed to know the general risks of trying to handle venomous snakes. Even if he contends he was unaware, the pamphlets are also evidence that those involved in Thrillorama know the risks of being around them. When John elected to participate in a rattlesnake roundup he assumed the risk that an individual with his skill and expertise would normally anticipate, mainly, getting bitten, poisoned, or even so far as slipping on a snake and injuring one self. These are the kinds of risks one expects to assume when participating in the contest described. One might also say that at such a likely rowdy event, one assumes "distraction" risks from the crowd as such a crowd is likely to be rowdy. However, that a four foot wall was in place as well as a rope line to be monitored by attendants at the event makes it unlikely John assumed the risk of being grabbed by a crowd member. The very presence of the attendants and their job to keep people behind the rope infers that John did not likely expect or foresee the possible distraction of being grabbed by a crowd member while the attendants were distracted and not paying attention to flirt with girls in the crowd. Thus, the risk of someone crossing the rope line and grabbing a contestant, to the point of distracting them so badly they are bitten, is not one of the risks contestants assume. Thrillorama would have a better argument that contestants assume such risk if no wall, no rope, and no attendants were provided and contestants could plainly see the "exposure to the crowd." Since all these things were present and acted to restrain the crowd at under Thrillorama's supervision, being grabbed by an audience member is not one of the risks assumed by John and will not absolutely bar recovery if a negligence claim is successful.

2. Scott's act will not likely provide a defense to Thrillorama. Intervening acts cut off liability if they are unforeseeable. Courts usually extend this definition more in favor of foreseeability than the other way around including medical malpractice and failed rescue as "foreseeable" events which, if they exacerbate injury or cause additional injury, the original tortfeasor can be liable. It is certainly foreseeable that a crowd member might "break the rope line" and interfere and possibly cause injury at such an event. The fact that Thrillorama had a rope line, four foot wall and attendants seems to certainly indicate that even Thrillorama anticipated such an event. While Thrillorama might attempt to argue that these obstacles were actually in place to protect the snakes from escaping and they never foresaw individuals trying to reach over, the facts state clearly that "Thrillorama, Inc. has attendants monitoring the rope barrier to make sure that the public does not cross the barrier and get too close to the ring wall." Thus, Scott crossing the rope barrier and reaching over the wall, missed by the attendants, is exactly the kind of foreseeable risk Thrillorama anticipated and is easily argued foreseeable in general. Since Scott's intervening act was not an unforeseeable event, it will not act as an intervening act/event and provide a defense to Thrillorama. Scott's act may act to create a "single, indivisible injury" under which John can sue both Scott and Thrillorama as Joint and Severally liable tortfeasors. While in most states this would probably make little difference since Scott is likely to not have the deep pockets of Thrillorama and probably offer little in terms of contribution, in GA juries can allocate comparative fault in Joint and Several Liability cases that limit the liability collection potential of the defendants to the % assigned. While Thrillorama could normally seek contribution from Scott, in GA, Thrillorama may be able to avoid a large share of the liability if the Jury assigns Scott a large portion. Further, an intentional intervening act can often completely cut off liability from the original tortfeasor. While the facts don't seem to support an intentional injury rather than mere negligence, Thrillorama might try and cast Scott as an intentional intervening actor which would bar its liability altogether.

3. The primary defense that I would recommend to Thrillorama would be contributory negligence. Scott clearly contributed a great deal to his own injury by failing to stay behind the appropriate rope line. Scott knew or should have known the risk of walking over the designated line and

reaching over a four foot barrier into an area filled with 50 rattlesnakes. He breached his duty to the contestants not to expose them to further foreseeable risk and to Thrillorama not to expose it's invitees/guests to additional risk of harm. His injury was a direct result and proximately caused by his this breach making him contributory negligent to his own injury. It is difficult to anticipate whether a full defense of assumption of risk would be a better strategy. On one hand, it is obvious that reaching into a snake pit assumes the risk of being bitten however, as a guest and invitee, it is less obvious whether he assumed the risk of being allowed to be so close to the snake. Due to the negligence of the attendants, I would be wary of asserting such a holistic defense for fear the judge/jury would not want to go so far as excuse Thrillorama entirely given its employees' negligence in the case at hand.

Question 3 - Sample Answer #2

1. Thrillorama will have difficulty defending against John's claim based on assumption of the risk. Assumption of the risk is a valid defense against negligence actions. The defense requires that the person who allegedly assumed the risk did so voluntarily and with full knowledge of the risks entailed. Here there can be no question that John did in fact assume the risk of being injured by a snake in relation to his attempts to "Catch 'Em and Sack 'Em". John was an experienced rattlesnake catcher who was personally well-aware of the dangers involved in the catching and handling of venomous snakes, and he was also fully informed of those dangers by the forms provided by Thrillorama to all contestants prior to their participation. Additionally, there are no facts to indicate that John's participation in the event was anything but voluntary. Therefore, John assumed the risks inherent in participating in the competition. However, the question is whether he assumed the risk of Scott getting over to the wall, past the rope barrier and pinching him. Fundamentally, the defense of assumption of the risk only applies to the dangers the plaintiff actually was aware of and assumed the risk of. For instance, the classic example is that a person playing football assumes the risk of being tackled or injured in the course of normal game play; however, that player does not assume the risk of someone punching him in the face during the game. Similarly, John would have assumed the risk of being bitten while he attempted to catch a snake, but he would not have assumed the risk of someone interfering with the activity and causing him to be injured. If John had simply been distracted by a person in the crowd who was cheering his name, that would be different because that's something that normally might be associated with this type of event. But Scott's actions go outside of the realm of John's normal expectations and therefore Thrillorama can't claim that he assumed the risk of getting injured in the way that he did. The actual cause of his harm was not something inherent in the act. Looking at it differently, John assumed the risk of participating in a closed environment where he knew he would be a walled enclosure with 50 rattlesnakes. However, Thrillorama's negligence allowed someone else to get close to the ring, forcing John to deal with an outside variable (Scott) whom he did not anticipate and for whose actions he could not have assumed the risk.

2. Scott's actions will lessen the amount of damages that John can recover from Thrillorama but they will not constitute a defense. Thrillorama was engaged in a dangerous activity and erected a rope barrier to keep people away from the walled enclosure in order to protect both those outside of the ring as well as those inside. Thrillorama had a duty to protect John from the interference of others (if not from the snakes themselves under assumption of the risk). They breached that duty vicariously when one of their employees was too busy flirting to ensure that no one crossed over to the wall. There was causation because but for the employee's breach Scott would not have been able to get close enough to pinch John. There was also proximate cause because it was

foreseeable that if a person got close to the wall they could either get into the enclosure or otherwise distract the occupants, which could cause them harm. It's probably true that Thrillorama's employees never envisioned this exact chain of events; however, all that is required is that the result be foreseeable and in this case it was. And finally, there is significant damage to John (as he lost all of his leg below the knee). All of these allow John to establish a prima facie case of negligence.

