

February 2015 Bar Examination Sample Answers

DISCLAIMER

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QUESTION 1 - Sample Answer # 1

1. The Uniform Commercial Code (UCC) Article 2 applies to all contracts for the sale of goods. Goods are items of movable personal property identified as the goods at the time of sale. The cases sold are goods and thus Article 2 applies to the contract between Buyer and Seller. In addition, Article 3 of the UCC applies to negotiable instruments, and governs the transferability of negotiable instruments, including the application of the holder in due course rule. The \$3000 check is a negotiable instrument and, as such, Article 3 applies.

2. Seller and Buyer formed a contract for the sale of goods. The Statute of Frauds (SOF) is a legal doctrine where certain contracts must be put in writing in order to be enforceable. The SOF applies to all contracts for the sale of goods where the value of the goods \$500 or greater. Here, Buyer and Seller appear to have formed an oral contract for the sale of goods, where the value of the contract was \$6000. As such, their agreement had to be put in writing to comply with the SOF. There is no evidence that an agreement was memorialized in a writing. To fully comply with the SOF, a writing must be signed by the party to be charged (the party denying the existence of the contract). The writing must contain the essential terms. The essential terms in a contract for the sale of goods should include a description of the subject matter (the goods), the parties, the price, and the quantity. The quantity must appear in the agreement to be enforceable. If the price is missing, the courts will imply a reasonable price.

Seller may argue that Buyer's acceptance of part of the goods proved up the contract. However, this will not defeat the requirement that the agreement must comply with the statute of frauds. If a Buyer accepts some goods before later challenging the existence of the contract, the SOF is waived to the extent of the goods accepted. However, it appears that Buyer will not be accepting the goods, or will be revoking his acceptance, as discussed further below.

3. An express warranty is one that a Seller makes to a Buyer that becomes part of the basis of the bargain. It is one either directly stated to the Buyer in connection with the transaction or that appears in written materials provided to the Buyer. In addition, a seller who displays a model of a good, is charged with an express warranty of that representation. It appears from the facts that Seller brought 100 cases to the meeting

between Seller and Buyer, in order to show Buyer the quality of the goods. This offering will be seen as an express warranty of the quality of the goods. However, in Georgia, if a Seller requests that a Buyer inspect the goods prior to contracting, the Buyer is charged with what the inspection should have revealed. In this case, Buyer was offered the opportunity to inspect and should have determined that the products were not compatible with its intended use. Buyer will not prevail against Seller for a breach of this first express warranty.

However, in Seller's offer, he described the goods as "Grizzly Mercury" cases. This may operate as an express warranty that the goods were manufactured by Grizzly. As it turns out, the cases were not manufactured by Grizzly. As such, Buyer may have a cause of action for breach of this express warranty. It is not likely a court will charge Buyer with knowledge that the goods were not manufactured by Grizzly, since he had the opportunity to inspect the goods.

In all contracts for the sale of goods where the Seller is a merchant, the law provides an implied warranty of merchantability. What this means is that the goods should be fit for the ordinary intended uses. A merchant is one who deals in the kind of goods sold or otherwise holds himself out as an expert in the goods. Here, Seller is clearly a Merchant. Therefore, the implied warranty of merchantability came with the purchase and sale. Here, the goods should have been fit for the ordinary purpose of providing a functional case for the Mercury smart phone. The cases failed at providing this use and, as such, Seller is in breach of the implied warranty of merchantability.

Additionally, when a Seller knows the purpose that a Buyer is buying the goods for, and knows that the Buyer is relying on Seller's knowledge to pick goods special for Buyer's purpose, the implied warranty of fitness for a particular purpose arises. This warranty can be given by any seller, whether or not a merchant. Here Seller should have known that Buyer was relying on Seller to sell him goods that were fit for Mercury phones. They fell short of their purpose and, as such, the implied warranty of fitness was breached.

