July 2017 Bar Examination Sample Answers

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QUESTION 1 - Sample Answer # 1

1. Ante litem notice

The ante litem notice was timely filed but was not properly served. The issue is whether the ante litem notice complies with the procedural requirements of the Georgia Tort Claims Act, which governs tort lawsuits against the State of Georgia and any state agencies. Before instituting litigation, a plaintiff must send notice of her claims to the Georgia administrative office and a copy of the notice to the agency responsible for the alleged conduct. The plaintiff must send the notice within a year after the conduct giving rise to her claim occurred.

Here, Plaintiff's guardian sent the ante litem notice to the Department of Transportation by certified mail on February 5, 2015. Service by certified mail is proper, but the attorney failed to send notice to the Georgia administrative office in addition to the agency responsible for the alleged conduct. Moreover, service of the ante litem notice was not timely. However, the attorney may seek an excuse given the nature of Plaintiff's injuries.

Plaintiff was likely incapable, as a result of his injuries, of initiating the litigation process before a guardian was appointed. The guardian was not appointed until June 1, 2014, and the ante litem notice was sent only seven months later. In that case, service would have been timely.

2. Proper ante litem notice

The issue is what must be contained in an ante litem notice under the Georgia Tort Claims Act. Generally, the State of Georgia enjoys sovereign immunity and cannot therefore be sued by its residents unless the legislature waives such immunity. The Georgia Tort Claims Act was adopted to waive immunity for tort actions and to provide residents a cause of action when they suffer damages as a result of tortious conduct on the part of a state actor. Before a plaintiff can file such an action in court, she must provide notice to the state agencies involved. Such notice must include a description of the incident and the resulting injuries, the specific claims the plaintiff seeks to assert, and the relief the plaintiff seeks.

3. Statute of limitations

The issue is when the statute of limitations begins to run, when it is tolled, and how long it lasts. The statute of limitations governs how long a plaintiff has to file a lawsuit after his claim arises. In Georgia, the statute of limitations for personal injury cases is two years. The statute of limitations begins to run from the time of the conduct that gave rise to the claim, or in a suit for personal injury, from the time that the plaintiff becomes aware of the injury resulting from the conduct.

In a suit by Plaintiff against Defendant's estate, the D.O.T. employee, and the D.O.T., the statute of limitations began to run on the date of the accident, January 15, 2014, and would expire on January 15, 2016. Nothing in the facts suggests that Plaintiff was not immediately aware of his injuries resulting from the accident. However, the statute of limitations may have been tolled from the time of Plaintiff's injuries until the time the guardian was appointed because Plaintiff would have been unable to assert his claims due to the severity of his injuries. In that case, the statute of limitations would have tolled until June 1, 2014, and would expire on June 1, 2016, as to Defendant, the D.O.T. employee, and D.O.T. In a survival action by Defendant's estate against the D.O.T. employee and the D.O.T., the same statute of limitations would apply and would expire on January 15, 2016. Defendant's son would also be allowed to bring a wrongful death action against the D.O.T. employee and D.O.T. The statute of limitations began to run on the date of Defendant's death, March 15, 2014, and would expire on March 15, 2016.

4. Venue

a. State of Georgia/DOT

Venue is proper both in Baker County and in Miller County. The issue is how to determine what county is the proper venue in a case involving the State of Georgia. Under the Georgia Tort Claims Act, when a plaintiff names as a defendant in a tort case the State of Georgia, venue is proper in the county where the conduct giving rise to the claim occurred. In this case, Plaintiff's claim arose from a car accident that occurred in Baker County, Georgia. Therefore, if Plaintiff sued the State of Georgia, venue is proper in Baker County. Venue may also be proper in the county where the plaintiff resides. In this case, venue would also be proper in Miller County, where Plaintiff lives.

b. Defendant's estate

Venue is proper in Dougherty County. The issue is how to determine what county is the proper venue in a case involving a deceased defendant. Generally, venue is proper in a tort case in Georgia in the county where the defendant resides. When the suit is brought against the estate of a deceased defendant, venue is proper in the county where the executor or personal representative of the estate resides. In this case, Defendant is deceased, and his son was named as executor of the estate. Therefore, venue is proper in a case brought against Defendant's estate in Dougherty County, where the son resides.

QUESTION 1 - Sample Answer # 2

1. (a) The issue here is whether the ante litem notice was timely filed against the state of Georgia. According to GA law, a plaintiff must issue an ante litem notice, which is a notice of an intent to sue the government, within 1 year of suffering the injury at issue. If the ante litem notice is not timely filed or not filed at all, the court hearing the case must dismiss it for lack of subject matter jurisdiction. Here, the accident occurred on 1/15/2014 and the ante litem notice was filed on 2/1/2015, which would be outside of the one year period. However, the plaintiff was brain damaged and legally incompetent until a guardian was appointed on 6/1/14. The 1 year period should have tolled in the interim between the accident and the appointment of the guardian because the plaintiff was incompetent and not able to sue. Because the ante litem notice was filed within 1 year of 6/1/14, it was timely filed.

(b) The issue here is whether the notice was correctly served. GA law allows for service by certified mail when the government is being sued and the service must be mailed to the state Risk Assessor's office. Here, the notice was served by certified mail to the Commissioner of the DOT. The method of service is correct but the service appears to have been sent to the wrong recipient. Therefore the state was not correctly served.

2. The issue here is the proper information in an ante litem notice. The purpose of the notice is to put the state on notice that is about to be or is being sued. Therefore the notice requires the name of the plaintiff, plaintiff's counsel's information, the named defendant (the part of the government being sued), a description of the legal claim, claimed damages, the date of the alleged event, and a brief description of the event(s). Essentially, the notice requires everything needed to put the state on notice about the fundamental aspects of the claim and the relief sought.

3. The issue here is the statute of limitations on each of the three defendants, which are the defendant driver's estate, the D.O.T., and the D.O.T. employee who resides in Baker County. Here one defendant is a living person, another is an estate, and the last is the state of Georgia. Generally in GA, personal injury claims have a two year statute of limitations. This applies to the D.O.T. employee being sued as an individual. The statute should have equitably tolled while the plaintiff was incapacitated but before his guardian was appointed, so it should expire on 6/1/2016 (two years after 6/1/2014). If the court elects not to invoke equitable tolling it would expire two years from the date of the accident, 1/15/2016. Georgia's waiver of sovereign immunity also imposes a statute of limitations of two years, assuming there is a valid ante litem notice filed within 1 year of the injury. The same equitable tolling should occur, so the dates are the same as above. The statute of limitations for suing an estate is one year from the date of the death or two years from the date of the event, whichever is earlier. Because the defendant died two months after the accident, one year after his death is earlier than two years. Thus the statute of limitations expires one year after his death, which is 3/15/15.

4. (a) The issue here is where venue would be appropriate if the state of GA/D.O.T is named as a defendant. If venue is improper the court must transfer the case to the proper

venue. Venue is generally proper in the county where the defendant resides or where the events in question took place. If neither of those are applicable, then the residence of the plaintiff may be used. If none of those are applicable, then the county where the majority of in-state events, or in-state witnesses, or in-state evidence is located is used. The venue rules state that when the state of Georgia (or subunit) is a party, venue is appropriate where the act occurred, which in this case is Baker County. Venue may be appropriate in Miller County, the residence of the plaintiff, if justice so requires (perhaps because the plaintiff has a serious brain injury and cannot travel).

(b) The issue here is where venue is appropriate if the plaintiff only sues the defendant's estate. The abovementioned rules for venue apply. When the defendant is deceased, venue may still be proper in the county where his executor resides, if the estate has not been fully probated. Here, that is Dougherty County. However, the location of the accident may be best, for instance if there is evidence in the case that makes Dougherty County an inconvenient forum. The residence of the original defendant driver (now deceased) is not used because the executor has stepped into his shoes. The county of the plaintiff might be used if justice requires, as noted above.

QUESTION 2 - Sample Answer # 1

1. All Night's Interest in the Property

All Night ("AN") could claim an interest in the property upon the theory of adverse possession. Under Georgia law, in order for an individual (adverse possessor) to claim title to the property through adverse possession, the adverse possessor must prove the following elements by a preponderance of the evidence: The possession is (1) Continuous for the statutory period; (2) Open and Notorious; (3) Exclusive; and (4) Adverse and Hostile, against a claim of right. It is important to note that payment of the ad valorem or property taxes on the subject property does not, in and of itself, establish title by adverse possession.

With respect to (1) Continuous, Georgia has bifurcated the statutory time limits for adverse possession. If the adverse possession occurs under color of title, the statutory length is seven (7) years. If the adverse possession occurs without color of title, the statutory length is twenty (20) years. Color of title refers to something contained in the adverse possessor's title, that is incorrect or faulty, that nevertheless indicates that the adverse possessor is the owner of the subject property.

With respect to (2) Open and Notorious, Georgia law requires that the possession be of such character and observability that an owner of reasonable diligence and prudence would have observed the adverse possessor. With respect to (3) Exclusive, the adverse possessor cannot establish title by adverse possession if he shares possession with the true owner. With respect to (4) Adverse and Hostile, Georgia law requires that the adverse possessor have a good-faith belief that they are entitled to possession of the subject property. Thus, adverse possession acquired through fraud, deceit, or concealment will

defeat a claim of adverse possession.

Here, All Night constructed the curb and drainage inlet in 1981, and has occupied this location ever since. There is nothing in the facts to indicate that All Night's title or deed shows All Night as the true owner of the property. Accordingly, the applicable statutory period is twenty (20) years, and would run in 2001. Thus, under either the color of title or without color of title, All Night has continuously remained in possession of the subject property for the statutory period. Moreover, the facts indicate that the curb and drainage inlet were located within National Bank's landscaping curb, and visible to all.

Thus, All Night's possession was open and notorious. The facts also indicate that the curb and drainage inlet are solely used by AN, thus satisfying the exclusivity requirement.

Thus, this case will turn on whether AN's possession was in good faith. Trendy Gym would argue that since the title report and survey clearly indicated AN's property lines, and AN constructed over them anyway, this is evidence that the adverse possession was not done in good faith. However, there is nothing to indicate that AN purposefully constructed over the property lines, or otherwise engaged in any intentional, fraudulent, or action in bad faith to obtain title of the property. In other words, there is no evidence to show that AN constructed over the property lines with the intent to obtain the property by adverse possession. As a result, it is likely for a court to determine that AN's possession was in good faith, thereby establishing title by adverse possession.

2. Removal of curbing and drainage inlet

If the court determines that there is adverse possession, then Trendy Gym will not be able to remove AN, or require payment. Once title has been acquired through adverse possession, the adverse possessor is considered to be the true owner of the property. As mentioned above, AN likely established title by adverse possession (title by prescription) in 2001, upon the running of the 20-year statute of limitations. In addition, this can be enforced against subsequent owners, if the subsequent owner is a "successor in interest" - i.e. purchased the land for value.

Moreover, Trendy Gym purchased the property with knowledge of AN's encroachment, and thus was on notice of another interest. Georgia is a race-notice statute. Thus, if a subsequent purchaser obtains title to land with notice of a prior competing interest, their title is not superior. Here, the facts indicate that the title report and survey Trendy Gym obtained prior to closing, revealed AN's interest and encroachment. Thus, Trendy Gym would likely be found to be on notice of AN's prior interest. Nevertheless, it is advisable for AN to bring an action to quiet title to the property, and conclusively establish title to the property by adverse possession.