Because Scott's actions were foreseeable they do not rise to the level of a superseding cause. An example of such an event would be if a child was pushed down and while he sat there, the child was crushed by a tree that unexpectedly fell. That is so unforeseeable to the original tortfeasor that it would cut off his liability, even though straight but for causation exists (i.e. but for the push, the child would not have been sitting in that precise spot to get hit by the tree). That sort of fact scenario does not exist here. However, Scott was clearly negligent himself. He had a duty to his friend not harm him or act in an unreasonable manner towards him. He breached that duty by pinching him when John was engaged in the dangerous activity of trying to catch snakes. Scott is clearly a but for and proximate cause of the harm that John suffered and again there are damages.

As a result Scott and Thrillorama are both liable under negligence theories to John. Thus, Scott's acts will not likely be a defense to Thrillorama (not a superseding event/cause), but his actions will mitigate the damages that John can recover from them.

Note: Thrillorama could seek a right of contribution from the employee (if he can pay) to reduce their damages. The right of contribution is still alive though GA uses mod. comp. neg.

3. Thrillorama should have a strong defense to Scott's cross-claim. Essentially, Scott is claiming that Thrillorama should have to pay damages to him for the results of his own intentional tortuous conduct when he is both a but for and proximate cause of his own harm. Scott might have a good claim if he was a child, but as an adult, courts will not be very sympathetic. It is true that Thrillorama provided the opportunity for Scott to harm himself, so there is some negligence liability. However, in terms of damages, GA is now a modified comparative negligence state (set at 50%) meaning that if a plaintiff is more than 50% negligent for his own harm he will not be able to recover ***anything*** against the defendant. Scott will surely be considered more than 50% negligent in this situation, and therefore, Thrillorama should be able to defend against him recovering any damages.

Question 3 - Sample Answer #3

1. A defense to a negligence action or a strict liability action in Georgia is assumption of risk. In order to successfully assert assumption of risk as a valid defense to a negligence or strict liability action, the defendant must prove that the plaintiff was aware of the risk, knew the full extent of the danger and appreciated the risk associated with the act, and voluntarily assumed that risk by undertaking to do the act despite the risks. In Georgia, assumption of the risk is a defense to both a negligence action and a strict liability claim. Here the facts tell us that John is suing Thrillorama and Scott for their negligence.

Here, Thrillorama will most likely not be able to rely on the assumption of risk defense as a bar to John's claim. It is undisputed that John was aware of the risks associated with rattlesnake

catching. He was an experienced catcher of snakes to sell them for anti-venom purposes. Thus, he knew the risks of getting bit by a rattlesnake. However, it is not as clear whether John fully understood and appreciated the risk associated with participating in the competition. While John knew the risks or participating in the competition, he did not assume the risk that Thrillorama attendants would be negligent in their duty of preventing observers from intentionally interfering with the participants and their concentration. The rules of the competition required that Thrillorama attendants guard the single rope barrier to make sure that no observers got into the snake arena. As John would understand it, this would make it impossible for observers like Scott to play tricks on him and divert his focused attention. It is likely that John could not have imagined much less appreciated the risk associated with participating in competition in which its guards were not paying attention to reckless observers seeking to pass the single rope barrier and play intentional tricks on the participants. Thus, although Thrillorama may argue that it is not liable because Scott's actions were an unforeseeable intervening cause of John's injuries (see below), it may not rely on the assumption of risk defense.

2. Under Georgia law, a negligent actor may assert as a defense the negligent or unforeseeable acts of another as a defense to his own liability through negligence which will cut off his own liability. The defendant must prove that the second actor's negligence was an unforeseeable intervening cause. If the second actor's actions were a foreseeable result of the defendant's actions, the defendant cannot escape liability from his own negligence. An action or event is not foreseeable if it is one in which the actor could not reasonably expect to flow from his negligent actions.

Thrillorama may argue, that because Scott acted subjectively and intentionally to play a vicious trick on John, that Scott's actions were not foreseeable. While to a certain extent it is true that Thrillorama could not foresee Scott's subjective thoughts and his plan to play a trick, it could however foresee that some harm could come to the participants from its negligence in maintaining a single rope barrier between the observers and the participants in the arena. It is foreseeable that someone with Scott's juvenile mindset could easily pass the rope barrier to interfere with the participants or otherwise get hurt themselves. Furthermore, the fact that Thrillorama had hired attendants to watch the rope barrier and they failed to do so makes it ever more foreseeable that some injury could result. If instead Thrillorama had maintained a solid fence between the observers and had attendants making sure that no one climbed over the fence, then it would not have been foreseeable that someone like Scott could have gotten within range of the participants. It can't be said that Thrillorama could not foresee that someone would cross a single rope barrier and injure themselves or cause injury to another. Thus, Thrillorama cannot claim that its negligence is cut off by that of Scott. Instead, the court will likely view this as a case of joint negligence, where both Thrillorama and Scott's negligence combined to cause the harm to John.

3. Thrillorama may assert the defense of comparative negligence against Scott. Under Georgia law, which is a modified comparative negligence state, if a plaintiff's own negligence contributes to his injury, then his amount of recovery will depend on the relative degree of fault between he and the defendants. If the plaintiff is found to be less at fault than the defendants, then the plaintiff may still recover, however, his amount of recovery will be offset by the proportion of his own fault. If the plaintiff's negligence is equal to or greater than that of the defendants, then the plaintiff will be barred from recovering at all (like contributory negligence). The defense of comparative negligence is applied only to negligence claims in Georgia (it is not applied to strict liability claims which Scott may have brought given that Thrillorama kept rattlesnakes which are wild animals). Here, Scott's claim is based on Thrillorama's negligence, so the defense is

applicable. Moreover, there is evidence to suggest that Scott's negligence contributed to his injuries. Scott made a voluntary decision to pass over the single rope barrier and into the arena where the dangerous snakes were. Further, he reached out to play a trick on John, which made him reach into the area close to the snakes. Thus, Scott's negligence definitely contributed to his injuries. In fact, Thrillorama may be able to argue that because Scott was contributively negligent, that the proximate cause of his injuries was his own negligence, and thus his negligence exceeded that of Thrillorama. It is likely that a jury would see that Scott's negligence was the primary and proximate cause of his injuries, thus his negligence was at least equal to or greater than that of Thrillorama. Under comparative negligence principles, Scott would be barred from recovering against Thrillorama.