4. In all contracts for the sale of goods, a Buyer has a right to inspect the goods before accepting them. Upon accepting the goods a Buyer is bound to the contract, unless Buyer rightfully revokes his acceptance. Here it appears that Buyer has accepted the goods, since he had the opportunity to inspect and began to re-sell the items. It was not until it he found out later that the goods were not compatible with the Mercury phones that he alerted Seller of the issue. When a Buyer could not reasonably find out about a defect that existed at the time of the sale, and he later finds out about a defect, he may sometimes revoke acceptance if the defect substantially lowers the value of the goods to the Buyer. Here, cases that aren't compatible with the Mercury phone is clearly a defect large enough for revoking acceptance. A court make take issue with the fact that Buyer could have tested the product prior to buying, at the time of inspection.

5. Article 3 of the UCC provides that when a negotiable instrument is properly transferred to a holder in due course (HOD), that transferee takes the instrument free of all personal defenses of the drawer of the check, and only takes subject to the so called "real

defenses". A check (negotiable inst.) is negotiated by the payee indorsing the check and transferring the check. An HOD is one who is a transferee of the check for value, without notice of any personal defenses. Here, the check was properly indorsed and transferred to We Carry. We Carry paid value (accepted it in consideration of prior debt) and presumably had no notice of the defects in the Buyer/Seller contract. As such, Buyer will not be able to raise the defense of Seller's breach of contract to avoid paying the check.

QUESTION 1 - Sample Answer # 2

1. Multiple Georgia laws apply to this transaction.

What Georgia laws apply to this transaction? This involves sales of movable goods so UCC-2 would apply to the sales. Seller and buyer are acting in ordinary course of business that they are in so they are each Merchants. Some rules are different for merchants under UCC-2. Common law statute of frauds would apply to the contract because it is a sale of goods over \$500 so it must be in writing. This is a bilateral contract since it contains mutual promises, seller promises cases and buyer promises to pay. Part performance could save the contract from the statute of frauds since the buyer has partially paid and has taken possession of some of the goods. UCC-3 which covers commercial paper applies since there is a transfer of a check (draft) given to Buyer and then given to We Carry. Implied and express warranties law will apply since the goods are not what they were supposed to be. Contract defenses such as mutual mistake will also apply since neither the buyer nor the seller knew that they were not Grizzly cases.

2. Statute of Frauds

Whether the statute of frauds ("SOF") applies as between the Buyer and Seller. SOF applies to the sale of goods over \$500.00 so the contract must be in writing. Here the contract was for \$6,000 worth of phone covers and the parties agreed on a price. The contract must be in writing since the SOF applies because the price is over the limit. This can be done at the time the parties meet or since they are merchants, one of them can put their agreement in writing within a reasonable time and send it to the other. This would satisfy the writing requirement. Nothing in the facts shows that anything was put in writing. So the contract would be unenforceable if no exception applies.

Part performance in Georgia can satisfy the SOF writing requirement if the buyer makes full payment or partial payment and takes possession. The Buyer paid for half of the covers but only took possession of 100 of the covers. 100 covers at \$10 each is \$1000 so the SOF would apply to this 100 if looked at alone. Since partial payment and partial possession the contract between the merchants would be valid to the 100 covers and not the remaining 500. The contract would only be valid against the first 100 covers and not the remaining 500 due to the SOF.

3. Express or Implied Warranties

Whether express or implied warranties apply to this contract and if so how do they impact it. Express warranties are oral or written expressions that the buyer relies on and goes to the heart of the contract. In the Bob's list ad the Seller listed the covers as Grizzly Mercury cases. The Buyer relied on this statement and these were the most popular brand covers so it goes to the heart of the contract. It was later discovered that the covers were not Grizzly Mercury so this would be a breach of an Express warranty.

Implied warranties can be the implied warranty of merchant ability and implied warranty of

particular purpose. These were not disclaimed in the facts so disclaimers will not be a defense. The implied warranty of merchantability means the product is fit for ordinary use. Here the cover does not allow a user to sync or charge their phone while using the case. The case would have to be taken off to sync or charge which would defeat the purpose of the case. Since the case cannot be synced or charged while using the case the ordinary use would fail. This is a breach of the implied warranty of merchantability.

Implied warranty of particular purpose means the good is fit for the purpose advertised. Here the case was suppose to be for the Mercury phone but did not fit correctly. This would be a breach of the implied warranty of particular purpose since the purpose is a Mercury cover but the cover does not align with the holes.