If the court determines that adverse possession was not properly established, then Trendy Gym has the following remedies available. When a party is wrongfully in possession of property, the "true owner" has two avenues: legal remedies and equitable remedies. If the owner seeks to go the route of a legal remedy, the party wrongfully in possession will have

to pay the fair market value of the property that is wrongfully possessed - Trendy Gym is unlikely to be successful in requiring AN to lease the property. If Trendy Gym seeks to go the equitable route, it will likely go for a mandatory injunction (make AN remove the curb and drainage inlet). A mandatory permanent injunction will only be awarded where: (1) there is a substantial likelihood that irreparable harm will occur without the injunction; (2) threatened injury to Trendy Gym outweighs the threatened harm to AN of the injunction; and (3) the injunction does not disserve the public interest. This is not the case here.

With respect to any equitable relief sought by Trendy Gym, AN could assert the equitable defense of laches. The defense of laches applies when the plaintiff has waited an unreasonable length of time to assert a claim, such that it prejudices the defendant. Here, it has been over 35 years since the curb and drainage inlet were constructed. To assert any claim now would be unreasonable, and thus barred by the laches defense.

3. Permission to construct curbing and drainage inlet

As discussed above, in order to establish title by adverse possession, the adverse possessor must possess the property adverse to and hostile against another's claim of right. In essence, this means that permissive possession or occupancy of the property by the adverse possessor will not establish title by adverse possession. For example, a lease, license, and/or profit are insufficient to establish title to a parcel of land by adverse possession. Thus, if AN was given permission to build the curb and drainage inlet, they will be unable to establish title by adverse possession. In addition, the fact that the permission was given in 1980, before construction occurred, would significantly strengthen the argument against adverse possession.

QUESTION 2 - Sample Answer # 2

1. The basis for which All Night may claim an interest in the property now owned by Trendy Gym.

Encroachments are frequent events where a neighbor's use of their property protrudes on the actual borders on another. The neighbor whose land is being encroached on would claim that there is a trespass. They have legal title in the plot that is recorded and publicly made available and there is an interference of that possession and title.

Encroachments, however, may be excusable in several instances. As Partner mentioned, there is a legal theory to obtain title of land, even if it is not technically yours on record, by waiting a number of years. This is called Adverse Possession. More specifically, this theory of law requires a person to openly, notoriously, and hostilely make use of the land for a required amount of time. In Georgia, this open and notorious possession must actually be pursuant to an honest belief of title. Georgia's time period for the open and notorious possession to confer actual, legal title is a period of 20 years. 7 years if the adverse possessor can point to some writing to show that they believed the land to honestly be theirs.

If All Night were successful in their claim for Adverse Possession, they would be granted the best interest in land they could ask for: title. Specifically, Adverse Possession gives title to the portions of land the adverse possessor actually used. In this case, the space of the two encroachments. The only way to receive title to a whole plot of land from corner to corner as an adverse possession is to show the court some document that made you believe the whole plot was yours over the extended time. That, however, is not seen here. All Night isn't trying to occupy the whole plot, but they are occupying and claiming use of the land these encroachments occupy. As such, All Night would not owe anything to either Trendy Gym or National Bank because adverse possession's purpose is to free up un-used land and give it to the person actively openly using it. While this seems unfair, National Bank - as the owner of the land being encroached - should have been attentive and asserted its title and property rights in these areas that All Night has encroached on. Rather than bringing an action to quiet title to clarify whose land it was and rather than suing All Night for damages or even an injunction from completing construction, National Bank allowed All Night to occupy the land in broad daylight.

Here, All Night has owned its plot since 1979. However, the clock for adversely possessing the slivers of land that All Night encroaches on will start from 1981. This is because All Night did not finish development and construction of the encroaching portions of the land until 1981. Following Georgia law, All Night received a claim under Adverse Possession in 2001 for the actual title of the land that All Right encroached on.

2. Trendy Gym's possible success in requiring All Night to either remove the encroachments or to pay for the use of the encroached areas.

The best way for All Night to have avoided any possible liability would have been if they proactively sued for quiet title in court. Such an action would recognize a successful adverse possession by judicial decree. Even without that action, All Night will not likely have to pay for permission to use the land of their encroachments, nor would they have to remove those structures. First and foremost, as explained above, All Night has a legitimate adverse possession claim in the land occupied by the encroaching parking lot and drainage inlet. What's more, Trendy Gym bought National Bank's land with these encroachments in full sight. There was no misrepresentation or non-disclosure on All Night's part that could give Trendy Gym some claim of equitable relief. Additionally, Trendy Gym does not have any plan to even use the land that is being encroached upon.

As buyer of the land with public records available, Trendy Gym could have avoided this situation by noticing the encroachments and their incompatibility with the recorded deed. What's more, they should take up this action against National Bank. Perhaps this encroachment violates the warranty against encumbrances within the land sale contract. Either way, while it would seem All Night is the malicious party staking claim in land that was not originally within their rights, they have abided by adverse possession and thus annexed the property into their own through actual open, notorious use and possession.

3. The effect of prior permission for All Night to use portions of National Bank's land.

If All Night were to find written permission within their records for the use of National Bank's land, the situation changes from a question of adverse possession to a question of easement. An easement is an agreement between two property owners that allows one owner to effectively use the land of another. A classic example would be a neighbor agreeing to let another neighbor use a trail through their property to access a road. An easement can be either expressly or impliedly created. An express easement needs writing, intent, and notice. An implied easement can result from necessity, prior use, or even prescription (an adverse-possession-like theory). An easement may be eliminated by either written release of the servient and dominant party, merger of the plots of land, the end of necessity, an active prescription interfering with the granted easement, or estoppel. Here, the facts indicate that there was a record that found the permission. This seems to say that there was an express easement created between National Bank and All Night. All Night would then have the ability to use portions of National Bank's land within the scope of the easement. Here, that scope would always remain the same: the amount of space that All Night intruded upon would merely be required to not grow any larger. For this express easement to run with the land - that is, for the easement to bind Trendy Gym as successor - there must be notice. It doesn't seem like Trendy Gym had actual notice of this written easement in the form of the written permission. However, perhaps they had constructive notice by merely seeing open and obvious permanent structures that were intruding upon the land.

Even if there wasn't an express easement, perhaps All Night could have an implied easement through prescription. Like adverse possession, this theory rests on the fact that All Night used the portion of land openly and notoriously to the point it created the easement by prescription. An implied easement through prior use is not likely available because while this theory requires noticeable prior use of the easement (here, the open and obvious structures), it requires that the land was all owned by one owner and sold to a party who noted the owners continued use of the portion of the plot sold. Here, All Night never owned National Bank's plot.

The effect of an easement is that All Night would not have the title that would have been afforded by adverse possession. Rather, they would have had a more permanent license based on contractual permission to use the land in a continuous way. While the title of the encroachment land wouldn't become All Night’s, they would still be able to use the land as long as there wasn't a written release or merger. In terms of an estoppel claim for Trendy Gym to end the easement, as mentioned above, there isn't much of an argument for Trendy Gym to point to in order to prove their rights were being injured enough to require equitable relief. They had at the very least constructive notice of the encroachment and they don't plan to use the portions of the land anyway.

QUESTION 2 - Sample Answer # 3

TO: Partner
FR: Examinee

Date: July 25, 2017

MEMORANDUM

Re: All Night's Property Encroachment

1. Adverse Possession

A person or entity may gain ownership of land, that does not rightfully belong to them, through a process known as adverse possession. Pursuant to Georgia law a person or entity will gain legal title to property, through adverse possession, if the person (1) openly and notoriously possesses the land, (2) exclusively, (3), in a hostile manner, (4) for at least twenty consecutive years if the person possesses the land without color of title, and for seven consecutive years with color of title.

A person or entity openly and notoriously possesses land if it does not hide its possession. Stated differently, a person openly and notoriously possesses land if it is clear to the public that the person or entity is claiming dominion over the land. Exclusive means that the person or entity is the only person who has control over the land during the designated period of time. Hostile means that the person or entity is possessing the land without permission. "With color of title" means that the person or entity believed they possessed the land with legal title.

Here, All Night has full legal title to both the parking lot curb that was built 1.5 feet over its property line, and the private drainage inlet that was constructed five feet over the property line, as the result of adverse possession.

In accordance with the facts, All Night constructed the curb and drainage over its property lines in 1981. Between 1981 and 2016, a period of approximately thirty-five years, All night openly and notoriously possessed the parking lot curb and private drainage, because both were "visible to all." Although the facts do not indicate whether anyone else claimed possession of the parking lot curb and private drainage inlet, it can be safely presumed that All Night was the only entity who claimed possession of the parking lot curb and private drainage inlet. Additionally, because All Night's possession of the curb and inlet were not hidden, All Night's possession would also be considered hostile. Finally, because All Night does not claim that it developed the land through its belief that it had legal title to the land, its possession of both the inlet and drainage, which has spanned for a period of more than twenty years, satisfies Georgia's statutory period for adverse possession. For these reasons, All Night may now claim full legal title to both the curb and drainage through adverse possession. To solidify this ownership, however, All Night needs to file a quiet title action so that everyone in the world may be on notice that All Night is the rightful owner to the curb and drainage.

2. Encroachment Rights

Georgia is a race notice state. This means that the first person to file their deed with the

court is deemed the legal owner of the property. Notice, however, may be actual, constructive, or inquiry. Actual notice means that the party was informed that someone else owns the land. A person is deemed to have constructive notice when a deed is filed with the court. A person is deemed to have inquiry notice when someone else is in possession of the land.

The issue in this matter is whether All Night's adverse possession is enforceable against Trendy Gym. One way that Trendy Gym's rights would supersede All Night is if Trendy Gym is a bona fide purchaser. A bona fide purchaser is a person who purchases land, for value, without notice that another owns the land. Here, Trendy Gym would not be considered a bona fide purchaser because at a minimum, Trendy Gym had inquiry notice that All Night, at a minimum, was in possession of the curb and drainage inlet. According to the facts, it was abundantly clear that All Night's property lines were clearly identified, and that the drainage inlet and curb went beyond those boundaries. Because Trendy Gym could have gleaned this information on its own, a court would not consider it to be a bona fide purchaser. As a result, Trendy Gym's rights to the land do not supersede All Night's now ownership of the curb and drainage inlet.

Accordingly, because All Night has acquired full legal rights to the curb and drainage inlet, through adverse possession, Trendy Gym may not require All Night to remove its curb or drainage inlet or require All Night to pay for such "encroachments" because the land no longer belongs to Trendy Gym.

3. Permission to Construct the Encroachment

The analysis discussed above would substantially change if National Bank had given All Night permission to construct the curb and drainage inlet--largely because it would mean that the curb and inlet were not possessed in a hostile manner. If land is not possessed in a hostile manner, a party may not claim ownership to it through adverse possession. Stated differently, if National Bank had given All Night permission to encroach upon it's land, All Night would not have obtained legal title to the land but an easement.

The question would then become whether the easement ran with the land. An easement is essentially permission from a servient estate to a dominant estate (beneficiary) to use the serviente state's land. An easement is deemed to run with the land if (1) the owner intended for the easement to run with the land, (2) the easement touches and concerns the land, and (3) the subsequent owner is on notice about the land.

Because there is no evidence that National Bank intended for the easement to run with the land, if permission had been granted for use, Trendy Gym would have full legal rights to eject All Night from further use of the curb and drainage inlet upon purchase of the land. Trendy Gym would also have the right to require All Night to pay for the use of the encroachment. This payment for use would be considered a license to use the land for a designated period of time.