Question 4 - Sample Answer #1

1. Husband's Crimes:

a) **Aggravated Assault of Paramour**. Husband committed aggravated assault on Paramour. Assault is either an attempted battery or actions creating a reasonable apprehension of immediate injury or threat of injury in the victim. While words alone are not enough, words combined with conduct usually are enough unless the words mitigate the threat inherent in the conduct. Here, Husband was holding a pistol when he told Paramour that he was going to kill him. Because he had the apparent ability to carry out the threat immediately, and because Paramour was reasonable in believing he would make good on his threats, Husband committed an assault. Under Georgia law, the assault is elevated to aggravated assault when the defendant uses a deadly weapon in the commission of the assault; therefore, Husband could be charged with aggravated assault.

b) **Battery of Paramour**. Battery is the unlawful application of force to another. It is a general intent crime; therefore, Husband needed only to intend the act of hitting not the result in order to commit it. Here, Husband committed a battery when he punched Paramour in the face.

c) **Arson**. At common law arson was defined as the malicious burning of the dwelling house of another; however, Georgia has removed the requirement that the burning be committed upon a dwelling house. The malicious burning of any building is sufficient for someone to commit arson. Thus, if Husband had the requisite mental state and committed a sufficient act of burning, he could be guilty of arson. While mere blackening is not sufficient, here, the facts indicated that there was a significant amount of smoke and debris, suggesting that far more than blackening occurred. Additionally, malice is satisfied where the defendant acts intentionally. Here, Husband intended to burn the restroom to conceal evidence of his other crimes; therefore, he has the necessary mental state to be guilty of arson.

d) **Murder of Paramour**. Murder is defined as the unlawful killing of a human being with malice aforethought. A defendant can be found guilty where he intended to kill, intended to inflict serious bodily injury, acted with depraved indifference, or the felony-murder doctrine applies. There are no degrees of murder in Georgia. All murder is a capital offense. Here, it is not clear that Husband intended to kill husband; however, he certainly intended to inflict serious bodily injury when he slammed Paramour's head into the floor. Because Paramour died as a result of the injury inflicted, Husband is guilty of his murder.

e) **Felony Murder of Patron**. Under the felony murder doctrine, an individual can be found

guilty of murder where a killing occurs in the commission or attempted commission of an inherently dangerous felony. The Georgia statute does not limit the doctrine to certain enumerated inherently dangerous felonies; however, even in states that do enumerate, arson is clearly an inherently dangerous felony. Here, Patron died during the course of the commission of Husband's arson, and it is irrelevant to the question of his liability whether she died before or after he left the scene. He was responsible for anyone who died as a result of the fire that he set.

2. Husband's Defenses:
a) **Self-Defense**. Husband may try to argue that he had a right of self-defense that arose when Paramour jumped on his back. A person has the right to the amount of force he reasonably believes is reasonably necessary to prevent injury to himself. However, deadly force may only be used to encounter deadly force, and an initial aggressor must attempt to withdraw before he can assert self-defense. Husband's aggravated assault was the initial act of aggression; however, he could argue that his statement that Paramour was not worth killing combined with his turning his back to leave were sufficient withdrawal from the fight and communication of that withdrawal to Paramour to reinstate his right of self-defense. However, even if the initial punch was justified as self-defense, he immediately exceeded the scope of what was reasonably necessary to meet the force offered against him when he began slamming Paramour's head into the floor. Husband had no right to use deadly force.

b) **Heat of Passion/Adequate Provocation**. Husband may also try to argue that he acted in the heat of passion and thus the murder charge should be reduced to voluntary manslaughter. For this defense to work, he must have been laboring under a subjectively and objectively adequate provocation, meaning that he was actually provoked and a reasonable person would have been provoked, and that he did not actually cool off an a reasonable person would not have cooled off. While Husband may have been angered by the sight of Paramour given his knowledge of his wife's prior adulterous affair with Paramour, courts have consistently held that this is not adequate provocation unless one spouse actually finds the other spouse in the bed in the act of adultery; therefore, this defense is not available. Moreover, the fact that he was able to formulate a plan for covering up his crime suggests a level of cool-headedness and in-depth thought processes that runs counter to an assertion that the killing was committed in the heat of passion.

c) **Insanity**. Husband could try to argue that he was insane at the time when he killed Paramour. Under Georgia law, an individual is legally insane if he has a mental disease or defect such that he cannot determine that his actions are wrong or an insane delusion that prevents him from controlling his actions. This defense will fail for two reasons. One, husband displayed a level of cool headedness in committing arson to cover his tracks and calmly leaving the building with his wife that suggests he was fully in control of his faculties. Second, nothing in the facts suggests that he had a mental disease or defect or was suffering from an insane delusion. His animosity toward Paramour was based in fact not in insane delusions. Thus, this defense is also not available to Husband.

Question 4 - Sample Answer #2

(1) Husband likely committed assault; murder of Paramour; arson; and felony murder of Patron.

Assault of Paramour. The elements of the crime of assault are (definition #1): assault as an attempted battery; or (definition #2): the intentional creation, other than mere words, of a

reasonable fear in the mind of the victim of imminent bodily injury. Assault is a specific intent crime. In this case, Husband did not commit the first definition of assault because he did not attempt to commit a battery - there are no facts to support that he had the specific intent to shoot or cause bodily injury to Paramour at that point, and specific intent is needed for attempt. Husband did, however, commit the second definition of assault because he intended to put Paramour in fear by pointing the gun at him in the restroom and by telling him, "I'm going to kill you for what you did to my wife and me." This fear was reasonable, a gun would certainly cause bodily injury, and it was imminent because Husband was there and was holding the gun right in front of Paramour.

Murder of Paramour. The elements of murder are causing the death of another with malice aforethought. Therefore, murder is a malice crime. Husband caused the death of Paramour when he slammed Paramour's head into the floor; and based on the autopsy, this was the cause of death. This "intent to kill" murder can be shown by intent to cause serious bodily injury. Husband did this when he continued to slam Paramour's head into the floor even after he had punched Paramour in the face and Paramour was already on the ground. These actions show that Husband intended to cause serious bodily injury to Paramour. The intent to kill may or may not be inferred from Husband's act of following Paramour into the restroom - Husband might argue that he did not have the intent to kill then since he lowered the gun. However, intent to kill can be shown by the intent to inflict serious bodily injury as just explained.
Husband could also be charged with the felony murder of Paramour. Felony murder is a killing committed during the course of an inherently dangerous felony. It must be completed before the felon reaches a place of temporary safety. Also, the killing must be foreseeable. In Georgia, battery can be a felony that is the basis for the underlying felony murder. Murder is punishable by death or life in prison.

Battery of Paramour. This is likely not something Husband can be charged with, if he is charged with murder, since it will merge into the murder offense. Nonetheless, the elements are: the unlawful application of force to another resulting in bodily injury. Husband did this when he jumped on top of Paramour and slammed Paramour's head into the floor.

