

February 2011 Bar Examination

Question 1

In 1990, Abe graduated from the Medical College of Georgia, completed his residency training as a primary care physician, and became licensed to practice medicine in the State of Georgia. He decided to move back to his hometown of Climax, Georgia, and open a walk-in medical clinic.

Abe worked hard and prospered, opening clinics in nearby towns of Pelham, Coolidge, Iron City, Cairo, and Bainbridge, all in Georgia. Along the way, he took in a partner, Bob, and they formed a corporation named Climax Clinics, Inc. Abe owned 60% of the corporation and Bob owned 40%.

Upon the formation of the corporation in July 1995, Abe and Bob both signed shareholder agreements and employment agreements with Climax Clinics, Inc. The restrictive covenant in the employment agreement executed by Abe and Bob provided:

"Physician will not, directly or indirectly, alone or in conjunction with another person, practice medicine within a twenty-five (25) mile radius of a 'prohibited office' or see patients for consultation within a twenty-five (25) mile radius of a 'prohibited office'."

"'Prohibited office' is defined as one or more of the offices listed in Exhibit A to this agreement in which physician saw patients for Climax Clinics, Inc. within two (2) years of the date of termination of physician's employment with Climax Clinics, Inc."

Exhibit A to the employment agreement listed all the clinics which were open at the time of the incorporation. The exhibit had been amended to include all clinics opened by Climax Clinics, Inc. during the period of Bob's employment. Neither the exhibit nor any amendment thereto contained the specific address or location of any clinic.

The shareholder agreement executed by Abe and Bob with Climax Clinics, Inc. provided:

"The shareholders each covenant and agree that for two (2) years after a sale of shareholder's shares of the corporation, shareholder will not come directly or indirectly into the territory of any location at which the corporation is providing clinical services to provide professional services."

"'Territory' was defined in the agreement as 'that area within a fifty (50) mile radius of any Climax Clinics, Inc.'s clinic'."

As the business grew, the corporation employed several other doctors to practice in the various clinics. In August 2000, Chuck was employed by Climax Clinics, Inc. to practice in the clinic in Iron City. He and each of the newly employed doctors signed an employment agreement at the time of their employment with Climax Clinics, Inc. The contract which Chuck signed contained a restrictive covenant which provided:

"Physician agrees that upon termination of this agreement that he/she will not, for a period of five (5) years thereafter, within a fifty (50) mile radius of any Climax Clinics, Inc. clinic, engage in the practice of medicine in any capacity without the written consent of Climax Clinics, Inc."

In 2001, Abe and Bob had a falling out concerning the conduct of the business of the medical

clinics, and Abe and Bob agreed that Abe would buy Bob's shares in Climax Clinics, Inc. Three (3) months after Bob's sale of shares to Abe and termination of his employment with Climax Clinics, Inc., Bob opened a medical clinic in Donalsonville, within twenty-five (25) miles of an existing clinic operated by Climax Clinics, Inc. in Iron City. Chuck was employed by Bob to practice medicine in the Donalsonville clinic with him. Abe believes that he can stop Bob and Chuck from practicing medicine in Donalsonville.

1. To what extent, if any, is the restrictive covenant in the employment contract executed by Bob and Climax Clinics, Inc. enforceable?
2. To what extent, if any, is the restrictive covenant in the shareholder agreement executed by Bob and Climax Clinics, Inc. enforceable?
3. To what extent, if any, is the restrictive covenant in the employment agreement executed by Chuck enforceable?

NOTE: Discuss each covenant separately and fully, explaining the analysis to be used to determine the enforceability, *vel non*, of the agreement in question.

Question 2

Bob and Betty began dating their freshmen year of college. By the end of their senior year, their relationship began to sour, and they decided to break things off. Bob graduated with a bachelor's degree and accepted an entry level position with a large company, making a very handsome salary. Bob also purchased a home in a quiet residential area in Atlanta. Betty, on the other hand, could not find a job and moved back in with her parents, who also resided in Atlanta. Betty, who was once ambitious, lost interest in her previous career aspirations, refused to look for a job, and spent her days and nights lounging around her parents' home.

A month after graduation, Betty discovered that she was pregnant. While there is no dispute that Bob is the biological father of Betty's unborn child, she did not initially tell him about the pregnancy and wanted to conceal her pregnancy from him. Instead, Betty disclosed her pregnancy only to her parents and her best friend, Sue. Sue decided that she could not withhold this information from Bob and revealed the pregnancy to him.

When Bob found out about the pregnancy, he was furious. He confronted Betty, who admitted that she was pregnant, but she refused to discuss any of the details. Instead, Betty stated to Bob, "I don't want to have anything to do with you. I do not want any help from you. I am not interested in your opinions concerning this pregnancy. Leave me alone!" On the day following this conversation with Betty, Bob comes to you seeking counsel concerning his rights.

1. Discuss what steps Bob should take under Georgia law in order to establish his rights as the legal father of Betty's child.
2. Assume for the following questions only that Bob is successful in establishing his rights as the father, is awarded full custody of the child by the Superior Court of Fulton County, Georgia, has lived with the child in Georgia since his birth, and has provided the child with a stable home

environment, and by all accounts is a model father. Assume further that Betty's parental rights, however, were never terminated. Five years pass, and Betty has cleaned up her act, earned a graduate level degree and has landed a job that pays her a six-figure salary. Betty has purchased a new home in an upscale community and has established herself as a respectable member of the community. Betty has not had contact with Bob or the child in over five years, but she contacts Bob expressing a desire to re-establish a relationship with their child, and advises him that she plans to seek custody of the child.