This sale was a breach of an express warranty, implied warranty of merchant ability, and implied warranty of particular purpose so the Buyer is entitled to damages.

4. Buyer's opportunity to inspect.

Whether the Buyer's opportunity to inspect has any significance on acceptance, rejection, or revocation of acceptance. A Buyer has the opportunity to inspect for defects before acceptance of goods. Inspection must be made in a reasonable time or if a hidden defect must notify Seller within a reasonable time of discovery. If the Buyer realized the cases were not made by Grizzly then Buyer could have rejected delivery. But the cases were shown at time of contract so it must have not been a defect that was noticeable upon inspection without fully using the case. The Buyer found out about the defect and notified the Seller. This was within a reasonable time. Buyer can reject the rest of delivery and return unsold cases for a refund. This return and refund would be a revocation of the agreement.

5. Negotiable Instrument (Check)

Whether a "holder in due course" impacts the rights and obligations of the Buyer, Seller, We Carry, and Big Bank. A holder in due course receives the negotiable instrument for value, in good faith, and has not notice of defects, fraud, or discharge. Here the check is a draft which Buyer gave to Seller. At this time the check ordered payment to the Seller because Seller was named on check. The Seller indorsed the check and give it to We Carry. The indorsed check became bearer paper since it was indorsed and not made out to We Carry directly. We Carry took the check or bearer paper at that time for the discharge of debt (value), in good faith because they had not reason to believe not valid, and no notice of discharge or fraud so they would be a holder in due course ("HIDC"). Since they are a HIDC the bank must pay We Carry, which will come out of Buyers account. Then Buyer would have seek damages against Seller. We Carry (the HIDC) gets full enforceable rights to the check.

QUESTION 1 - Sample Answer # 3

1. This transaction implicates several aspects of Georgia law, including contract law under both the common law and Article 2 of the Uniform Commercial Code (UCC), including rules relating to acceptance and revocation of acceptance, and express and implied warranties. The transaction also implicates evidence rules due to the applicability of the Statute of Frauds. Because the transaction involves a negotiable instrument, U.C.C. Article 3, covering commercial paper, also applies to the transaction. Additionally, inasmuch as the transaction affects the relationship between Seller and We Carry, landlord-tenant law is also implicated.

2. The Statute of Frauds requires that, with exceptions, certain agreements, including agreements for the sale of goods of \$500 or more, are only enforceable if committed to a writing signed by the party to be charged. Here the Statute is implicated because the agreement is for the sale of \$6,000 worth of goods. Although the Statute requires such agreements to be in writing, the sale of goods may be taken out of the statute by part performance of the parties. Therefore, the issue then would be the level to which the agreement has been performed. Seller would argue that the contract has been performed as to half of the goods subject to the agreement, based on the provision of \$3,000 against the total purchase price of \$6,000. Seller would argue that the contract has only been performed to the extent of the goods actually delivered and accepted, or 100 of the 600 cases. The court may also be influenced by Article 2's general principle that the *quantity* is an essential required term of contracts, while other terms may be left out of the agreement and rule that the agreement is only reasonably certain as to the 100 cases accepted, with the remainder unenforceable because of the Statute of Frauds.

3. First, both Seller and Buyer may be liable under the Implied Warranty of Merchantability, under which a *merchant* is implied to have warranted that goods are suited for their ordinary purpose. Buyer is clearly a merchant selling goods of the type at issue here, and therefore will likely be liable to the retail customers to whom Seller sold cases, as a case purporting to be fit for a Mercury phone should be able to fit the ports on a Mercury phone. Seller may also be liable under this implied warranty if a court determines that he is a merchant of these types of goods. Both Seller and Buyer may also be liable under the Implied Warranty of Fitness for a Particular Purpose, which is an implied warranty made by *any seller* of goods to one whom the seller knows has a particular need or purpose for the goods and whom is relying on the seller's expertise in making the purchase decision. Here, both Seller and Buyer are potentially liable for this warranty regardless of merchant status, as such is not required for this warranty. The issue with this warranty will be whether there is a sufficient "particular purpose" and the element of reliance required for this warranty. Seller would likely be able to make a strong argument that Buyer was not relying on Seller's specific skills or knowledge, as Buyer appears to be a sophisticated merchant regularly dealing in goods of this type. Therefore, Seller would most likely not be liable to Buyer under the Implied Warranty for Fitness of Purpose. The retail customers of Buyer likely have a stronger case for applying this warranty against Buyer. A trier of fact would likely not find the customers to be sophisticated and that they reasonably relied on Buyer's expertise in the field to suggest the "Grizzly" cases as being