Voluntary manslaughter of Paramour. If the prosecution wanted to charge Husband with a lesser charge in lieu of murder of Paramour (but not both), it could charge Husband with the voluntary manslaughter of Paramour. Voluntary manslaughter is the causing the death of another in the heat of passion with adequate provocation. There cannot be an adequate "cooling off" period. Here, Husband caused the death of Paramour, as discussed above. He likely did it with adequate provocation, not based off of Paramour's affair with his wife, since there was certainly an adequate cooling off period from when that happened - but based off of Paramour's act of jumping on top of Husband's back and saying, "She might have gone back to you, but she will always love me and I'll always love her." It was in the heat of passion since it was in the moment after Paramour said that to him.

Arson. Arson is the burning of the dwelling house of another. The burning must be more than mere scorching - it must be material wasting. In Georgia, there are different degrees of arson. This might be second degree arson if it was the nightclub and not someone's home. Arson is a malice crime. Here, husband committed arson when he started a fire in the restroom to conceal what he did to Paramour. Based on the damage described, this act caused burning that rose to the level of burning required for arson.

Felony murder of Patron. Felony murder is a killing committed during the course of an inherently dangerous felony. It must be completed before the felon reaches a place of temporary safety.

Also, the killing must be foreseeable. Here, Husband could be charged with the felony murder of Patricia Patron since her killing happened during the course of and as a result of the arson that Husband committed when he started the fire in the restroom as discussed above. Also, the fire caused by Husband's arson was the cause of Patron's death since an autopsy established that she died from smoke inhalation. Lastly, Patron's death was foreseeable because it is foreseeable that someone could die if you set a fire in a nightclub, especially when there were other patrons there.

(2) Defenses

Withdrawal; renunciation. Husband can try to claim that he withdrew from the assault when he put the gun back in his pocket and said, "You aren't worth killing but if you know what's good for you, you will stay away from my wife." However, at that point the crime of battery was already complete; therefore, this is not a valid defense.

Self-defense. Self-defense is allowed when a victim reasonably believes that they are in imminent peril of an unlawful act, in which case they may use reasonable force to defend themselves. Husband can claim that he defended himself when he turned to leave but Paramour jumped on his back. Even if Husband started the confrontation, he can say he had already turned to leave; and Paramour couldn't use force to stop a fleeing felon since Husband wasn't a felon (assault is a misdemeanor). Also, Husband used deadly force, which likely was not permissible in this situation. He could have retreated. Therefore, this is not a valid defense.

Also - even if he didn't intend to kill Patron, it was still felony murder because it was foreseeable.

Question 4 - Sample Answer #3

1. Assault - Husband likely committed both tortious and criminal assault against Paul in the restroom, when he pointed his pistol at Paul and stated that he was going to kill him. The offense of assault involves the intentional creation of a reasonable apprehension of an immediate battery, which is a harmful and offensive touching. Here, it appears that Husband intentionally created a fear in Paramour of an immediate battery, since he aimed a pistol at him and stated he was going to kill him, which induced Paul to immediately begin begging for his life and forgiveness. Husband may also be liable for aggravated criminal assault of Paramour. Ordinary assault is ratcheted up to aggravated criminal assault when it is committed with the use of a deadly weapon, as is the case here, since Husband used a pistol.

2. Battery - Husband committed the tort of battery against Paul when he punched him in the face. A battery is the intentional creation of a harmful or offensive touching. Here, husband intentionally punched Paul in the face; however, Husband may avail himself of the defense of self-defense. A person is entitled to use reasonable force to fend off an imminent battery upon himself. Here, because Paul jumped on Husband's back, Husband can argue that Paul was the initial aggressor and that Husband was privileged to use force against Paul to defend himself. However, once Paul fell to the floor, Husband likely exceeded the scope of the defense by slamming Paul's head repeatedly into the floor. Paul was no longer an aggressor, yet Husband continued to slam Paul's head into the floor until blood began to run. This is not a reasonable amount of force because it exceeded what was necessary for Husband to fend off Paul's aggression.

3. Murder - Husband may be guilty of murdering Paul. Murder involves the intentional killing of

another with malice aforethought. Malice aforethought can be formed moments before the killing takes place. The crime of murder may arise where the defendant intentionally kills or inflicts serious bodily injury upon the victim and the victim dies as a result. This is likely the case here, as Husband intentionally slammed Paul's head into the floor until blood began to run. The causation requirement is met, since Paul died as a result of blunt trauma to the head. Husband may argue that he was acting in the heat of passion, and thus the crime of murder should be mitigated down to voluntary manslaughter. The heat of passion defense is available if the defendant was under the influence of an objectively adequate provocation at the time he acted and had no time to cool off. Examples of adequate provocation include presently-witnessed adultery and the infliction of serious battery. Though Husband was aware of his wife's affair with Paul, it is unlikely that this awareness in itself provided adequate provocation for a heat of passion defense, as there was no presently witnessed adultery. Statements alone, such as Paul's statement here ("she will always love me and I'll always love her"), typically do not constitute adequate provocation. Moreover, Paul was not inflicting serious battery upon Husband at the time Husband acted; he had merely jumped on his back. Thus, a heat of passion defense is unlikely to succeed. Husband may also argue that he was acting in self-defense. Imperfect self defense occurs when a defendant unreasonably defends against aggression by the victim with excessive force, and can mitigate a murder charge to voluntary manslaughter. This defense is also unlikely to succeed here. It does not appear that Paul was inflicting any kind of serious injury upon Husband, since he merely jumped upon his back. Husband's repeated slamming of Paul's head into the floor appears to have been purely malicious, motivated by anger over Paul's relations with Husband's wife, rather than due to mistaken justification regarding self-defense.

4. Involuntary Manslaughter, Depraved Heart Murder, and Felony Murder - Husband may be guilty of the involuntary manslaughter of Patricia. He is likely not guilty of intent-to-kill murder of Patricia because he had no specific intent to kill her, since he did not appear to know she was in the restroom at the time. However, Husband set fire to the restroom and then locked it without checking first to see if any other patrons were inside the restroom. This is likely to constitute at least criminal negligence, which can serve as the basis for an involuntary manslaughter charge, and may even constitute depraved heart murder, which involves a reckless and wanton disregard for human life. A court could find that setting fire to a bathroom and then locking it while patrons are potentially still inside constitutes a wanton disregard for human life, supporting a depraved heart murder charge. The causation requirement is satisfied, since Patricia died of smoke inhalation, and death from smoke inhalation is a foreseeable consequence of setting fire to the restroom and then negligently or recklessly/wantonly locking the door without first checking for other patrons. There is also a chance that Husband could be liable for felony murder of Patricia. Felony murder liability arises when a victim dies during the commission of an inherently dangerous felony. Here, a felony murder charge is possible, since Patricia died during Husband's commission of an inherently dangerous felony - arson (discussed below).

5. Arson - Husband may be guilty of arson, which is defined as the malicious burning of a building. Arson requires actual charring of the building's structure itself. Here, Husband intentionally set fire to the restroom, meeting the malice requirement. His actions appear to have resulted in burning of the building's structure, since there was debris found in the restroom.