QUESTION 3 - Sample Answer # 1

1. Which of the Georgia Rules of Professional Conduct may Helen have violated?

Unaffiliated attorneys sharing office space:
Two or more attorneys who are not in a firm together must not share office space unless they do so in a way that unambiguously puts clients and potential clients on notice of the fact that the attorneys do not practice together. Here, Helen chose to share an office with Lori, another practicing attorney with whom Helen was not in a firm. While it is not clear from these facts how the office is physically set up and whether or not this arrangement notifies clients of their lack of affiliation, Helen's practice of advertising to potential clients that she will handle bankruptcy matters as well--a specialty in which she does not practice herself but in which Lori actively works--is likely to encourage the belief that the two operate in a firm and therefore it certainly militates against a finding that clients are put on adequate notice.

Law firm name:
An attorney or attorneys practicing in a firm are free to call that firm whatever they like, including a trade name, so long as it does not suggest a connection to a government agency and so long as it contains the name of at least one lawyer working in the practice. Here, Helen's chosen name, "South Georgia Law," is not in compliance with these requirements because it does not include her own name, and she is the only attorney in the practice.

Advertising formalities;
Attorneys who wish to communicate with potential clients must do so in writing. Such writings must also contain the word "advertisement" prominently within them to put the potential client on notice as to what they are reading. Despite the fact that Helen had perhaps worked on some of their cases before, as she no longer worked for Big Law Firm when she solicited its clients, she was speaking to them as merely potential clients. As such she was required to communicate to them that her letters were advertisements. It is not clear from these facts whether she did or did not do so, but what is known of the character and content of her letters suggests that she may not have.

Misrepresentation:
An attorney has a duty not to make misrepresentations to clients or potential clients. Misrepresentations include affirmatively deceitful statements and conduct as well as material omissions. Here, Helen misrepresented herself to Big Law Firm's clients. Helen was merely an associate and likely did not interact heavily with the cases of each and every client, but in her letter she suggested that she was vital to all of their cases and was necessary to their continuity. This was both actively deceitful and involved the omission of material information about the junior nature of her position at the firm. Helen also made misrepresentations when she claimed that she would represent these potential clients in bankruptcy matters, omitting the fact that she would not actually be handling such cases herself but instead referring them out to an unaffiliated attorney.

Advertising of contingency fees:
Attorneys who make statements advertising their willingness to work on a contingency fee must also conspicuously display a disclaimer indicating that contingency will not be available in all cases and that some fees and fines must be paid by the client regardless. Here, Helen told the potential clients she was soliciting that she would give them a "no fee unless you win or collect" payment scheme--a contingency fee arrangement--if they hired her within 30 days. There is no indication in the facts that she made any disclaimer, conspicuous or otherwise, regarding the fact that contingency would not always be available.

Referrals:
Attorneys are permitted by the rules to make referrals to other attorneys, but only under very narrow circumstances. For such a referral to be allowable, it must be fully disclosed to the client, and the client must consent to the referral arrangement in writing. Additionally, there must not be a referral fee. Here, Helen has arranged with Lori to enter into a referral agreement whereby she refers bankruptcy cases to Lori in exchange for a fee. There is no indication in the facts that clients will be informedly consenting to this arrangement, and the fee is impermissible.

Spoliation:
A lawyer has a duty not to destroy, and in fact to take reasonable steps to preserve, documents and other physical and digital things that he/she knows or should know could be material to a case that is either pending or that the attorney has reason to believe will be filed. Here, Helen intentionally destroyed the evidence of the letters that she sent to Big Law Firm's clients. Helen should have known that these documents would be material evidence in both a disciplinary proceeding against herself for violation of the rules and a likely soon-to-be-pending suit against her by Big Law Firm for a breach of confidentiality or a non-compete agreement. From these facts, it is not completely certain if Big Law Firm would have any such claim against Helen, but it seems likely, and if so then Helen had reason to know about it.

General dishonesty and bad behavior:
Attorneys also have an ethical obligation not to act in any way that calls into question their fitness to practice law. Generally dishonest actions serve to call this into question. Helen's unauthorized copying of Big Law Firm's client data and work product may or may not be illegal under the circumstances, but it was certainly dishonest and underhanded. This conduct, along with her conduct towards the clients that she contacted and her planned shady referral arrangement with Lori all serve to call her character and her fitness to practice law into question.

2. Which of the Georgia Rules of Professional Conduct may Lori have violated?

Unaffiliated attorneys sharing office space:
Two or more attorneys who are not in a firm together must not share office space unless they do so in a way that unambiguously puts clients and potential clients on notice of the

fact that the attorneys do not practice together. Here, Lori chose to share an office with Helen, another practicing attorney with whom Lori was not in a firm. While it is not clear from these facts how the office is physically set up and whether or not this arrangement notifies clients of their lack of affiliation, Helen's practice of advertising to potential clients that she will handle bankruptcy matters as well--a specialty in which she does not practice herself but in which Lori actively works--certainly militates against a finding that clients are put on adequate notice. Though this ambiguity is created by Helen, if Lori has done nothing to clarify things for the clients, then she will also be held to have violated the rules.

Referrals:
Attorneys are permitted by the rules to make referrals to other attorneys, but only under very narrow circumstances. For such a referral to be allowable, it must be fully disclosed to the client, and the client must consent to the referral arrangement in writing. Additionally, there must not be a referral fee. Here, Helen has arranged with Lori to enter into a referral agreement whereby she refers bankruptcy cases to Lori in exchange for a fee. There is no indication in the facts that clients will be informedly consenting to this arrangement, and the fee is impermissible. Though Helen will be the one making referrals, by agreeing to accept them and to pay a fee, Lori is also implicated in this violation.

QUESTION 3 - Sample Answer # 2

1. Helen has violated many of Georgia's Rules of Professional Conduct (RPC). First, Helen stole the proprietary work of her old law firm when she went there late at night and copied the list of clients, engagement letters, fee agreements, and other forms Big Law Firm had developed. A lawyer is not allowed to commit a crime of moral turpitude, stealing would be such a crime.

Second, Helen's firm name "South Georgia Law" is a violation of the RPC. Lawyers are not allowed to have trade names. The name of the firm should identify at least one partner. Moreover, a law firm's name cannot imply that it is connected with the state in some way. A client could see "South Georgia Law" and think the firm is in some way related to the government of Georgia. This is especially true because "South Georgia Law" was the only way Helen was identified on her business cards, her letterhead, and above the door of her office.

Third, the letter Helen sent to all of Big Law Firm's clients is a violation of the RPC. Helen most likely lied to the clients by telling them that she had worked on all of their matters for the past four years. Because Big Law Firm has twenty-five partners and probably many more associates, it is unlikely that Helen has worked on all of their cases. If she had worked on all of their cases, it was probably in a small way for many of them. As such, her statement is misleading, if not an outright lie. Helen also mis-lead clients by stating that representation in Bankruptcy Court was available, without informing the potential clients that neither her nor someone in her firm would be handling the bankruptcy representation. The RPC do not permit a lawyer to mislead or lie to clients or potential clients.

Fourth, the letter Helen sent to the clients was also inappropriate because it was not labeled as an advertisement. A lawyer can solicit business through the mail, if that lawyer marks all the materials they send out as "Advertisement." Helen did not do this so it is against the RPC.

Fifth, Helen threw away all copies of the letters she sent to the clients two weeks after opening. The RPC require lawyers to keep copies of their advertisements for two years. It seems Helen only kept a copy of it for several weeks. Consequently, this is also a violation of the RPC.

Sixth, Helen's offer to the clients that there is "no fee unless you win or collect" is improper. This is a contingency fee. A contingency fee is where a lawyer collects a percentage of what the client collects. A contingency fee must be in writing and state the basis for calculating the fee. However, contingency fees are prohibited in criminal and family law cases. If Helen is offering to only charge in criminal or family law cases when the client wins, then it is prohibited.

Seventh, a lawyer is not permitted to have an exclusive referral agreement with another lawyer for a fee. A lawyer can make a deal to refer clients if the deal is not exclusive, she tells clients about the deal, and the client consents. However, the lawyer is not permitted to do so for a referral fee. As a result, the agreement between Lori and Helen is prohibited.

2. Lori has violated the RPC by entering into an exclusive referral agreement with Helen for a fee. As discussed above, this is prohibited by the PRC and a lawyer should not pay another lawyer for client referrals. Lori violated the RPC when she entered into the client referral agreement with Helen.

QUESTION 3 - Sample Answer # 3

Question 1

Is the Firm name "South Georgia Law" proper?

A firm name may not contain the name of the State, because such uses imply state sanction law firms. Therefore, the name South Georgia law is improper.

Is the copying of Big Law Firms documents proper?

Since copying occurred after hours, Helen likely did not have permission to copy the files and as such misappropriated Big Law firm's trade secret and or copyrights. Client lists are considered trade secrets in Georgia, and misappropriation of such trade secrets infringes on Big Law Firms rights and as such would be actionable. The use of such client lists to solicit business would be sufficient for Big Law to at minimum seek injunctive relief as well as potential damages.

Helen has not conducted herself in accordance with the standards set forth for attorney conduct.

Was the letters Helen sent to Big Law firms clients proper?

Direct solicitation of clients is not proper, however an attorney may advertise via mail, if all letters and pages therein are clearly marked as being advertisements. Here there are insufficient facts to say if the letters were so marked. Further an attorney may solicited work directly from other attorneys, family, and persons which she has had previous dealings with.

Here Helen had not been authorized to communicate directly with the clients and as such would not have been able to establish a relationship that would allow her to directly solicit work. Arguably if Helen only sent the letters to client attorneys she may not have improperly solicited work.

However, regardless of whether her method of sending the letters where proper, and attorney cannot advertise in a manner that is likely to be misleading. In her letters Helen stated that she had managed their files, was familiar, and had worked on their matters for the last four years, and this rises to the level of misrepresentation, because it leads the reader to believe she had worked on their matters in her capacity as an attorney, where in fact she only been an associate for one year. Further she worked with only one of the partners of the firm, thus she would at most only be familiar with those clients, but here Helen copied the entire firm client list and sent letters to ALL. Thus she clearly misrepresented herself in a misleading manner to the clients, and it is impossible for her to offer "continuity" for all these clients.

Arguably a thirty-day time limit, for those clients she is familiar with, would be insufficient.

Finally, in Georgia attorneys are required to maintain and store copies of their advertisements for two years. Here Helen violated that rule by destroying all copies after just two weeks.

Consequently, the letters sent to the clients are improper methods of solicitation.

Was it proper to hold herself out as being able to represent in Bankruptcy court?

It is improper to hold oneself out to be competent in an area of law in which one is not actually competent. Here Helen holds herself out as being able to represent in Bankruptcy court, while intending to delegate to work to Lori with whom she shares offices. Further it is improper to delegate work to another attorney without client consent. Finally, it is not proper for an attorney to have exclusively refer clients to a particular attorney, here Hene intended to refer all bankruptcy work to Lori.

Thus Helen is improperly intending to delegate work to other attorneys without client consent, and she is holding herself out to be competent in a difficult area of law in which,

due to her one year of experience likely is not well versed.

Is Helen's fee structure proper?

A fee structure must be clear and explained to the client, preferably in writing. Here Helen essentially proposes a contingent fee, by saying "no fee unless you win or collect," such fee structures must be in a writing that clearly explains the basis of calculating a potential fee to be paid. Further, there is no determination of who would pay fees associated with representation. Typically, even with a contingent fee arrangement, clients must still pay those fees.

Here Helens fee structure does not meet the requirements of explaining their basis of calculation, and as such is not proper.

Question 2

Is it proper for Lori to pay Helen a referral fee?

Although, referring clients to other attorneys is not improper, if it is not exclusive or under a reciprocal referral agreement, It is not proper to pay a referral fee to be paid to the referring attorney.