suitable for the particular need (a case for the Mercury phone). Finally, both Seller and Buyer would likely be liable for express warranties made to Buyer and retail customers, respectively. An express warranty is any statement, sample, example, etc. that forms a basis of the bargain between parties. Although the facts do not include such detail, Buyer must have made some representation to the customers that the case was suitable. The fact that the customers purchased the phone is evidence that they relied upon Buyer's representation. Similarly, Buyer may be able to claim that Seller violated an express warranty to Buyer. Seller would likely attempt to argue that Buyer did not reasonably rely on Seller's representations, but given the high-demand nature of the product, it is not clear that Buyer could have done more to test the sufficiency of the cases, or anything other than rely on Seller's representations.

4. Under the UCC and the perfect tender rule, goods must be conforming in order to satisfy an agreement. Article 2 provides a framework for a buyer to inspect goods to ensure conformity prior to acceptance. A buyer may revoke acceptance of goods only when (1) the buyer accepted believing that the seller was going to cure deficiencies, or (2) the nonconformity could not have been discovered by reasonable inspection. Here, there is no apparent issue as to cure, as Seller made no statements about being able to cure. Therefore, to the extent Buyer did accept at least the 100 cases, the question is whether Buyer can now revoke that acceptance. This will be a factual question determined by whether or not Buyer had reasonable opportunity to actually try the cases out with the Mercury phone. Although the Mercury is in hot demand, it appears from the facts that some Mercury phones are in circulation (evidenced by the retail customers having phones). Between that fact and Buyer's likely expertise with goods of this kind, it seems like Buyer did have a reasonable opportunity to inspect and discover the nonconformity, and therefore will likely not be able to revoke acceptance.

5. A holder in due course is a holder of a negotiable instrument (one in possession with a right to enforce) who takes the instrument for value and without any notice of claims or defenses against the instrument. Here, We Carry would likely be found to be a holder in due course. As a holder in due course, We Carry will be able to enforce the instrument against all except to the extent anyone has a real defense against enforcement (fraud in factum, illegality, unauthorized signature, etc.). Buyer's likely defenses (mistake, misrepresentation) only amount to *personal* defenses, which have no effect against a holder in due course. Therefore, We Carry should be entitled to payment on the check upon presentment to Big Bank.

QUESTION 2 - Sample Answer # 1

1. The issue is whether the wife moving with the child to Florida raises a cause of action. Under Georgia law, alone, the move does not raise a cause of action. However, because there is a standing order against removing the child in this case, there is a cause of action. Additionally, if the husband can show that it was made for improper purpose, like to inhibit his rights, or that it is not in the best interests of the child, then he may have a cause of action. Here the court awarded physical custody to the wife, visitation to the husband, and joint legal custody to both. This means that the husband has visitation rights and a say in the legal aspects of his child's upbringing. He could argue that moving is against the best interest of the child because he will be unable to see his father very often due to the greater distance. He could also argue that the wife is moving to prevent the husband from having contact. If with of these have factual merit, there is cause of action.

2. The standing order is enforceable if the court had jurisdiction over the parties. Here, it appears that the parties are both from Georgia and have been living in the state. as GA is their domicile, they are subject to in rem personam jurisdiction. Additionally, a party may not unilaterally go against a court order. If no hearing has occurred this may have been a Temporary restraining order, and in such a case, it is valid for 14 days and a payment hearing will be held. This may also be a preliminary injunction, preventing the parties from leaving with the child, which is valid if it is shown that there is an immediate and irreparable harm that will occur and the harm exceed that restraints on the other party. Here the harm is the child leaving and this exceed the harm in the wife postponing her move. She may argue that her harm is greater because he already sold the house, but husband filed the action last week, giving her notice, and the wife can get temporary housing.