6. Husband may be liable to other patrons in the restaurant for negligent infliction of emotional distress, but only if they suffered actual physical impact as a result of the rush to escape the burning club (e.g. by being pushed).

MPT I Sample Answer #1

MEMORANDUM

To: Robert Benson

From: Applicant

Re: Franklin Sports/Rights of Publicity

Jackson most likely will not establish a cause of action under the statutory Right of Publicity and Franklin could defend against any suit by Jackson based upon the statutory Newsworthy exemption.

1. Jackson will likely not establish a cause of action as Franklin's use of his image is not identifiable.

The elements of a statutory cause of action for violation of the right of publicity are (1) the defendant's knowing use of the plaintiff's photograph or likeness, (2) lack of consent, and (3) resulting injury (FRPS § 62). In this statute, the Franklin legislature has attempted to codify the common law right of publicity. Unlike the common law's ambiguous requirement that the defendant appropriate of the plaintiff's persona, section 62 has explicitly set forth the requirements for "identification" which serves the statutory version of persona. Under the statute, use of another's photograph or likeness only violates the right of publicity if it is such that the person is "readily identifiable." This is defined as when the "naked eye can reasonably determine that the person depicted in the photograph is the same person" as the plaintiff. If a plaintiff is not identifiable, then in no sense has his right of publicity been violated.

While this statute expressly preempts all common law causes of action for right of publicity, the Franklin State Assembly explicitly stated that to the degree common law decisions are in accord with the legislation's provisions, they continue to constitute good precedent which the court may use for guidance in applying the legislation. (FSA Rep. No. 94-176) Franklin's common law addresses many factors that affect the "identifiability" of a person's likeness. Such factors include a uniquely colored & patterned suit, patches, names, as well as scars, tattoos, and other identifiable marks. Additionally, the courts have held that where such unique attributes are present, a completely obscured face or body is not determinative when a devoted following could otherwise identify the plaintiff. As stated by the ***Holt*** court, "the question is not simply whether one can recognize an individual's features, but whether on can ***identify*** the specific individual from the use made of his image." Yet, where the suit is was identical in color, design, and cut to those worn by every other participant in the sporting event, especially a relatively low tier collegiate event, the court has found no identifying attribute (***Brant***).

In this case, the plaintiff is well known on the local level, as shown by the majority of fans at a Blue Sox baseball game being adorned in apparel with Jackson's unique double-zero number. This shows that a fan would be able to distinguish Jackson from other player's based on those markings, much like the plaintiff in ***Holt***. Yet, Jackson's "unique" attributes are not nearly as striking as the gold-colored suit with purple stripes worn by the plaintiff in ***Holt***. Aside from the number on his back, his uniform, much like the plaintiff in ***Brant***, is the same as every other player on the team, not only this season, but for the last 25 years. Further, as the uniforms do not include the player's name on the back, the only truly unique feature of his uniform is that fact

that a zero proceeds the final zero (as five other players, all Caucasian like Jackson, have numbers ending in zero). While it is not determinative that Jackson's face and body were obscured by the spray of dirt in the photo, the court has required a much more striking uniqueness of the exposed attributes in order for the plaintiff to establish identifiability, such as if Jackson's full double-zero number were visible which is not the case here. The combination of an obscured face, a generic uniform, and partially obscured number would make it unlikely that the public could conclude this was a picture of Jackson as opposed to any other player. Thus, a court determination that he was not "readily identifiable" as required by the statute would make it impossible that Jackson could prove facts which support his claim under law and the case would be dismissed for failure to state a claim.

2. Franklin can raise the statutory Newsworthy exception this use was ancillary to local sports reporting.

In addition to the codification of the common law elements of right of publicity, section 62 also codifies the Newsworthy exception applied under the right of freedom of the press found in both the Franklin Constitution and US Constitution. The statutory version provides an express exemption from right of publicity claims when the "persona" is used in "any news, public affairs, or sports broadcast or account." While this seems to provide very broad protection from right of publicity claims, section 62(a) must still be considered which includes any use of another's photograph or likeness for the purposes of advertising, selling, or soliciting purchases of goods or services. Franklin courts have distinguished between these two purposes - news dissemination and solicitation - based upon whether, in the mind of the consumer, there would be a relationship between the particular use at issue in the case and the new dissemination function of the newspaper. When a photograph was reprinted on a large poster with no text whatsoever and resold in retail outlets, the court has found that the purchasers would have no reason to know that sports reporting was related to sale of the poster (***Jancovic***). But, in this case, the use of Jackson's image was incidental to the solicitation. Like in ***Miller***, the use illustrated how the season had been properly depicted and excitement conveyed, thus informing the public of the nature and quality of Franklin's news reporting, rather than creating an inference of endorsement by the individual depicted by featuring his name. Therefore, Franklin's use of Jackson's photo is exempt from liability under the statutory Newsworthy exemption.

MPT 1 - Sample Answer #2

I. Issue
At issue here is whether the photo used in the advertisement for the Gazette violates the Franklin right of publicity Statute with respect to Richard Jackson. There are four elements to such a claim, which the statute has codified from the common law. The elements are: (1) the defendant's use of the plaintiff's photograph or likeness in any manner, (2) for purposes of advertising or selling or soliciting purchases of products, merchandise, goods or services, (3) without the plaintiff's prior consent, and (4) resulting in damages. The Gazette has viable defenses both to the claim that it violated the statute itself, plus an affirmative defense grounded in section 62(d)

II. Use of likeness
Mr. Jackson will claim that the first element, that requiring "the defendants use of the plaintiffs photograph or likeness in any manner", is satisfied through the reproduction of the Photo in the Gazette's ad located in the Franklin City Journal. Section 62 (b) defines this element of the claim,

including any photographic reproduction such that the person is readily identifiable. 62(d) further explains that "A person shall be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use." (Franklin Right of Publicity Statute 62(d)) As noted in the legislative history, as well as 62(g) this definition is meant to preempt the common law cause of action. With respect to this requirement specifically, this definition of readily identifiable is meant to clarify the common law, which according to the legislative history "went too far in upholding individual claims, while others [cases] did not go far enough."

In this case, the picture does not show Mr. Jacksons face at all, and the only identifiable characteristics include the fact that the person depicted in the Photo is a Caucasian, and the second digit of his jersey number, which is a zero. Jackson will argue that given his fame in the community and the popularity of his "double zero" jersey, this is sufficient to make his likeness readily identifiable under the terms of the statute. Mr. Jackson will also point to the Holt case, in which the court found the plaintiff was identifiable despite the fact that the number and name on the plaintiff's jersey were blurred out in the use. As discussed above, it is not sure how much weight will be given to the common law precedent due to the pre-emptive nature of the statute.

The Gazette has a viable defense however. Based on the fact that at the time the advertisement was printed there were five Caucasian members of the blue sox whose numbers ended in zero, and the game the Photo was taken from was unmemorable in an unmemorable season, that Jackson's likeness is not readily identifiable, along the lines of the Brant case in which the court found that the legs and pool were not sufficiently identifiable characteristics.(subject to the same disclaimer above). As a result, the court is likely to rule that Jacksons likeness is not readily identifiable.