(a) What is the legal standard for making the custody determination?

(b) What factors must be established in considering the issue of custody?

Question 3

Evergreen Nurseries is a greenhouse operation in south Georgia that grows produce seeds into seedling plants and sells the seedlings to growers. Growers either tell Evergreen what type of seeds they want grown into seedlings and Evergreen buys the seeds, or the grower sends the seeds to Evergreen to grow them out. Once Evergreen has the seeds, it germinates the seeds in its greenhouses and grows them into seedlings. When the seedlings are ready to transplant, Evergreen sends the seedlings to the growers, who plant the seedlings as row crops and harvest produce such as peppers and melons.

Farm to Table, Inc. is a commercial pepper grower. At the beginning of this year's growing season, Farm to Table's office manager called Evergreen's sales manager and asked Evergreen to "grow some pepper plants for us for the fall planting season." Farm to Table's office manager confirmed the order with a fax to Evergreen. The fax stated:

This fax will confirm that we want to have 800 pepper plants for the fall growing season. We want seeds for 200 Stillettos and 200 Revolutions. We also want 400 Brigadier pepper PLANTS. We are not sure how many seeds we will need for the Brigadiers. Please let us know how many Brigadier seeds we need to buy.

There was no other written confirmation of the transaction. Evergreen purchased the seeds for the Stilletto and Revolution peppers and advised Farm to Table that it needed to buy 600 Brigadier seeds. Farm to Table purchased the 600 Brigadier seeds from a seed dealer and had them sent directly to Evergreen by the dealer.

Evergreen invoiced Farm to Table, Inc. at the rate of \$.028 for the Brigadier plants and \$.063 for the Stilletto and Revolution plants. Although the rates for the Stilletto and Revolution plants included the costs of the seeds, this amount was not invoiced separately.

Shortly after the pepper seeds sprouted, Evergreen noticed that some of its Brigadier pepper plants appeared to be diseased. After samples were sent to the Experiment Station in Tifton, the plants tested positive for Bacterial Leaf Spot (BLS), a deadly plant bacterial infection. Once BLS is in the soil, it can reoccur in subsequent years, and Evergreen had had a BLS outbreak in the previous year. Evergreen attempted to halt the spread of the BLS in the Brigadier peppers by pulling the diseased plants and destroying them. Evergreen shipped the remaining, apparently

healthy, Brigadier plants to Farm to Table, Inc. However, a few days after Farm to Table's employees planted the Brigadier pepper plants, they also developed BLS and had to be destroyed. Subsequent tests revealed that Farm to Table, Inc.'s Brigadier plants were infected with the same strain of BLS as was found in the diseased plants in Evergreen's greenhouses. The Stilleto and Revolution plants sent by Evergreen to Farm to Table were not diseased, and Farm to Table had a successful fall pepper crop from those plants, but the Brigadier crop was a total loss.

Farm to Table, Inc. wants to file suit against Evergreen for strict liability, breach of warranty, and damages for lost profits from the loss of the Brigadier pepper plants.

You are an associate in the law firm hired to sue Evergreen. You are asked to provide a memo to the Partner in charge of the file on these issues:

1. Can Farm to Table, Inc. bring a strict liability claim against Evergreen for the damages to the pepper plants caused by the BLS? Discuss the reasons for your answer.
2. Can Farm to Table, Inc., bring a breach of warranty claim against Evergreen for the implied warranty of merchantability for the Brigadier plants? Does your answer change if the Stilleto and Revolution plants were the diseased plants and not the Brigadiers?
3. What is the measure of damages for Farm to Table's loss of the Brigadier pepper crop and what must Farm to Table, Inc. offer as evidence to prove its claim?

Question 4

Three new clients, Tom, Dick and Harry, have come to you for legal advice with respect to certain professional and business pursuits. All three are architects who wish to set up a new architectural firm in Athens, Georgia. They also have another acquaintance, Sally, who is in the real estate business but not an architect and who is interested in being a co-owner with them in the building of their office. All four have negotiated a construction loan from a local bank. The bank has said all four must personally guarantee the loan.

The architects need advice about what type of business entity or entities they should create for their professional practice and their office building. They are also concerned about possible malpractice claims, as well as any debts and liability claims which might arise from ownership of the building. They are willing to let Sally be the manager of the building, which could have some extra space to be rented to other parties until the architectural firm expands with more employees. The three clients have also said that Sally is willing to help them out by investing money in the architectural firm. The architects have also recruited a business manager whom they wish to be involved in the architectural firm as much as possible.

1. Given the choices of forming a common law partnership, a for profit corporation, a professional corporation, a tenancy in common, a limited partnership or a limited liability company, which would you advise the three architects as the best choice for their architectural practice under Georgia law? Briefly discuss the major benefits or limitations of these choices.
2. What would be your advice for the best entity to own and operate the building? Why?

3. Could Sally and their business manager own stock and be a member of the board of directors or an officer if they formed:

(a) A business corporation?

(b) A professional corporation?

(c) A limited liability company?

Why or why not?

4. If the architects formed a professional corporation, what would happen to the stock of any shareholder who might leave the architectural practice for any reason, including death, assuming there is no written agreement on this matter?

5. Assume the architects decide to form a professional corporation. What type of charter or other basic legal documents would you suggest they have and which, if any, of these documents would need to be filed as public documents with the Georgia Secretary of State or with the Clerk of the Superior Court of the county in which the principal office of the professional corporation will be located?

6. Should any legal conflict arise among the three architects in the future, what should you tell them now regarding your role as legal counsel for any entity that you assist the three of them in creating versus your role as legal counsel for any or all of the three of them individually?