3. The issue is the weight of a child's choice in custody. Here, the child's writing will not be operative on the court. In Georgia a court may consider the wishes of the child in determining custody. If the child is 14 or older, the child's wishes must be complied with, unless it is against his best interest. Between 11 and 14, the wishes are a factor to be considered, but not as compelling as 14 and older. Here the child is 9, so the court will determine the best interests of the child based on a number of factors. these include: the wishes of all the parties, the interrelationship with any family or siblings, how that child has adjusted to his community and life, the mental and physical health of the parties, and the conduct and fitness of the parents. Here, It is unclear on the facts what the child's health, adjustment, or needs are. However, we are told that the action alleges drug and alcohol abuse on the wife's part, which would go to her fitness as a parent. The court may also consider the relationship with the wife's alleged new lover and whether there are any threats to well-being or special relationships in connection with this person.

4. The issue is whether there exists a claim for relief based on the same sex relationship of the wife. Here, there is likely a claim for relief. The alimony provided by the court ends within 10 years of the decree or if the wife remarries. Here, the 10 years is not up yet (divorced in 2009), and husband will argue that it should be modified because she has

essentially remarried. In Georgia same sex marriage is not available. Also, common law marriage was abolished in Georgia in 1997, so that will not be available. However, the husband may argue in good faith that despite the "official" marriage certification, the couples operates as a married couple, they live together and are "lovers." This is a good faith claim that can be used and the court will have to determine what it means by "remarry." In the alternative, if the husband is using this to change custody, it will be more difficult. While GA does not recognize same sex marriage at this time, changing the wife's custody just because of it would likely violate the equal protection clause. While the test is somewhat unclear, there would either need to be intermediate scrutiny or greater than rational basis review. Here, the court is unlikely to find a basis that is substantially related to a important government purpose, or an exceedingly persuasive justification. The overarching theme for child custody in Georgia is the best interest of the child. Thus, if the same sex relationship can be show to be affecting he child's best interests, welfare or happiness, there may be a cause of action.

5. Yes. The issue is whether alimony can be modified under Georgia law, alimony can be modified if it is of a particular type. Certain alimony, like lump sum payments or reimbursement are like contract rights, and cannot be changed. But here, it appears to be a periodic payment because it is for an amount of time and can be ended by remarriage, husbands death or 10 years. Therefore, the court can re-open the alimony for a material change in circumstances. Here, the income was 90k, and is now 45k, that is likely a significant difference that will allow modification. The court has discretion in alimony decrees, and will consider a variety of factors like income, dependence of the parties, length or marriage, employability, etc. On the other hand, if the reduced income is to change the child support it will be more difficult because the court has less discretion. The child support rules are set out by the Georgia child support commission in their obligation table. However, because the table considers the income of the parties, as well as the needs fo the children, there is likely a valid claim for relief where the income has materially changed, as it has here.

6. The issue is whether the husband has rights to a jury trial in this case. In the U.S. Constitution, 7th amendment right to jury trials in civil cases, as part of the bill of rights, applies to the federal government, and has not been incorporated to the states through the 14th amendment due process clause. However, Georgia allows for jury trials in divorce cases. The Superior Court of Georgia has jursdiction over divorce cases.

QUESTION 2 - Sample Answer # 2

1. The allegation that Wife and Child will move to Florida states a claim for a relief. Under Georgia law, a parent with physical custody is not bound to stay in Georgia as long as he gives sufficient notice to a parent with visitation rights. However, another parent with visitation rights may oppose the move if it would substantially impact his ability to see the child and carry out his right to visitation.

Here, Wife has provided a letter that she gave to Husband giving him over thirty days notice of her move to Florida with their Child. While Wife has given Husband notice of the move, Husband still has the right to challenge on the basis of his visitation rights. It seems unlikely that the court would disallow Wife from moving to Florida because it is so close to Georgia. Nonetheless, Husband has the right to pursue this action pursuant to his rights of physical custody.

2. Yes, Wife must abide with the Standing Order of the Court, but can challenge it for the right to move or a faster temporary hearing. Under Georgia law, a parent cannot remove a child from Georgia while waiting for an order regarding the modification of child custody. However, if this order poses substantial hardship to the other parent, he can petition for its removal. Wife may raise her notice and planned move to challenge the order.