III. Commercial purposes.
Being that the use was in an advertisement this element should be easily satisfied.

IV. Consent and the First Amendment Affirmative Defense.
Under the consent prong, section 62(d) of the statute provides for an affirmative defense, in which consent is not required for use in connection with any news, public affairs sports broadcast or account. In Miller, the court held that incidental use of a photograph in an advertisement of a news reporting function was exempted from the common law cause of action. In addition, the legislative history suggests that section 62 is meant to provide further support to the affirmative defense, noting that "It is the Committee's view that the important right of freedom of the press, found both in the Franklin Constitution and the First Amendment to the United States Constitution, must supersede any individual claims..."

As a result, the Gazette should argue that the use of the Photo in the advertisement here is similar to the use in Miller in that it is incidental to the advertising in relationship to its news reporting function. Additionally, like in Miller, the advertisement contained no use of Jackson's name, and as discussed above does not clearly indicate Mr. Jackson's likeness at all, so the use does not imply any endorsement of the Gazette by Jackson. Jackson may point to his personal success with endorsements and the value of the endorsements as well as the sharp increase in revenue the Gazette experienced after the advertisement was published. This would follow along the lines of Justice Weiss' dissent in the Miller case and favor a finding of a violation of Section 62. However, given the legislative history, and the even smaller likelihood that an endorsement would be implied here as compared with Miller, 62(d) is likely to be interpreted by the court to exempt the use here from requiring consent, as incidental to use in connection with the news.

V. Damages
Not to be considered.

MPT 1 - Sample Answer #3

Our client, the ***Franklin Sports Gazette***, has been sued for its alleged infringement of the statutory right of publicity of Franklin Blue Sox star Richard "Action" Jackson. The claim surrounds an advertisement the ***Gazette*** published in June 2009 which included a photograph ("the Photo") of Jackson sliding into home. Whether Jackson has a cause of action and whether the ***Gazette*** can successfully maintain an affirmative defense are each close questions, but both should be decided in the ***Gazette's*** favor.

Right of publicity actions are governed by § 62 of the State Code (the "Statute"). The Statute is largely similar to the common law right of publicity it preempted, and in fact the State Assembly specifically contemplated common law precedent remaining valid precedent where they are in accordance with the Statute. The Statute creates a cause of action against "any person who knowingly uses another's photograph . . . for purposes of advertising or selling . . . without such person's prior consent." That the ***Gazette*** knowingly used the Photo is undisputable. ***See*** Allen memo, June 15, 2009. This analysis will therefore focus on whether the Photo was a "photograph" under the Statute's "readily identifiable" standard and whether the ***Gazette*** can maintain an affirmative defense based on their role as a news provider.

1. The Photo was not a "photograph" under the Statute because Jackson was not "readily identifiable."

The Statute allows a cause of action only for photographs in which the claimant is "readily identifiable . . . when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the (claimant)." Under the common law, decisions consistently relied on whether a photograph revealed features unique to the claimant in determining whether the claimant was identifiable. In ***Holt v. Juicy Co., Inc. and Janig, Inc.***, __ Fr. __ (2001), the Court found that an image of a skier wearing a unique gold-colored suit was identifiable because the suit's "distinctive appearance" and the fact that the "suit's color scheme and design are unique to Holt" made the claimant identifiable. In ***Brant v. Franklin Diamond Exchange, Ltd.***, __ Fr. Ct. App. ___ (2003), the Court of Appeals distinguished ***Holt*** on the grounds that the claimant had "no unique . . . identifying features." The claimant had no cause of action because there was "no way that the public could conclude that this was a picture of (the claimant) as opposed to any other diver."

Here, Jackson was depicted sliding into home, with a spray of dirt obscuring most of body and all of his face. The only visible features are part of the second zero in Jackson's uniform number and the white skin tone of his one raised arm. ***See*** Benson memo, July 28, 2009. The Blue Sox had three players with trailing zeros (two of whom were Caucasian) when the photo was taken, and have five today (all Caucasian). Knowing that a player was Caucasian and had a uniform number with a trailing zero was not sufficient to uniquely identify the player.

Jackson could argue that since he is the star of the team, a viewer would conclude that the sliding player was in fact Jackson. He could also point to the ad's headline, which used the word "Action", Jackson's nickname. However, since the terms of the statute require that the player be "readily identifiable," and since precedent has consistently associated that standard with

characteristics unique to the claimant, his efforts will likely fail.

2. The *Gazette* has an affirmative defense because the Photo was used in connection with a "news account."

The statute provides an affirmative defense for uses "in connection with any news, public affairs, or sports broadcast or account." In ***Miller v. FSM Enterprises, Inc.***, ___ Fr. Ct. App. __ (1988), the Court of Appeals considered a claim for the use of a photograph in a print advertisement soliciting magazine subscribers. After distinguishing precedent involving a poster sold with no text on it at all, the Court concluded that the use of the image was "incidental to the advertising of FSM in relationship to its news reporting function." It emphasized that the photograph "illustrated the way in which (the claimant) had earlier been properly and fairly depicted by the magazine in a legitimate news account" so as to inform "as to the nature and quality of FSM's news reporting." Although the statue preempts common law, the legislative history shows an emphasis on allowing ancillary uses in association with freedom of the press, so this precedent is likely to be followed.

Here, the ***Gazette's*** use is very similar to the use in ***Miller***. As in ***Miller***, the Photo was accompanied by text soliciting subscriptions. As in ***Miller***, the text emphasized the quality of the ***Gazette's*** coverage and reporting. Jackson may try to distinguish ***Miller*** by arguing that the headline "GET IN WITH THE ACTION!!!!!" included his nickname, "Action." ***Miller*** acknowledges that the exemption for incidental advertising of a news medium is limited to situations "when there can be no inference of endorsement by the individual depicted." ***See also*** Miller, Weiss dissenting ("if (the claimant's) name had been used in connection with the solicitation, there would have been no question that an endorsement was implied and her right of publicity violated.") The ***Gazette*** will need to argue that "action" is a common word, particular in the context of sports reporting, and that it was simply a descriptive term and not a reference to Jackson's nickname.

Conclusion

The ***Gazette*** is likely to defeat Jackson's complaint, either because he has failed to state a cause of action or based on an affirmative defense. There is no cause of action when the claimant is not "readily identifiable," and the Photo lacked any characteristics unique to Jackson. There is an affirmative defense when the image is used for advertising a publisher of news accounts, and the advertisement did just that.
For these reasons, the ***Gazette*** is unlikely to be held liable.