As of now, if Lori has not paid a referral fee to Helen, she has not violated any rules of professional conduct.

It is not improper for Lori to share office space and share the costs of carrying such office space with Helen, and none of Helens violations of the rules of professional conduct will be imputed to her if they maintain separate practices

QUESTION 4 - Sample Answer # 1

1. A legally binding contract will come into effect where there is an offer and acceptance supported by consideration. Here the relevant offer is Aaron attempting to purchase FarmTech from Frank and the relevant consideration from Aaron is $7.5 million and from Frank is the transfer of the company to Aaron.

The issue here is whether the offer has been accepted by Frank.

It is arguable that the letter of intent constituted a condition precedent to a binding contract, that is, that the written agreement had to be entered into by March 15, 2017. If that is the case, as the condition precedent was never fulfilled, there can be no contract.

The better view is that there is a contract and it is oral. We know that Aaron had made the offer to Frank to buy FarmTech for $7.5 million. After Aaron sought to extend the deadline

for entry into the written agreement, it could be argued that Frank waived his right to rely on the condition precedent by stating that he did not think extending the deadline for the written agreement was necessary and stating "we have a deal, you have my word." These actions along with the memorandum Frank sent to his employees informing them that purchase of FarmTech was imminent is evidence that supports an argument that Frank agreed to be bound and waived any condition precedent. There is therefore an enforceable contract to sell FarmTech.

The agreement need not be in writing as the statute of frauds is not engaged. Of relevance, this is not a contract for the sale of land, goods over $500 or one that cannot be performed in one year or less. As the purchase is for cash, it is likely that the contract can be performed very quickly and in any event in one year or less.

The fact that Aaron incurred costs by arranging financing and contracted with a business consultant is not relevant to whether a contract was formed unless one tries to argue that detrimental reliance is a consideration substitute here. However, we know that the consideration is $7.5 million dollars and the transfer of the company to Aaron, so consideration substitutes need not be examined.

2. (a) In order to grant an order for specific performance a court must be satisfied of the following general matters for injunctive relief (as specific performance is an injunction):
- Monetary damages are inadequate - see below.
- There is a protectable property interest or legally enforceable right - there is a binding purchase and sale agreement for FarmTech.
- Relief is feasible and the hardships are balanced (we assume this as the court has jurisdiction over the parties and would undertake the balancing exercise.)
- No valid defenses exist - here there do not appear to be any.

In addition to the above general matters, specific performance may be ordered where:
- A contract is in existence - this is satisfied (see above.)
- There are no outstanding conditions precedent to performance - this is satisfied as the question states that there is a binding sale purchase and sale contract.
- There is mutuality of remedies. This means that Aaron has the right under the contract to force Frank to sell and Frank has a right to force Aaron to pay - this appears to be satisfied here too.

The question then comes down to whether monetary damages are inadequate in this case. This may be argued both ways. On the one hand, courts will generally only order specific performance for land sale contracts as land is unique or for goods of a unique character like a painting by a famous artist (subject of course to bona fide third party purchasers.) If that is the case, Aaron will only be able to claim monetary damages.

On the other hand, it could be argued that the company as a separate legal entity is akin to land in that it would not suffice to substitute FarmTech for money given the particular characteristics of FarmTech. Further, expectation damages here are uncertain as even though Frank had $5 million per year in revenues and Aaron thought FarmTech might be

worth $10 million to his business, the combined effect of FarmTech on Aaron's business is uncertain and untested. There are no other facts that indicate an appropriate measure of damages. Therefore, as monetary damages are inadequate as expectation damages cannot be measured with certainty, it could be argued that the court should order Frank to specifically perform the contract.

(b) If Aaron had to seek monetary damages from Frank, the initial starting point is expectation damages or benefit of the bargain. This is unlikely to be successful here because expectation damages are required to be reasonably certain. Where future business interests are considered, past profits may be considered if they can be reliably established, say over a period of twelve months or more. Here there is no such indicia of reliability. Aaron simply believes that FarmTech might be worth $10 million to its business but this is not supported by any evidence.

It could be argued that as Frank's revenues exceeded $5 million per year over the last few years that this is an appropriate amount of damages, but for how many years would this calculation be made? Further it is unclear whether that $5 million can be adequately accounted for in combination with Aaron's existing business to accurate calculate lost profits that might have been obtained.

A breach of contract will always allow for some recovery of damages though. Here reliance damages are likely to be permitted to the extent that Aaron incurred costs by arranging financing and contracted with a business consultant as these can be tied directly to the contract. Further, the measure of damages can be reliably measured.

Consequential damages would not be permitted as there is no indication that Frank was on notice of any particular circumstances that hinged on this sale that would lead to a loss of profits by Aaron.

3. Whether Aaron has a claim against Betty for encouraging Frank not to go through with the contract will depend on the established facts. It is assumed that such a claim would be made for tortious interference with business relations. In Georgia, such a claim may be made where the interference unreasonably impacts on the business relations between two parties and is done so purposefully and without qualified privilege. Qualified privilege includes matters such as ordinary business competition. However, here it is unlikely that Betty has that privilege as she is not competing with Aaron in the agency business.

The next issue will be whether there is in fact a contract. This is because in Georgia, a claim may only be made for tortious interference with business relations where the tortfeasor is a "stranger to the contract." This presupposes that there is a contract in existence. If there is no contract, it is unlikely that Aaron would prevail. If there is a contract, it is likely that Aaron may prevail as Betty is a stranger to the contract as there appears to be nothing that links Betty to any aspects of the transaction or contract.

QUESTION 4 - Sample Answer # 2

1. Under Georgia Law, a legally enforceable contract requires mutual assent and consideration. Mutual assent is a meeting of the minds based on an objective standard where an offeror tenders an offer to the offeree creating the power of acceptance and the offeree accepts. Consideration is bargained-for exchange of legal value. If a contract meets the requirements of mutual assent and consideration, it is valid as long as the defendant has no valid defenses. Because this is a sale of a business and not the sale of goods, the common law applies and not the UCC. The UCC applies where the sale is predominantly goods, here, the sale is of a business that makes software, which is not a movable good under the UCC.

Here, Frank offered to purchase FarmTech for $7.5 million, which constitutes a valid offer creating the power of acceptance in Frank. Frank and FarmTech then entered into a letter of intent on January 15, 2017 for Frank to sell FarmTech to Aaron Agriculture for $7.5 million cash on the condition that they enter into a final written contract before March 15, 2017. This letter would not constitute an acceptance because it was merely stating the parties' intent to enter into an agreement. If the deadline passed with no written agreement, there would be no enforceable contract. However, on March 15, when Aaron approached Frank and Frank told him "we have a deal, you have my word," those words could viewed as an acceptance to Aaron's offer, thus creating an oral contract. Even though the letter of intent required a written agreement, the letter was not in itself an enforceable contract. Thus, the parties were no bound to it. By orally accepting Aaron's offer to buy FarmTech for $7.5 million, there was a meeting of the minds satisfying the mutual assent requirement. There is also consideration in that Aaron's promise to pay induced Frank's promise to sell his company and vice versa. The next issue is whether an oral contract is enforceable for the sale of a business.

The Statute of Frauds requires that some contracts be in writing to be enforceable. The following contracts must be in writing under the Statute of Frauds: Surety contracts, Executor's contracts to pay estate debts, contracts for the sale of land, contracts in consideration of marriage, contracts that cannot be performed within one year, contracts of the sale of goods of $500 or more. Here, because this is a sale of a business, the sale is not within the statute of frauds and thus does not require a writing to be enforceable.

There is an issue as to whether enough material terms have been agreed upon to make an enforceable contract. The agreement between Frank and Aaron consists only of a price term for the sale of a business worth millions of dollars. Most business sales such as this require contracting on many more terms. However, based on the parties' intent at the time the agreement was made and subsequently, they intended to enter into a agreement under these terms and agreed to be bound by them. Aaron sought financing and the help of a business consultant. Aaron told his employees that he was selling the business. These actions demonstrate the parties' intent to be bound and a court should find the contract enforceable despite the lack of many terms in the agreement.

Even if a court finds that there is not an enforceable contract, Aaron likely has a promissory

estoppel action against Frank. Where there is no enforceable contract, a plaintiff may still seek damages or to enforce the promises made under a theory of promissory estoppel. Under promissory estoppel, where one party makes a promise that he should reasonably foresee the other party relying on and the other party justifiably relies on that promise to detriment, a court may enforce the promise or grant some relief to prevent injustice. Here, Franks oral acceptance of the offer should estop him from denying that existence of a contract because it was reasonably foreseeable that Aaron would rely on it. Because Aaron did rely on it, by arranging financing and hiring a consultant, injustice would result by not enforcing the contract or at minimum granting Aaron damages for the costs he incurred in reliance on Frank's oral acceptance.

2. (a) To grant specific performance, there must be: (1) a valid contract, (2) all conditions of the contract must be met, (3) the legal remedy must be inadequate, (4) there must be mutuality of remedy, (5) the contract must be enforceable, (6) and there must be no valid defenses. Here, if the court finds that there is a valid purchase and sale contract then the first element is met. Under the second element, it is not clear whether all of the conditions have been met, but it may met if Aaron has obtained sufficient financing to pay the purchase price. Under the third element, a legal remedy is inadequate where the subject matter of the contract is rare or unique. Although FarmTech is a very profitable business, there is nothing in the facts that suggests the business is unique. The business may have comparable competitors. However, the fact that it is a business may make it unique.

Under the fourth element, there is likely mutuality of remedy because if there is a binding contract, Aaron could be made to pay the purchase price. Under the fifth element, the contract is likely enforceable because Frank has not entered into any other agreements with other purchasers yet and the court has jurisdiction over the parties. Finally, under the sixth element, valid defenses to a contract include fraud, impossibility, frustration of purpose, commercial impractability, incapacity, and the statute of frauds. None of these defenses likely applies here. The best argument against specific enforcement would be that there is an adequate legal remedy. The court could grant Aaron money damages as discussed below.

(b) Contract damages for a material breach, where breach prevents a party from gaining the benefit of his bargain, are expectation damages. Expectation damages put the non-breaching party in the position he would have been in had the breaching party performed under the contract. A court may also award consequential and incidental damages that can be calculated with reasonable certainty and were foreseeable at the time the contract was entered into. Here, Aaron's expectation damages would be difficult to calculate. At minimum, the expectation damages would be the fair market value for the company at the time of purchase minus the purchase price. If Aaron was correct in thinking the company was worth $10 million, his expectation damages would be $2.5 million. In addition, he may be able to recover the costs of acquiring financing and hiring a business consultant since such actions should have been foreseeable to Frank at the time they entered into the contract. Punitive damages are generally not awarded in contract cases.

3. Aaron may have a claim against Betty for intentional interference of a business

opportunity. Under Georgia law, a person may be liable for interfering with the business opportunity of another if the plaintiff had a valid contract or expectancy, the defendant intentionally interfered with that contract causing damages, and the defendant did not have a privilege. Here, Aaron had a valid contract with Frank for the sale of Frank's business, Betty knew about the contract and encouraged Frank to terminate the contract, and Aaron has suffered damages as a result of the interference. However, this action is narrowly construed in Georgia and a defendant will not be held liable if she had a valid competitive business interest. Betty is an agent for Business Broker, so she is not directly competing with Aaron to buy Frank's business. She is simply seeking to sell Frank's business to someone else. Accordingly, Aaron may have a claim against Betty for interfering with a valid business opportunity.