3. If the court finds that it is in the child's best interest to live with Wife, then the child's written election is binding. Under Georgia law, the primary consideration in determining the legal and physical custody of a child is the *best interests of the child*. To determine this, the court uses a number of factors including the parent's wishes, the child's wishes, the mental and physical health of all parties, the adjustment of the child, the interaction of the child with the parents and others, the ability of parents to care for the child, and any other relevant factors. If the child is under 14, then the child's wishes as to who he wants to live with is taken as a consideration for the court. If the child is 14 or over, however, his wishes are binding, if consistent with the court's finding of his best interests. A court will only modify a child custody order if there has been a material and substantial change in circumstances.

Here, there has probably been a sufficient material and substantial change to warrant a change in child custody, assuming Wife's drug and alcohol use has developed since custody was originally awarded. A parent's drug and alcohol use threatens the safety of a child and impairs the parent's ability to sufficiently care for him. A parent's remarriage or new cohabitation could also be considered a material change in circumstances, especially when combined with a parent's drug use. When reconsidering custody, the court will need to consider the child's election to live with Wife. The child is over 14 and, therefore, the child's wishes should be binding if the court finds that they are in his best wishes. It is possible, though, that the court decides the Wife's primary physical custody is no longer in the best interests of the child. Wife's drug and alcohol use affects her physical health, her mental health, and her ability to care for the child. That said, the child has lived with Wife since 2009 and has presumably adjusted to her life, school, etc. A court will put

weight on the importance of "continuity" in a child's life. The court will need to balance these factors to determine whether the child's wishes should be followed.

4. The wife's meretricious relationship should state a claim to end her alimony. Under Georgia law, alimony can be in the form of permanent periodic alimony, lump sum alimony, rehabilitative alimony, or reimbursement alimony. As the wife receives a monthly amount of \$1,500, it seems as though she was awarded permanent periodic alimony. This type ends when the wife dies, remarries, enters into cohabitation when in a relationship with another, including when of the same sex.

Here, the wife has entered into a romantic relationship with another woman and they have decided to live together. Therefore, Husband should have an action to end his payment of alimony to his wife. The wife will likely argue that she has not *remarried*, and the Joint Judgment and Decree does not prohibit cohabitation. The court may very well find that this is the situation--but, Husband should be able to at least state a claim to have the case heard by the court, according to Georgia law.

5. The husband's reduced income probably does not state a claim for relief from his child support payments. In Georgia, a court will only modify a child support arrangement if there have been material or substantial changes in circumstances. In determining child support, the court considers a number of factors, including the financial position of both parties, what each party received from their divorce, the needs of the child, and standard. Notably, Georgia will consider *all* assets in determining child support payments--it is not limited to income. Georgia uses a pre-set table of amounts, taking into account a sliding scale of how many children a person has, age, and other factors.

Under these facts, the only change has been the decrease in Husband's monthly income. Originally, Husband earned \$90,000/month, and this income has diminished to \$45,000/month. The change is a 50 percent pay cut, which is substantial. Depending on what his child support payments were according to the pre-set Georgia amounts, this might impose a material change meriting modification. However, the court will also consider that the monthly income is extremely high. Furthermore, Husband received his entire business in the divorce settlement, and likely has other capital through that. Finally, his Wife is still unemployed and, currently, has physical custody of their child. Therefore, the court would probably find that the child support payment should not be modified.

6. Husband does not have the right to a jury trial. In Georgia, parents do not have the right to a jury trial in proceedings determining child custody and child support. Instead these orders are determined by a judge.

In this case, Husband's claim includes modification of legal and physical custody of the child, parenting time, modification of child support, and modification of alimony. Because his claim includes child support and custody inquiries, he does not have the right to a jury trial under Georgia law.