MPT II Sample Answer #1

To: Henry Bowman, Bowman & Bowman
From: City Attorney's Office

Dear Mr. Bowman

I am writing in response to your July 24, 2009 letter regarding TWS and Acadia Estates(AE). While TWS does have the exclusive right to service the residents of El Dorado county, it does not have the exclusive right to provide water and sewer services to the proposed AE or in Bluewater County. While TWS holds CCN, the area of the CCN does not include AE, only El Dorado County.

While TWS may have applied for a modification of its existing CCN, the Franklin Public Service Commission (Commission) will evaluate in light of the City's right to annex, right to serve outside city limits (Section 675) as there is no current holder, and whether TWS possesses the capability to provide continuous and adequate service (Section 457).

The City has the right to annex the property and bring water/sewer service under Section 675. Bluewater has a water supply system and there is no current holder of a CCN for the area of AE. In Klein Water Co v. City of Stewart the Columbia Court of Appeals allowed a similar city service were a city annexed areas in which it had begun providing water service into its city limits and customer outside of city limits. While the water association raised federal law (Section 1926), the court found that the same protection allocated to the association was also found in municipalities, including the city. While we do not dispute that Section 1926(b) was enacted to encourage rural water development by protecting associations' customer bases and thereby safeguarding the financial viability of rural association and the repayment of federal loans, Bluewater not only has federal loans as well, but has more money invested within them.

For TWS to bring a lawsuit, you would have to (1) be an association within meaning of the Act (which you and the City both are) (2) have qualifying federal loan (which we both do) and (3) have provided service or made service available in disputed area. This is something TWS has not done. While you have provided "water supply to serve and meet the needs of rural residents" by serving approximately 250 homes and some commercial businesses, your facilities are located approximately 5 miles away from the AE site in El Dorado County. Further, though your water line is about 3 miles from AE (to serve 100 homes), our lines are less than a quarter mile away and would be completed (with the necessary 12 inch pipe to your inadequate 6 inch one) within approximately 3 months, as opposed to your 2 years.

In order to have "made services available" under Klein (which distinguished Glenpool and is binding on our fed. courts) an association needs water lines adjacent to or within the area at issue before municipal service begins. In Klein, the associations' facilities were 1.2 to 1.4 miles (not 5) and would take 12 months (not 2 years) to be operational. Even with these facts, the court acknowledged that the availability of service necessary was merely speculative, leaving the association without Section 1926(b) protection. Like Klein, you do not have the needed written authorization via the Franklin Code (FC) (450) because your CCN does not cover the area or even county. Further, FC requires that all CCN holders provide continuous and adequate service to every customer in the area, yet TWS has zero customers in Bluewater county and would be hard pressed to now serve more.

Unlike TWS, in Glenpool v. Creek County the rural water association had been incorporated to provide water service within specific territorial limits and had a water line that ran within 50 feet of the area, customers only had to apply for service, and the association would be obliged to provide service. While the case prohibited the City from using annexation as a "spring board" for providing water service to the area and thereby curtailing or limiting the service made available by the association, the facts are very distinguishable from our situation and the 10th Circuit is not binding authority. The test is do facilities exist in, or in proximity to, the location to be served. Do you have existing water lines within or adjacent to the property claimed to be protected prior to the time an allegedly encroaching competitor begins providing service? No, your lines and facilities are miles away while ours are under a mile from AE. If not, are you able to provide such service within a reasonable time? No, you stated that your services would be completed by January 2011, while ours would be finished in 3 mere months.

A Columbia trail court in Fountain Water Supply v. City of Orangevale, outlined "making service"

as 2 components: (1) legal right under state law to serve an area; and (2) the physical ability to serve an area, which is also known and the "pipes-in-the-ground" test. While Klein debated the legality of "pipes-in-the-ground", your inability to meet those requirements is more legal merit to City's exclusive right to serve AE.

Further, the US Code states 1926(a) as "serving farmers, ranchers, farm tenants, farm laborers, and rural businesses, and other rural residents," not a residence of over 500 single family homes, condos, and/or apartment complexes. Therefore, your association does not have exclusive rights to serve AE, and even if your extension is granted after AE is annexed you have no legitimate state or federal claim under the US or Franklin Codes and no right to service where the City has met all service requirements. The City has the right to extend its system into any territory adjacent to the city provided it shall not enter into territory served by a CCN holder unless the holder requests. As shown in our draft service plan, there is no CCN for the AE area. As TWS does not currently hold a CCN, and given your capabilities, should not be granted an extension, the City has proper and exclusive rights to AE.

I hope this addressed your concerns as we feel confident of City's legal position should it come to legal action.

Sincerely, City Attorney's Office

MPT II - Sample Answer #2

Dear Mr. Bowman,

The City of Bluewater writes in response to your letter dated July 24, 2009. Bluewater has the exclusive right to provide water and sewer services to the Acadia Estates subdivision. The weight of precedent demonstrates that any legal action taken by TWS to enjoin Bluewater's provision of services will fail because TWS does not qualify for protection under the applicable federal or state laws.

Federal Law Supports Bluewater's Right to Provide Water Service and Indicates That TWS Would Lose a Court Challenge.

7 U.S.C. § 1926(b) states that "service provided or made available" by a covered rural association "shall not be curtailed" by a city's annexation of an area "served" by the association. The controlling federal case, ***Klein Water Co. v. City of Stewart***, as well as a relevant district court case, ***Fountain Water Supply, Inc. v. City of Orangevale***, indicate that there are three elements for an association to win a claim that a municipality has violated § 1926(b). The plaintiff must be an association as defined in the statute, it must have a qualifying outstanding federal loan, and it must have "provided service or made service available in the disputed area." ***Klein***; ***Fountain***.

While TWS may claim to be an association, and its loan of $1.4 million qualifies, all indications are that the statutory language "served by such association" suggests that municipalities are only precluded from including in their territory and then serving areas that are already served by the association. ***See*** 7 U.S.C. § 1926(b). There are two prongs in the 15th Circuit to determine whether an association "has provided" service to a particular area. First, the association must have legal authority to provide the service. Second, it must have the physical capacity to serve

the area. ***Fountain***.

TWS cannot meet the first prong, as it lacks the requisite Certificate of Convenience and Necessity ("CCN") to serve Acadia Estates. Even if it obtains such certificate in the future, a federal court might apply the "pipes in the ground" rule to see if the association has the physical capacity to serve the area. ***Fountain***. Even if it applies the slightly broader ***Glenpool*** test from the 10th Circuit, which the 15th Circuit referenced without expressly adopting in ***Klein***, TWS would lose. ***Glenpool*** states that an association has "made service available" to an area if the association's facilities are located in or are "in proximity to" the area to be served. Much like the municipality in ***Glenpool***, Bluewater stands at the ready to provide water and sewer services from its plant and lines that are less than one fourth of a mile from Acadia Estates. Acadia Estates is projected to need water pipes that are 12 inches in diameter. The city will be able to provide service within three months of the date of annexation. Draft Service Plan. As you know, TWS would not be able to serve Acadia Estates until 2011 at the earliest, and at present has no pipes wider than 6 inches and has no facility closer than three miles. While you may reply that the subdivision may not be complete until December 2010, some residents may have moved in once the earlier homes are completed. They should not have to wait for TWS when Bluewater could provide service in plenty of time for them to move in.