QUESTION 4 - Sample Answer # 3

1. Aaron probably has a legally binding contract with Frank to sell FarmTech for $7.5 million, which Frank has breached. For a valid contract, there must be an offer, acceptance, and consideration. The contract must be sufficiently definite to indicate a meeting of the minds. Here, the purchase of FarmTech appears to be a valid option contract, giving Aaron the option to purchase FarmTech for $7.5 million. Frank provided consideration by agreeing not to sell FarmTech to anyone else. Aaron may have provided consideration by setting the money aside or making the future promise to pay. However, a court may find that Aaron did not provide sufficient consideration on January 15. Generally, in an option contract, the offeror gives some consideration (often payment) to the offeree so that the offeree keeps the option open. It may be more reasonable to consider the letter of intent to be an offer that Frank left open for Aaron until March 15, 2017. However, in this case, a contract would still have been formed when Aaron approached Frank with a counter offer on March 1 (buying FarmTech for $7.5 million on April 15) and Frank accepted, telling Aaron that "we have a deal" to sell FarmTech for $7.5 million by the original date of March 15. Even if the court did not think that Aaron had originally provided consideration, at that point, Aaron began acting in reliance, which is a substitute for consideration. When Aaron arranged financing for the purchase of FarmTech and hired a business consultant, he acted in reliance. At that point, a court is likely to find consideration. Frank's letter to his employees informing them that the purchase of FarmTech was imminent is further evidence that Frank intended to enter into the contract with Aaron. This is not parol evidence as it arises after the contract. Since there is an offer, acceptance, and consideration, and no defenses apply, Aaron has a legally binding contract to purchase FarmTech from Frank.

Frank will probably claim that the written agreement was a condition of the contract and, therefore, his performance was excused on April 1 because the written agreement was due on March 15. While coming to a written agreement may have been a condition of the original offer, once Frank stated "we have a deal", he seemed to remove that condition -- he did not say "if your terms are reasonable, we will have a deal". Therefore, Frank's performance is probably not excused by the lack of written agreement up to this point.

Frank is likely to argue that the contract violates the Statute of Frauds, as it was an oral

agreement. In Georgia, written contracts are required in certain circumstances, such as contracts for land, marriage, and goods over $500. The sale of a company does not qualify as "goods" under the UCC, and no other circumstances apply. Therefore, the Statute of Frauds does not bar this contract.

2. (a) Aaron could ask the court for the remedy of specific performance, but he is unlikely to be successful in this case. Specific performance is reserved for unique goods, such as goods that are made specifically for the buyer, or land, which is always considered unique. Because specific performance is an equitable remedy, courts are reluctant to impose it unless manifest injustice would result otherwise. FarmTech is arguably unique in that it represents a one-of-a-kind software program that Aaron was planning to merge into his businesses after the sale. However, because specific performance is a rarely imposed and extreme remedy, and because the loss of FarmTech can be quantified with money damages (as discussed below in 2(b)), Aaron is more likely to receive monetary damages.

(b) If Aaron seeks money damages for Frank's refusal to sell FarmTech, he should seek $2.5 million, plus incidental costs. Compensatory damages seek to give the aggrieved party the "benefit of the bargain." One way to measure the benefit of the bargain is the difference between the contract price and the market price. In this case, Aaron sought to pay $7.5 million for FarmTech, but believed it could be worth $10 million in value to his businesses. If Aaron can justify this figure with specifics and documentation, he would be best off asking for $2.5 million. Aaron may also want to plead reliance damages -- the costs of arranging financing and contracting with a business consultant. However, a court is unlikely to award both expectation and reliance damages, as this would represent a windfall to the plaintiff: if Aaron had successfully bought FarmTech and made the $10 million, he still would have had to arrange financing and contract with a consultant, so it would not be fair to give him both. If, however, Aaron now must break the contract with the business consultant and accordingly pay a termination fee, he could fairly recover that termination penalty as an incidental cost.

3. Aaron does not have a contract claim against Betty. Aaron does not appear to have ever met or spoken to Betty, and there is not a contract between them.

Aaron may have a tort claim against Betty. Betty's conduct will certainly not rise to the "outrageous" level necessary for intentional infliction of emotional distress; plus, there is no evidence Betty intended to inflict emotional distress. However, Betty may have tortiously interfered with Aaron's business relations. To be liable, the tortfeaser must knowingly and intentionally interfere with a person's business in order to cause them economic harm. There must be causation and damages. Causation and damages are present, because Betty's actions foreseeably cost Aaron a significant sum of money.

However, Betty probably does not have the requisite intent for the tort, because she probably acted for her own economic gain, rather than to cause Aaron economic harm. Generally, if the alleged tortfeaser is merely pursuing his own economic gain, this would not qualify as tortious interference with business.

MPT 1 - Sample Answer # 1

Statement of the Case - Statement of Facts - Body of the Argument

Allied's provision of mental health services to probationers--including their failure to provide appropriate services to female probationers--is a state action. Determining whether an individual's conduct is state action is a fact intensive question, but there are two basic tests. First, private conduct may be state action where the private entity "exercises a function that has traditionally been a public or sovereign function." Lake.

Second, private conduct may be "state action when the state exercises its coercive or influential power over the private actor or when there are pervasive entanglements between the private actor and the state." Lake. In addition, under either test, the plaintiff must show a nexus between the state action and the claim. Both tests are met here, and there is a sufficient nexus.

1. Because criminal punishment--including probation--is traditionally an exclusive government function, Allied's provision of mental health service to probationers is state action.

Allied's provision of mental health services to persons placed on probation is a state action under the public function test because criminal punishment--whether jail, probation, or a fine--is traditionally an exclusive government function. At issue is whether services connected with probation are traditionally an exclusive government function.

Under the public function test, a private actor exercising a traditionally exclusive government function will be subject to constitutional limits while performing that function as if the private actor were a state actor. Lake. The state's power to enforce its criminal laws and punish violations is one such traditionally exclusive government function. Thus, a private doctor providing health care to prison inmates is a state actor because the "state is required to provide medical care to those it imprisons." Lake, citing West. Likewise, an arrest directed by a private entity is a state action because "[o]nly the state has the power to deprive person of their freedom by arresting them." Lake, citing Camp.

Here, the provision of mental health care as a condition of probation is equivalent because, like an arrest, the terms of probation are a deprivation of a citizen's freedom. The government has the exclusive power to set the terms of probation. As § 35-210 provides, "the court shall determine the conditions of probation." The Director of the Probation Services Unit of Allied acknowledged that the terms of probation are a restriction on a person's liberty similar to jail. Deposition. Because the government has traditionally had the exclusive power to impose criminal sentences, the provision of probation services is a traditional government function and thus a state action.

Allied may argue that the provision of probation services is not an exclusive government because it can expressly be delegated to private actors through statute and because it is more similar to providing health care to private citizens. Neither argument is persuasive.

First, § 35-211 does expressly authorize counties to contract with private entities to provide probation services. This, however, is not dispositive. For example, in Lake, the court found that a lottery was not a traditionally exclusive government function because it was similar to private gambling--not because the state had contracted with a private entity. In contrast, here, there are no similar private actors providing probation services, so the mere authorization of private contracting does not diminish the historically exclusive government nature of probation. Second, Allied may argue that its provision of mental health care is more similar to a privately operated hospital than a prison. This ignores the true nature of these services. Rita Peek and others are not seeking mental health care from Allied because they want mental health care, as they would with a private hospital.
Rather, they are seeking mental health care from Allied because it is a term of their punishment for the crimes they committed. Because criminal punishment is traditionally an exclusive government function, the terms of that punishment are as well.

2. In the alternative, the government's extensive oversight and control of Allied's probation services creates a sufficient entanglement that Allied's services are state action.

The state and county exert significant control over Allied's provision of mental health services through state statute, county approval and direction of services, and public officials on Allied's board of directors, such that the state and county have "exercised coercive power or ha[ve] provided such significant encouragement . . . that the choice must in law be deemed to be that of the state." Rendell-Baker. At issue is the extent of the state and county's influence over Allied's provision of mental health services.

Under the state coercion test, a private entity will be deemed to be a state actor when "the state exercises its coercive or influential power over the private actor or when there are pervasive entanglements between the private actor and the state." Lake. Mere regulation of the private entity is not sufficient. Thus, a private school's employment decisions are not state action simply because of the extensive state regulation of education--regulation that was not relevant to the employment decision. Rendell-Baker. In addition, merely entering into a contract with a private entity is not sufficient. Lake. On the other hand, the acts of a private festival organizer were deemed state action where the city provided the festival grounds at no cost, city employees were closely involved in festival planning while being paid by the city, the city promoted the festival, and the city's airport personnel were involved in the festival's air show. Camp. Likewise, the decision of a high school athletic association was deemed state action where the board of directors was primarily representatives of public schools, the association operated athletics for the state's public high schools, and the State Department of Education formally adopted the association's rules. Brentwood.

Here, the state and county regulate and control Allied's provision of probation services. The state regulations in § 35-211 create requirements for Allied, for Allied employees, and for the county's overseeing of the program. Any entity providing probation services must be a nonprofit, and individuals providing those services must possess a bachelor's degree. More importantly, the entity must receive the county's approval of an annual Plan of Services, of an annual report of services provided, and of quarterly reports. Allied's director of Probation Services Unit confirmed that Allied provides and receives the county's

approval for these reports. The probation services are entirely funded by the county (including fees paid by probationers as a term of their probation). The terms of the probation are determined by the sentencing judge, such that Allied must "carry out whatever the judge orders." Deposition. In addition to these means of control, two public officials (a county judge and the director of public health services) sit on Allied's board of directors. As in Brentwood, public officials on the board of directors increases the likelihood of state control. This control is more than the mere regulation that the court found in Rendell-Baker or a normal contractual relationship as in Lake. As a result of the state statute, the county approval requirements, and the county funding, Allied is sufficiently controlled by the county that its actions are state actions.

Allied may argue that the county does not have much functional control because it only approves quarterly and annual reports. On a day to day basis, Allied does not deal closely with the county. However, this ignores the county's real control over the operations. In addition, while only 2 of the 11 board members are public officials--in contrast to Brentwood, where the board was primarily public officials--these two members probably have more say over the probation operations because they were added to the board when Allied began providing probation services.

3. The county's control over the quarterly lists of probationers awaiting services creates a sufficient nexus between the reason there is state action and plaintiff's complaints.

The county's quarterly approval of the lists of probationers awaiting services is closely related to either reason for finding state action--the traditionally exclusive government function of punishing criminal conduct and the county's control over Allied--meeting the final prong of the Rendell-Baker test. At issue is whether the conduct giving rise to plaintiff's claim--the means of providing mental health services--has a nexus with the state's traditional function or control of Allied.

Under Rendell-Baker, there must be a nexus "between the state and the challenged action," regardless of whether there is state action under the public function or control test. There is no nexus where the plaintiff is challenging conduct unrelated to the state's control of the private entity or to the traditional government function. Thus, for example, a plaintiff challenging her termination must show a government connection to the private entity's employment practices. A contract with the government unrelated to employment is not sufficient.

Here, the plaintiffs are challenging Allied's provision of mental health services, which is closely related to either reason for finding state action. The provision of mental health services is a condition of probation, so it is closely related to the traditional government function. In addition, the county exercises its control over how Allied provides mental health services to probationers, including approving a list every quarter with the probationers who have yet to receive service. Thus, the plaintiff's claims are closely related to the county's control as well.