QUESTION 2 - Sample Answer # 3

1. In entering a judgment of divorce when a child is involved, the primary concern of the court will always be the best interest of the child. Generally it is not considered in the best interest of the child to remove that child from its home or to move the child to a location where he or she cannot maintain a meaningful relationship with both parents. Additionally, while Wife may have notified Husband of her intent to move with the child, only the court can modify its Final Judgment and Decree (the Decree). While the facts do not say specifically, it is likely that by moving to Florida, the wife would violate the portion of the Decree awarding parenting time to Husband. While the court may consider the circumstances surrounding Wife's notice of her move to Husband, and Husband filing his action immediately before the move so that Wife has already sold her home but is unable to move, the allegation of her intent to move the child to Florida is likely valid on its face.

2. The standing order is enforceable. Either Husband or Wife may seek modification of the Decree at any time for good cause shown. Since the Decree is still in effect, the court maintains jurisdiction. As of the date of service Wife is still a resident of Atlanta, and the last domicile of the marriage was in Atlanta, so Atlanta is the proper venue. The court has the discretion to enter an order to maintain the status quo until such time as the merits of the cause are heard, though given the circumstances the court may also use its discretion to ensure both Wife and Child do not remain temporarily homeless.

3. In Georgia, a child 14 years of age or older may choose which parent he or she wants to primarily live with. The child's election is presumptively valid unless the court specifically finds that living with the chosen parent is not in the best interests of the child. The strongest argument Husband presents for taking physical custody of the child, against the child's wishes and contrary to the Decree, is the allegation of Wife's drug and alcohol abuse. While addiction does not itself prohibit Wife from remaining the primary custodial parent, if she demonstrates behaviors commonly associated with addiction, such as violence, unreliability, or allowing criminals or other dangerous people to frequently enter her home, the court may decide that the child is unsafe living with Wife and that it is in the best interests of the child that Husband be awarded primary physical custody.

4. It is unclear if the wife's relationship states an independent claim for relief, though it may be considered if the court chooses to modify alimony or child support. Georgia law at this time does not recognize marriages between two people of the same gender (pending resolution of this matter on Federal Constitutional grounds by the U.S. Supreme Court). Therefore Wife's relationship cannot be considered a "marriage" for purposes of the alimony provision in the Decree. However, a party may not avoid a modification in alimony simply by not getting married if they are in fact living as though they are married and benefitting from their co-habitor as though that person were their spouse, such as sharing

common expenses or even by receiving financial support from their partner. It is unclear from the facts presented if the relationship would meet these criteria.

Under Federal Constitutional jurisprudence, however, mere moral disapproval of Wife's same-sex relationship is not a rational basis for state action, and judicial orders in family law cases are state action. The relationship may therefore not be considered as a factor in any decision to remove wife as the custodial parent or reduce her parenting time.

5. The allegation of reduced income states a claim for relief. As noted the court maintains jurisdiction to modify a Decree at any time for good cause. Given the alimony order it is likely that this was a no-fault (irretrievably broken) divorce. In that instance alimony may be awarded for a limited time or an indefinite time, and in whatever amount is deemed just based on the circumstances of both parties. In this case the Decree awarded alimony to wife for a period of ten years, or until she re-marries or Husband dies. As noted previously the meretricious relationship may come into play in determining the Wife's income and resources for alimony purposes. However, the alimony was also awarded based on Husband's then-reported income, which has allegedly been cut in half in the five-plus years since the Decree. If proven, it would be unjust to require Husband to continue paying alimony on an amount calculated using his prior \$90,000 salary when he now makes only \$45,000. This assumes that the reduction in salary was not offset by any increase in other income or was not done intentionally for the sole purpose of reducing the amount Wife receives.

Husband's reduced salary would also be relevant to Husband's prayer for modification of child support. Child support in Georgia is calculated by adding together the income of the parents. The total monthly child support obligation is then determined by referencing a chart based on the total income. Each parent is required to pay the same percentage of the child support obligation as their percentage of the total combined income, with additional adjustments made based on the percentage of the time each parent has custody of the child. If Husband's income has been cut in half, that is a substantial reduction in his means. Assuming Wife would still be attributed a monthly income of \$1,500, this would substantially reduce both the total child support obligation of the two parents and Husband's share of that obligation.

6. While in most cases a party filing a civil action has an absolute right to a jury trial, in this instance Husband does not have the right to a jury trial. He is seeking a modification of the existing Decree, which is within the sound discretion of the court to grant in whole, grant in part, or deny.