An additional factor indicates that TWS lacks the physical capacity to serve Acadia Estates. Adding Acadia would triple the number of customers served by TWS. Even if it is able to extend the pipes and build new facilities in proximity to the area in time, serious questions remain about TWS's capacity.

In addition to the clear meaning of the text of the statute, Bluewater's position is supported by the dual purpose of 1926(b). The two purposes of the federal statute are to encourage rural water development and to provide the federal government with greater security for its loans. ***Fountain***. Bluewater has a greater amount of outstanding federal water development loans than TWS does. Why should the federal government enforce a claim that will jeopardize its revenue? Bluewater will foster rural water development by including the new subdivision to a strong and proven water service network.

Further, Bluewater would not only win a case in defense against TWS, but it could itself preclude TWS from serving the area. Bluewater also qualifies as a public agency with a qualifying outstanding federal water loan. ***See Klein*** (noting that "Congress intended that municipalities be viewed as 'associations' for purposes of the ... Act"). Therefore, Bluewater could invoke 1926(b)'s purpose to prevent its exclusive right from being infringed.

If TWS claims that ***Klein*** and ***Fountain*** indicate that federal courts in the 15th Circuit will look to underlying state law and that state law supports TWS because it has obtained a Certificate, it is erroneous reading of the case law. The cases only look to state law to determine how to determine whether or not the association has received the legal authority to provide services in the area in question, which is only one prong of a two-prong test. TWS still must satisfy the second prong, of having pipes in the ground or at least having facilities in the proximity of the area. TWS has neither.

State Law Further Supports Bluewater's Right.

Section 450(b) does not help your client. The law only prevents provision of services that interfere with an area for which a corporation "already holds" a CCN. Even if TWS obtains a CCN and then sues, § 450(b) would be preempted by the federal law. The Supremacy Clause notes that state laws conflicting with federal laws are preempted. The state may not enjoin the provision of water

services that is lawfully authorized by the controlling federal statute.

Further, § 675 only applies to areas that are "served" by the holder of a Certificate. Acadia Estates will not be served by TWS until 2011 at the earliest. The city in fact receives express authorization from § 675 to extend its system to the annexed area that is "adjacent to the city."

MPT II - Sample Answer #3

Henry Bowman, Esq.
Bowman & Bowman
3200 Allen Parkway
Cypress FR

re: Turquoise Water Supply - Arcadia Estates

Dear Mr. Bowman,

The city received your demand letter regarding TWS's belief that it has rights precluding the city from annexing Arcadia Estates and that state law bars the city from acting. We disagree with your contentions and feel that your claims are not meritorious.

7 U.S.C. §1926(B) was enacted to encourage rural water development by protecting associations' customer bases and safeguarding the financial viability of rural associations and the repayment of federal loans. We do not argue that TWS is an association covered by §1926(B) but we do contend that the city is as well and can rely on statutory protection as well. The 15th circuit in Klein vs. City of Stewart found that Congress did intend for municipalities to be viewed as "associations" and as such can also rely on its protections. To have protection under the Act, one must show it is an "association" within the meaning of the Act, it has a qualifying outstanding federal loan, and it has provided service or made service available in the disputed area. Again, as we are both "associations" under the Act and we both have qualifying federal loans, the question of service is important as to which one of us is entitled to the protections in the Act. The court in Fountain Water Supply (FWS) vs. City of Orangevale interpreted the statute to mean that making service available had 2 components (1) the legal right under state law to serve an area (2) the physical ability to serve, AKA pipes in the ground. Here, the legal right to serve is written authorization from the Franklin Public Service Commission by obtaining a Certificate of Convenience and necessity. Your client DOES NOT have a CCN to serve the proposed area. §675 of the Franklin Code however does give the city legal authority to serve the area as there is no holder of a CCN for that area. In addition, you will not be able to show that you have the physical ability to serve or meet the "pipes in the ground" prong of the test. TWS's nearest facilities are 3 miles from the proposed subdivision and the pipes closest to it are 6 inch diameter lines. TWS own best estimates for their ability to provide service would be in 2011. To meet the 2nd prong, the court in Klein set forth that if an association was not actually providing service, they could show that they would be able to in a reasonable period of time. The Arcadia subdivision needs to have water & sewer capacity served by water lines 12 inches in diameter. The city already has existing sewer & water lines less than 1/4 of a mile from the location and can have them up and running in several months. Given our readiness capacity and our closer proximity, we clearly meet the second prong of the test and as such the city and not TWS can use the §1926 protection to

justify its service to the subdivision. I am sure you will wish to argue that Glen Pool v. Creek County gives you better footing to claim ability to serve. It should be noted that TWS stands in a different factual position than Glenpool as they were already providing service there and the additional users were only 50 feet from Glenpools' lines. Again, TWS current infrastructure is several miles away and TWS will be unable to provide service in 2011 at the earliest. TWS situation is more like the plaintiff in Klein where the nearest facilities were a mile away and it would take at least 12 months to make service available. Although unlike the plaintiff in Klein, TWS has applied for authorization to provide service and for funding, the service plans of TWS remain speculative.

With respect to your claims that the city is banned by state law from serving the tract, you point to §450 & 675 of the Franklin Code. §675 provides that a city may furnish water and sewer services to a territory adjacent to the city provided they do not enter the territory served by a hold of a CCN. §450 states that a water supply corp. must obtain a CCN to provide service and again provides protection to such a holder. Here it must be stressed that TWS is NOT A HOLDER of a CCN for this subdivision. As previously discussed, without being a holder, the legal authority to provide services currently rests with the city. TWS has applied for expansion to include the subdivision pursuant to §457 of the Franklin Code, which allows for the holder of a CCN to expand/modify the service area. The standard given in §457 is that the applicant must possess the capability to provide continuous & adequate service. It is our belief TWS will not be granted the extension because you will not be able to meet the standard.

All indications are that the subdivision will begin construction and have people in need of service in 2010. The best case scenario provided by TWS on their timeline to provide service is it may be in 2011. Homeowners in the subdivision could find themselves without service if the amendment is allowed. However, we, the city will argue that we are capable of providing service in months so prior to the homeowners need. The city could be providing service on the 1st day of any homeowner's need and are already provided legal authority to do so. We will oppose your application for amendment and as we are a much more viable alternative, we expect to be successful.

We understand TWS's claims, we however feel that TWS's claims have no merit and cannot be sustained. We therefore ask that you reconsider your amendment application for a CCN and cease & desist any activities in competition with our annexing the subdivision and providing water to service it.

Sincerely,