MPT 1 - Sample Answer # 2

Argument

Allied Behavioral Health Services has been acting under the color of law by providing probationary services to Union County parolees and is therefore subject to 42 U.S.C §1983. Under Franklin Law, a private actor acts under color of law when one of two tests and a nexus requirement are met in order to show that the State is responsible for the specific conduct of which the plaintiff complains. The two tests are the Public Function Test and the Pervasive Entanglement Test. Here, plaintiff will show that the conduct of Union County and Allied Behavioral Health Services meets the criteria of both tests and satisfied the additional nexus requirement such that the Court can find that the defendants were acting under color of law under either of the tests set out by Franklin law.

I. Where the County delegates probational services to a private entity that must carry out the orders of the sentencing court, a private actor is engaged in a public function delegated by the State and the Public Function Test has been met.

The defendants are a private actor engaged in a traditionally public function that has been delegated to them by the State of Franklin through Union County Probation Office.

Under Franklin law state action exists where a private actor is engaged in a public function delegated by the state. (Mega). In West, the Supreme Court found that when a doctor contracted with a state to provide medical care the state was required to provide, the doctor became a state actor. (Mega citing West). In Camp, the Court of Appeals for the 15th Circuit found that a nonprofit entity was a state actor when the Police department was instructed to follow directions given by the nonprofit regarding security and arrests because only the state has the power to deprive persons of their freedom by arresting them. (Mega citing Camp). In the present case, Franklin Criminal Code §35-211(a) requires the County to provide probational services but allows those services to be delegated to a nonprofit entity. Union County has delegated these probation services for misdemeanors to the defendants, Allied Behavioral Health Services (Allied). Allied is required to carry out these services however the Court instructs them but the parolees are ultimately bound by what Allied decides. (Deposition of James Simmons). Since the County is required to provide these probationary services but has delegated them to Allied, Allied is much like the doctor in West. Furthermore, since only the State, via the court and county, has the ability to deprive persons of their freedom by placing them on probation, Allied is must like the nonprofit entity in Camp. These circumstances make Allied a state actor because it is engaged in a purely public function that has been delegated by the State.

The defendants may argue that what constitutes a public function must be narrowly tailored and that mental health counseling like what is provided by Allied is not a public function under the law. In Mega, the Court of Appeals for the 15th Circuit held that courts must narrowly construe public functions to include only those traditionally the exclusive prerogative of the state. (Mega). They found that even though the state delegated the operation of the lottery, the private entity that operated the lottery was not a public actor

because operating a lottery is not a traditional function of state government. This is not the case here. While providing mental health services alone is not a traditional function of state government, only the State of Franklin has the power to sentence someone to probation and set conditions of probation. (Deposition of James Simmons). Since Allied is tasked not just with providing mental health services but also overseeing the probation of the parolees, it has been delegated a traditional state function. Thus, the Public Function Test is met.

II. Where a private entity is providing probationary services and must submit quarterly and annual reports of those services to the County for approval and is bound to follow state law and court orders in its daily operation of those services, there are pervasive entanglements between the State and the private actor and the Pervasive Entanglement Test is met.

There are pervasive entanglements between the defendants and Union County such that the decisions of Allied can be deemed to be that of the State. Under Franklin law, when a state regulates, encourages, or compels the private entity this amounts to excessive entanglement which makes the private entity a state actor. In Rendell-Baker, the Supreme Court found that the State's extensive regulation of education did not make a private school a state actor because the state did not regulate, encourage, or compel the private board of trustees to fire employees. (Mega citing Rendell-Baker). In contrast, in Brentwood, the Supreme Court found that the Association was a state actor when the board of directors was composed primarily of representatives of public schools, the board effectively operated the sports program for the public high schools, and the State Dept of Education adopted the Association's rules for the public school sports program. (Mega citing Brentwood). These circumstances showed the State and Association were pervasively entangled. (Id.). The circumstances of the present case are much more akin to Rendell than Brentwood. Here, FCC §35-211(b)(2) requires Allied to receive approval from the County Probation Officer of an annual Plan of Services as well as meet all other requirements under the Code, including minimum requirements for employee qualification. Furthermore, the court, and therefore the state, is directly involved in sending parolees to Allied. The plaintiff's sentencing order explicitly says, "the Defendant must report to Allied Behavioral Heath Services for those services ordered by this Court and any services ordered by the County Probation Officer." Finally, 100% if the probation unit at Allied is funded, by county money and fees paid by probationers as ordered by the Court. The state is regulating and encouraging Allied as the court suggested in Brentwood. The state plays a very active role in the probation program at Allied and exercises extensive control through court orders, state statute, and funding. Therefore, the state and Allied are pervasively entangled and the second test is met.

The defendants may argue that the relationship with Allied is merely a normal state contract that does not amount to extensive entanglements as well as point out that a majority of the Board are not public representatives. While it is true that the State does not involve itself in the day to day conduct of Allied, the county must approve the quarterly and annual reports. Furthermore, Allied is bound by whatever the court orders and is not free to deviate from this order when supervising parolees. Finally, while only two of the eleven board members are public officials, those board seats were created when Allied began operating its probation unit. (Deposition of James Simmons). Because Allied is not free to deviate

from the court order, and the Board was expanded explicitly to allow for more input from the state, the pervasive entanglements are still present.

III. Where the County continuously approves reports showing the majority of female parolees are disproportionally denied services required by the terms of their parole, there is a connection between the State and the denial of probationary services such that the Nexus Requirement is met.

There is a significant connection between the state action and the shortcomings of Allied such that it is fair to treat the actions of Allied as the actions of the State itself. Franklin Law requires a nexus between the state and the challenged action of the defendant such that the offending conduct must be connected to the state's influence over the private actor. (Mega citing Rendell-Baker). This can be shown if the private actor involves the state in the decision. Such a nexus exists here. Under FCC §35-211(b)(4), Allied must submit quarterly reports listing the names of probationers served during that quarter and the services provided to those probationers. The County Probation Officer must then approve those reports. Additionally, under FCC §35-211(b)(5) Allied must submit to the County Probation Office an annual report of services provided and all expenses incurred and receive approval of that report from the County. During the last three quarters Allied's reports, approved by the County Probation Officer, showed Ms. Peek was on the waiting list for counseling services. (Deposition of James Simmons). These same reports show that 90% of female parolees are never given the chance to start counseling within the probation term and 70% must be given an extension of their parole in order to complete the counseling Allied must provide them. (Deposition of James Simmons). Finally, 75% of male parolees receive and complete counseling within the period of their probation without needing an extension. (Deposition of James Simmons). The County continuously approves reports that show this extreme discrepancy between female and male applicants without requiring any action by Allied. This is a sufficent nexus under Franklin law and thus in conjunction with the two tests discussed above allows the Court to find that Allied has acted with the color of law and is subject to 42 U.S.C. §1983.

MPT 1 - Sample Answer # 3

To: Examiner From: Applicant
Re: Argument Section of Brief

Statement of the Case:
Statement of the Facts:
Legal Argument:

Allied Behavioral Health Services' Actions with Regards to Peek Constitute State Action Due to the Public Nature and Terms of the Provided Services.

Overview:
At issue is whether or not Allied Behavior Health Services (Allied) may be held liable for

damages under 42 USC 1983 which entitles plaintiffs to a civil remedy for the deprivation of constitutional rights. In this case, Ms. Peek was wrongfully denied probation services provided by Allied on account of their discriminatory gender-based policies of giving men preference over women to receive mental health counseling services. Reception of mental health counseling was a condition of Ms. Peek's probation and the failure to receive such services would constitute a violation of her probation terms. Pursuant to Franklin Code 35-211, Union county contracted with Allied for services related to probation. The Plaintiff will show that Allied engaged in a public function and there is a close nexus between the state and the privately behavior.

Under Applicable Franklin and Federal Law, the Relationship Between Allied and the State Makes Actions by Allied Reasonably Attributable to the State and Therefore Relief should be granted.

Franklin should follow the U.S. Court of Appeals precedent set forth in Lake v. Mega Lottery Group (Lake) in analyzing the applicable rules of law for this case. In Lake, a private lottery group contracted with the state to operate state lottery functions. Lake, an employee of Mega Lottery Group, was fired and brought suit alleging that she was denied due process for her termination. At issue was whether or not Mega's actions constituted state actions entitling Lake to relief - the court concluded Lake was not entitled to relief under 42 USC 1983 and set forth rules for determining whether constitutional safeguards should be imputed to private actors conducting state functions.

The Court in Lake relied on Rendell-Bakr v. Kohn which articulated the appropriate test.

Constitutional protections will protect those harmed by private entities when it is fair to say that the state is responsible for the offending conduct (Lake). The Court in Lake presented two tests and an additional nexus requirement in order to hold the private entity liable.

State action exists where the private actor was engaged in a public function delegated by the state (Rendell). In this case, Allied's conduct was a public function. Probation services are typically carried out by the state, so by merit of the contract between Allied and the state to conduct probation services, Allied agreed to take on what has been a traditionally public function. Franklin Code 35-211 requires counties to appoint County Probation Officers in order to provide probation services either directly or through other entities. The statutory requirement imposed by the state legislature on the county governments necessarily makes probation services fall under the ambit of state action. Probation services would not be required otherwise. Additional case law expands on this idea. In West v. Adkins (West) a private doctor was a public employee for purposes of providing medical care to inmates in state prisons. In West, the government delegated a government role to care for wards of the state with a private entity - this is indistinguishable from the case at bar where the government did the same thing. Allied, like the doctor in West, contracted with the government to provide services normally carried out as a public function of the state. Both of these cases can be distinguished from the holding in Lake, because while providing medical services and probation services are functions only of the state, many entities engage in lottery operations. The operation of lotteries is not confined to state

actions. No other entities beside government actors put citizens on probation or incarcerate inmates and provide them with medical care. In his deposition, Allied's Director admitted that the probation services are funded by the county and fees paid by probationers. Since no other sources of income fund the probation services such as donations, grants, or anything else, Allied's behavior looks even more like state action because it is funded by the state itself or by funds that the state ordered probationers to pay. Additionally, Allied's Director admitted that no other services are offered other than what the court orders. Allied seems to be acting merely as an extension of government as a result, not a private actor that conducts its business with any measure of autonomy. Allied appears simply to be an extension of the judicial system of Union county. The worst possible conclusion would be to posit that Allied can effectively increase the sentences of its clients by failing to provide services, as it has done in this case, and force the court's hand in increasing penalties. As such, Allied is engaged, at minimum, in a public function.

A second prong of the test addresses entanglements between the private actor and the state. Stated simply, the rule in Rendell states that a private actor engages in state action when the government uses its coercive or influential powers over the private actor or there are pervasive entanglements. In this case, the Court has ordered that Peek receive mental health counseling within 18 months, but Allied's discriminatory practices make that an impossibility. This denial amounts to the state setting requirements for probation and then denying the probationers from meeting those requirements.

As discussed above, pervasive entanglement between the government and private actors exists. The government, by statute, set up requirements for the probation service providers that substantially diminishes the private actors' ability to act independently. Additionally, the program is wholly funded by the government either through direct contribution or by ordering those on probation to pay. Finally, Allied's board composition itself reveals a certain level of entanglement. One county judge and the director of public health services are members of the board. This creates at the very least an inference of bias or a conflict of interest between Allied and the State. The county judge may in fact double deal because he is incentivized to give out probation terms he know will not be completed because of the discriminatory practices by Allied. In turn, the one on probation will be forced to pay extra fees and face extended probationary periods, all providing income to the probation services provider. The judge and the health director therefore have an interest in seeing more individuals on probation for longer periods of time. Compare the case at bar to Camp in which entanglement was found to exist between a non-profit organization hosting a festival and the government because the government allowed the non-profit to use the municipal airport to host the event and city employees engaged in planning and executing the event. The judge's probation orders amount to planning much like city employees planned the festival in Camp, with Allied viable to see the plans carried out. Similarly in Brentwood, where significant entanglement existed between the athletic association and the public schools organizing athletic events, the association was found to be a state actor because it was composed of public school representatives. The association in Brentwood promulgated rules that the public schools were meant to follow. In this case, the court promulgated rules that Allied was meant to follow, so it is significant that a judge sat on Allied's board and tends to show that Allied's actions may simply be an extension of the

state. Allied may argue that the services have not yet been denied within the 18 month period and that she therefore lacks standing to sue because she has suffered no injury. However, as the deposition records show, the high probability of Peek being denied these services amounts to an injury that even if redressed in this single instance now (before the injury has occurred), the same injury is likely to occur again in the future and therefore the court should hear it now.

It appears both tests have been satisfied in this case.

A Close Nexus exists between the state and the challenged action.

In conclusion, Peek shows that the offending conduct was connected to the state's influence over Allied. Two out of the eleven directors were government employees with an interest in seeing probation terms last longer in order to increase revenue generated from probationers, one of Allied's two sources of income. This direct pecuniary interest of Allied, the directors, and the judges involved reveals a clear nexus between the policy of denying services ordered in a probation order. There is no other compelling reason for Allied's policies in this regard. Denying the mental health services disproportiantely in order to favor men has denied Peek and other women the opportunity to fulfill the terms of their probation. Although the government is not overtly compelling the discrimination, it has allowed the discrimination to occur, for whatever reason, by delegating its authority to supervise probation services to a private entity. 75% of similarly situated men receive their counseling in time as opposed to 70% of women not receiving counseling. The spaces available in these counseling sessions have been given to men, perhaps because men are less likely to object to being treated unfairly. The state here played at least a de minimus role in denying the counseling session, even though allied will attempt to show that the interference was slight, the presence of county officers in the board of directors is enough to create an inference of state control.

MPT 2 - Sample Answer # 1

TO: Carl S. Burns, County Attorney
FROM: Examinee
DATE: July 25, 2017
RE: Complaints about Zimmer Farm

1. The Zimmers' bird rescue operation would likely not be permitted under the county zoning ordinance.

A-1 Agricultural zoning in Hartford County permits the following uses: (1) any agricultural use; and (2) incidental processing, packaging, storage, transportation, distribution, sale, or agricultural accessory use intended to add value to agricultural products produced on the premises or to ready such products for market. Agricultural use means any activity conducted for the purpose of producing an income or livelihood from agricultural products such as: crops, livestock (such as cattle, swine, sheep, and goats), beehives, poultry (such

as chickens, geese, ducks, and turkeys), nursery plants, sod, etc. Agricultural use does not lose its character due to noise, dust, odors, or long hours of operation. Additionally, a seasonal farm stand, operated for less than 6 months per year, and 3 or fewer special events directly related to the sale or marketing of one or more agricultural products are allowed. Hartford County Zoning Code Title 15 § 22. In the past, the Franklin Court of Appeals heard arguments about, but did not rule on, exactly how to interpret statutory language. Wilson v. Monaco Farms (Fr. Ct. App. 2008). That case involved a list of four items protected by the Franklin Right to Farm Ac (FRFA) and whether an additional protection could be added. One argued that the list was exhaustive while the other argued that the court should: (A) determine what is common among the list, and then (B) consider whether the matter at issue is sufficiently similar to the items listed as to be included.

While Franken has not decided how exactly to interpret such a statute, Columbia's Court of Appeal's has. In Koster v. Presley's Fruit (Columbia Ct. App. 2010), they stated they were supposed to "ascertain and give effect to the legislative intent." Brady v. Roberts Electrical Mfg., Inc. (Columbia Sup. Ct. 2009). In doing so, they look to the statute's text and give the words their natural and ordinary meaning in light of their statutory context. If there is ambiguity or the language is otherwise unclear, then the court will look to the purpose of the law. In Koster, they looked at their Right to Farm Act, which has similar activities to the ones listed in Hartford's zoning code, and determined that wood products was not part of the list of activities. They seemed to apply the second test argued in Wilson. Due to this seemingly being a matter of first impression, we would likely want to argue for the stricter test, but due to how Columbia has decided this law, the rest of this analysis will assume that the more lenient test is followed.

Here, the zoning issue involved whether a non-profit bird rescue operation unrelated to the main agricultural processes of the farm is permitted under the current zoning. The bird operation does not seem to be done to produce an income or livelihood at all, since this is a non-profit operation. This is closer to a hobby than some income producing agricultural operation. Additionally, even if the bird operation was income- producing, it would likely not be considered an agricultural product. The list of agricultural products above mostly deal with plants or animals that produce some sellable products, like eggs, wheat, milk, honey, or timber. The closest category would be poultry, but those all deal with birds that can either lay eggs for sale or be killed for their meat. The bird operation does not produce eggs consumable by humans and the birds are not killed for their meat.

Therefore, the operation itself would likely violate the zoning ordinance due to it being a non-profit and the operation not fitting into the exact list or some common characteristic.

2. The Zimmers' bird festivals would likely not be permitted under the county zoning ordinance.

All of the law for the first part of the memo is applicable here.

Here, the zoning ordinance permits food stands and up to 3 festivals per year that are directly related to the sale or marketing of agricultural products. As stated above, the bird

rescue operation would not be considered an agricultural product under the ordinance. Last year, the Zimmers held 4 festivals, with the main purpose seeming to be to help the bird operation. The festivals did, however, market the sale of apples, which is an agricultural product of the Zimmer's farm. In addition, the Zimmers came up with the idea based on agro tourism, which is essentially a festival with other activities to market and sell agricultural products. While this would likely make this a close case, with additional facts about how the proceeds for the sale of the apples were used, these festivals seem to be related to the bird operations instead of the agricultural operations.

Without a more direct connection, and fewer festivals since they held one more festival than would have been allowed, it is likely that a court would find this to be a violation of the ordinance.

Therefore, because the direct purpose of the festival does not seem to be the sale of agricultural products and the Zimmers held more than 3 festivals, a zoning violation would likely be found.

Because the bird rescue operation is not a commercial venture and because the festivals are not primarily for commercial purposes, or would constitute an expansion of the existing one-day apple festival, it would likely not be a farm operation within the meaning of the FRFA.

The FRFA was enacted to "conserve, protect, and encourage development and improvement of [Franklin's} Agricultural land for the commercial production of food and other agricultural products, b limiting the circumstances under which a farming operation may be deemed to be a nuisance." Wilson (quoting Sen. Rpt. Comm. Agric. 1983).

Preemption of a local ordinance by a state law can be done in one of two ways: (A) the statute completely occupies the field that the ordinance attempts to regulate; or (B) the ordinance conflicts with a state statute and undermines its purpose. Shelby Township v. Beck (Franklin Ct. App. 2005). In Shelby, it was determined that the FRFA did not intend to occupy the field, meaning non-conflicting ordinances are allowed. See also FRFA § 4. An example of an impermissible ordinance is one that requires a minimum amount of land for a farm for any farm that existed before the ordinance was passed.

Shelby. The initial date of the farming operation is the date when the operation began, and it will not be affected by the expansion of any of the farming operations. Shelby; Wilson; See also FRFA § 3. The FRFA protects farm operations, which are activities that occur on a farm in connection with commercial production, harvesting, and storage of farm products. FRFA § 2. There is no exact definition of commercial production, harvesting and storage of farm products in the FRFA. However, in Shelby, rasing chickens for sale was considered a protected commercial production. The law on statutory interpretation is listed above.

Here, as stated above, the bird rescue operation is separate from the farming operations and there is no profit of income from any sale of a bird or the rescue of a bird. Due to the commercial requirement in the FRFA, it is likely that similar activities as the ones listed in

the county zoning ordinance would be protected, but not the rescue activity.

The festival presents more of a challenge. The Zimmers already had a one-day-apple festival each year. It was fairly small and only for children. The festivals that the Zimmers now hold focus mostly on the non-farm-operation bird rescue. While there is a sale of apples, these do not seem to be the main part of the festival. In addition, the expansion from only selling apples to having smelly birds around would likely not have been foreseeable for any residents that moved in when the farm was just a fruit and vegetable farm. This is unlike the Wilson expansion where the residents moved next to a dairy farm and the dairy farm later added more cows. These festivals are adding a new animal that the residents did not anticipate.

Therefore, the FRFA will likely not override the ordnance or provide additional protects to the Zimmers.

Therefore, the Zimmers are likely violating the local zoning ordinance by both their bird rescue operation and the festivals and the FRFA will not provide them any additional protection due to the operations and festivals not being related to the production of commercial agriculture.

MPT 2 - Sample Answer # 2

To: Carl S. Burns
From: Examinee Date: July 25, 2017
Re: Zimmer's Farm Complaints

I. The Zimmers' Bird Rescue Operation Is Not Allowed by the Zoning Ordinances Because It Has no Commercial Value.

The Hartford County Zoning Code allows persons to use A-1 land for any agricultural use or incidental use that adds value to the agricultural products or makes them ready for market. An agricultural use is an activity "conducted for the purpose of producing an income or livelihood" from agricultural products. Agricultural products include livestock and poultry.

Here, the Zimmers' bird rescue cannot be considered an agricultural use. Edward admitted that the birds had no commercial value. He did not make a profit from this in any way. Edward may argue that he makes a profit during the festival by promoting his bird rescue, but the zoning requirement states that the income or livelihood must come from the agricultural products. Profits from the festival would be incidental to the birds because he does not sell the birds in any way.

II. The Zimmers' Festivals Are in Violation of the Ordinance Because the Zimmers Hold More Than Three Festivals, but the Ordinance Cannot Stop all Festivals.

The Hartford Zoning Code allows for "special events" that are directly related to the sale or marketing of one or more agricultural products, so long as there are a maximum of three festivals a year. Here, the festival qualifies as a special event. The event is for the promotion of at least one agricultural product: the apples sold by the Zimmers. The festival promotes the apple sales by offering the apples for sale and providing recipes for baking with fruit. While it does not appear to be the primary focus of the festival, the ordinance only requires a direct relation to the sale or marketing of at least one agricultural product. Nothing in the zoning language prohibits the Zimmers from including a promotion of their bird rescue operation as well. Therefore, the Zimmers' festivals qualify as special events.

But the Zimmers do violate the zoning ordinance by holding more than three festivals a year. The Zimmers already hold four festivals a year, and they said they would like to expand the offering to a festival every month. This would be a violation of the ordinance and the county can limit the number of festivals held, but the county cannot prohibit the Zimmers from holding all festivals.

III. The FRFA Does Not Apply to the Zimmers' Bird Rescue Operation or the Festivals Because They Are Not Commercial Products or Connected to the Production of Commercial Products.

The FRFA is used to preserve the farm lands that have been present in Franklin for many years against people who "come to the nuisance." This allows Franklin to continue providing the agricultural products needed by its citizens without subjecting the farmers to the changing areas surrounding their farms. As long as the farm was there first, the farm is generally not subject to nuisance litigation. But there are limits. Before analyzing the Zimmers' activity, this section discusses two general principles in FRFA interpretation, and then proceeds to determine whether the FRFA applies to the bird rescue operation and the festival.

First, the FRFA only preempts local zoning ordinances that conflict with the statute. Preemption can occur in two ways: the state statute can be the exclusive regulation of the subject matter, or it can only preempt conflicting local ordinances (Shelby). The court in Shelby established that the FRFA only preempts conflicting local ordinances. This means that Hartford's zoning ordinances can apply so long as they do not conflict with FRFA.

Second, if FRFA applies, courts must be careful to use the correct date of analysis to compare the use. The courts must use the date that the neighboring land changed. In this case, the court must consider the date when the neighborhoods next to the Zimmers' farm became residential. In this case, the Zimmers' farm in 1990 was a strawberry and apple farm.

A. The FRFA Does Not Apply to the Zimmers' Bird Rescue Operation Because It Does Not Provide a Commercial Product.

The FRFA does not apply to the Zimmers' bird rescue operation because the activity does not fall within section 2. Section 2 defines two things: farm and farm operation.

Under section 3, nuisance actions cannot be brought against the farm or farm operation if the farm or farm operation existed before the neighboring property changed its character. Here, the bird operation would be challenged as a farm operation. The nuisance cannot attack the farm itself because the farm existed long before the neighboring properties became residential.

A farm operation is an operation or management of the farm or an activity in connection with the commercial production, harvesting, and storage of farm products. The statute does not define farm products. Regardless, there is nothing commercial about bird rescue operation (as admitted to by Edward), nor do they plan to create any commercial product through the operation. As discussed previously, the festival cannot be said to be a commercial production of the farm product. This would require some commercial transaction involving the birds themselves (even charging for the services could be argued to be a farm product since it is not defined in the statute), which does not happen. Therefore, the bird operation does not qualify as a farm operation.

B. The FRFA Does Not Apply to the Zimmers' Festivals Because It Does Not Aid in the Production, Harvesting, or Storage of a Farm Product.

The FRFA requires that a farm operation occur in connection with the commercial production, harvesting, and storage of farm products. These do not have to be limited to the operations present when the neighboring property changed in character. As shown in Wilson, the farm can expand. Additionally, Koster, from the Columbia Court of Appeal, interprets a similar statute in Columbia to allow for reasonable expansion of the stated activities as long as they are related to activities mentioned in the statute. Here, FRFA is broader than Columbia's statute, which listed the types of products included as farming products, but it still provides limits.

The farm operation is only protected by the FRFA when it is used to commercially produce, harvest, or store the farm products. The festival does not meet this criteria. The festival does nothing to aid in producing apples and strawberries (in fact, the space needed for the festival may take away from the amount of strawberries and apples that can be produced), and it does not help store the products. The Zimmers may be able to argue that it does help harvest the apples and strawberries if they show that recent past or future festivals will involve picking the fruit like the traditional festivals did before 2016. The court in Wilson seemed to allow for a very loose interpretation of the FRFA requirements by allowing the expansion of a farm to qualify as "technology" to advance the farm. However, even this broad interpretation may not qualify the festival as commercial harvesting because the event's main purpose seems to be promoting the offerings of the farm with any harvesting being incidental.

Accordingly, the bird rescue operation and the festival would not qualify as a farm operation and would not fall under the FRFA. Since the FRFA does not apply to these activities, the Hartford zoning ordinances apply. As established previously, this would prevent the Zimmers from operating their bird rescue operation and limit the number of festivals they

can host to three per year.

MPT 2 - Sample Answer # 3

MEMORANDUM

TO: Carl S. Burns, County Attorney
FROM: Applicant
DATE: July 25, 2017
RE: Complaints about Zimmer Farm

The bird rescue operation is likely not permitted under county zoning ordinance §22, while the festivals will likely be permitted, if the Zimmers comply with a number limitation, and the FRFA would not prevent the ordinance from prohibiting the Zimmers to continue the bird rescue operation while the FRFA may prevent the number of festivals from being limited.

I. The Zimmers' bird rescue operation is not permitted under the county zoning ordinance.

Because the Zimmers' bird rescue operation is not for profit, it would not fall under the permitted agricultural uses under the zoning code.

Title 15, Section §22(a) of the Hartford County Zoning Code indicates that within an A-1 district, agricultural accessory use intended to add value to the agricultural products on the premises is permitted. Under subsection (b)(2), "agricultural use" is defined as any activities conducted for purposes of producing an income or livelihood from agricultural products, including, crops or forage and poultry. Further, an agricultural use does not lose its character as such because it involves noise, dust, orders, and the like.

The bird rescue operation began in 2015. Edwards does not sell the birds, nor does he make any profit from the operation, or intend to make any profit. Therefore, a court would likely find that, because there is no financial gain from the bird rescue operation, it would not be protected under the ordinance.

However, it could be argued that the bird rescue does add value to the agricultural products produced on the premises, because as Edward Zimmer indicated, people drive from miles around to bring him wounded birds. Therefore, this activity could be a marketing technique to raise awareness about the farm, as well as the crops provided and sold by the farm, even if that is not the motivation or the primary purpose of the bird rescue operation.

Having more information about any uses from the birds, such as ability to fertilize manure might help classify the activity as an agricultural accessory use, however, as it stands, it does not appear that the bird rescue operation would fall under the permitted agriculture uses.

II. The Zimmers' festivals will likely be permitted under the zoning ordinance as an agricultural accessory use, however the number must be limited to three.

Under the A-1 district permitted uses are those for agricultural accessory use. Under § 22(3)(b), "agricultural accessory use" includes special events, provided that they are three or fewer per year and are directly related to the sale or marketing of one or more agricultural products produced on the premises.

The festivals will likely be considered an agricultural accessory use, because, under (3)(b), the festivals would be considered a special event that directly relates to the sale or marketing of one or more agricultural products produces on the premises.

While the "Fall Bird Festival" is an event to raise funds for the bird rescue operation, the event flyer also includes "Buy apples and discover the best recipes for baking with fruit." At the festival, the Zimmers also sell apples and strawberries.

However, it could be argued that the agricultural accessory use has to be a derivative use of a category defined under agricultural use, as one producing an income or livelihood, which the bird rescue operation is not. This does not dismiss the fact that the strawberries and apples, which are produced on the farm, are sold and promoted at the Bird Festival. Additionally, just because the festival is named, "Fall Bird Festival", this does not change the fact that a promotional method utilized by the Zimmers is to offer two sessions on cooking and baking with fruit and cookbooks that appear to have recipes from the fruits grown on the farm.

While it could also be argued that, because the Zimmers held four weekend festivals on their farm in 2016 that they are not permitted under the zoning ordinance, this can be limited to three from here on. While it is true that they violated the limit on the number of festivals in a given year, nothing indicates that this would prevent them from carrying out three festivals in the years to come.

Therefore, it is likely that the festivals will be permitted under the ordinance, if the number is limited to three per year and the Zimmers continue to sell their fruit at the festivals.

III. How, if at all, does the FRFA affect the county's ability to enforce its zoning ordinance with respect to the bird rescue operation and the festivals.

It is unlikely that the FRFA will affect the county's ability to enforce the zoning ordinance with respect to the bird rescue operation, however the FRFA will likely prevent the county from limiting the number of festivals.

In Shelby Township v. Beck (2005), the Franklin Court of Appeals explained that state law has the ability to preempt a municipal ordinance in two ways. First, when a statute completely occupies the field that the ordinance attempts to regulate, preemption occurs. Second, when an ordinance conflicts with a state statute and undermines its purpose,

preemption occurs. [Shelby] A conflict can be found when the ordinance permits what the statute prohibits or vice versa. [Shelby] In determining whether there is a conflict, the statute and the ordinance must be read with the policy and purposes in mind, as well as weighing the degree to which the ordinance frustrates the achievement of the state's objectives. [Shelby]

In Shelby, there was a conflict between the size requirement of the ordinance, which prohibited the defendants from raising chickens, and FRFA, which did not. Therefore, the court found that FRFA and the ordinance were in direct conflict, and that the ordinance undermined the purpose of the Act by prohibiting the farm operation. [Shelby] Because the farm operation began before the residential development neighboring it was created and the operation would not have been a nuisance but for the residential development, the court found that the operation was protected by FRFA. [Shelby] Additionally, the court determined that its conclusion also served the purpose of the Act to conserve land for agricultural operations and protect it from the threat of extinction by regulation from units of the local governmental units. [Shelby]

When the court in Brady was faced with this question, the court decided that it must turn to the provisions of the Right to Farm Act (RFA) of the state. [Koster (2010)] This was done to determine the legislative intent of the act and its applicability. The court emphasized that it needed to examine the statute's text and give the words their natural and ordinary meaning based on the statutory context. If the statutory language was clear and unambiguous, the statute's plain meaning should be applied without other consideration. However, when such statutory language is unclear, courts may refer to both the legislative history and purpose of the legislation as an aid.

Here, just as in Shelby, the FRFA does not "occupy the field," because the Franklin legislature has also authorized local governments to enact zoning laws concerning agricultural properties.

A. FRFA will likely have no affect on zoning ordinance with respect to bird rescue

The FRFA will likely not prevent the zoning ordinance from preventing the bird rehabilitation on the property.

Under § 2 of the FRFA, "farm" is defined as the land, animals, plants buildings, structures, machinery and equipment used in the commercial production of farms. Further, "farm operation" means the operation and management of a farm or activity that occurs on a farm in connection with commercial production, harvesting and storage of farm products.

In Koster, because wood pallets were not included within the definition of farm product under the Right to Farm Act, the court found that the manufacturing of the wooden pallets was not an activity protected by the RFA. In this consideration, the court considered that the pallets were constructed of wood and nails, and that these products originated from outside the defendant's property, and was not a product grown or raised on the farm premises.

Here, while the Franklin Right to Farm Act (FRFA) provides continued protection to a farm operation when it expands or changes its operation, the activity of rehabilitating birds only began in 2015, though the Zimmers have owned their property as a farm since 1951. The bird rehabilitation is not used in the commercial production of the farm. Further, the rehabilitation is not an activity that occurs in connection with commercial production, harvesting and storage. Further, though some of the structures used for the bird rehabilitation were apparently already on the premises before the rehabilitation began, it is likely that they would no longer be consider for commercial production, unless there is some way the Zimmers could tie them to the farm.

The Zimmers may argue that they have fixed up some of these buildings for the rehabilitation, which improved the overall quality of the farm. Further the Zimmers could argue that any farm equipment, and the like, that is stored in these buildings also benefitted and there is a connection. However, this is likely a weak argument.

Further, because the rehabilitation of the birds is not a product originated from the property, the rehabilitation will likely be found to be an activity not protected by the FRFA, similar to the finding in Koster.

B. The FRFA will likely prevent the ordinance from limiting the number of festivals on the property.

In Wilson (2008), the Franklin Court of Appeals held that a farmer expanding a dairy farm from 40 cows to eventually 200 cows was exactly the type of farm operation the legislature intended to protect when it enacted FRFA.

Similarly, here, the Zimmers have had festivals for years. The only change is the development of the rehabilitation as part of the festivals. A court would likely find that this is a great way to promote the farm and the products. Further, the farm has been around for much longer than the new residential homes. In order to preserve farm land and promote agricultural products the court will likely find the festivals not to be a nuisance.

Under § 3 of the FRFA, a farm or operation shall not be a nuisance if it existed before a change in land use or occupancy of land that boarders the farmland and if, before the change, there would not have been a complaint made for nuisance. As mentioned above, the complaints have just recently began about the festivals, though the family has been engaged in festivals for many years. Because all of the residential property owners are new, a change of ownership, under § 3(b) a farm or farm operation will not be found to be a public or private nuisance in such cases. This is the exact situation we are faced with.

Thus, the FRFA will likely prevent the ordinance from limiting the number of festivals on the Zimmer farm.

IV. Conclusion

For the above reasons, the zoning ordinance will likely disallow the bird rehabilitation, allow the festivals, if limited in number, and FRFA will likely have no effect on the ability of the county to prevent the bird rehabilitation, however, the FRFA will prevent the zoning ordinances from limiting the number of festivals.