QUESTION 3 - Sample Answer # 1

What crimes may Defendant be charged with regarding the death of Victim # 1?

For a charge to be brought against a defendant, the prosecution must prove both the *actus rea* and the *mens rea* for the crime. The *actus rea* refers to the actions of the defendant in committing the crime. The *mens rea* refers to the mental state required by the applicable statute. If a Defendant's actions cause a death, Defendant may be charged with murder if the prosecution can prove Defendant committed an act with the intent required by statute. If the perpetrator intentionally causes the death of another, the perpetrator may be charged with murder. If the perpetrator acts intentionally and with a willful disregard for the dangers of his/her actions, the person may be charged with "depraved heart" murder. Intent can be proven by showing the perpetrator committed an act that the perpetrator knew or should have known was likely to cause serious bodily injury or death. If the perpetrator commits an inherently dangerous felony such as burglary or robbery and someone dies as a proximate cause of the criminal act, the person may be charged with felony murder. The burden is on the prosecution to prove the Defendant had the intent to commit the acts that resulted in the death of Victim #1. The prosecution must prove its case beyond a reasonable doubt.

Defendant could be charged with "depraved heart" murder

Defendant intentionally sprayed the front of the house and through the open door and his bullets killed Victim #1. Defendant willfully disregarded the dangers of his actions by committing the actions even though he knew or should have known that doing so was likely to cause death or serious bodily injury to someone inside. He believed there were people inside because he intended to rob them, so he intentionally endangered them with his actions. Defendant therefore could be charged of "depraved heart" murder.

Defendant could be charged of felony murder

To charge Defendant with residential burglary, the prosecution must show Defendant entered a residence without permission and with the intent to commit a felony or a theft therein. Residential burglary is a felony in Georgia and carries a sentence of from 1 to 20 years in prison. Defendant entered the rented house without permission and with the intent to take the money from those he found inside. Defendant's actions therefore meet the elements of a burglary as he had the intent to commit the crime and carried out his intent through his actions.

To charge Defendant with armed robbery, the prosecution must show Defendant took items of value from a consciously aware victim or victims through force or through the use of a weapon. Armed robbery is also a felony in Georgia. Defendant also committed 5 counts of armed robbery as he took items of value from Victims #2, 3, 4, and 5. Defendant did not commit armed robbery against Victim #1, however, as Victim #1 was dead when Defendant took Victim #1's valuables.

To charge Defendant with aggravated assault, the prosecution must show Defendant made an assault upon a person with a deadly weapon or with an item which when used offensively may result in serious bodily injury or death by intentionally causing the victims to be fearful of an immediate assault. Defendant pointed the assault rifle at Victims 2 through 6 which is an aggravated assault under Georgia law because the rifle is a deadly weapon.

To be convicted of felony murder, the prosecution would have to show Victim #1's death resulted from the commission of a felony by Defendant. As the prosecution can show that Defendant committed burglary, 5 counts of armed robbery, and 5 counts of aggravated assault, and can show that Victim #1 died as a result of Defendant's intentional acts during the commission of the burglary, armed robberies, and aggravated assaults, the prosecution can charge Defendant with felony murder.

What crimes may Defendant be charged with regarding the wounding of Victim #2?

A battery is an intentional offensive or harmful touching of a victim against the victim's will. An aggravated battery is a battery that results in serious bodily injury to the victim that leaves visible marks on the victim or causes the victim to lose the use of part of the victim's body. A defendant can be charged with aggravated battery if the prosecution can show the defendant knew the defendant's actions were likely to result in serious bodily injury to the victim. Defendant sprayed bullets into the house he believed was occupied, so he intended his actions. Because the injury received by Victim #2 was a likely result of Defendant's action and Defendant knew or should have known it would be a likely result of his actions, Defendant had the required intent to commit aggravated battery. Because the result of Defendant's actions was Victim #2's loss of the use of his legs, his injury meets the bodily injury requirement for aggravated battery. Defendant intended the actions that resulted in Victim #2's paralysis, so Defendant can be charged with aggravated battery.

Is Driver a "party to the crime" under Georgia law for the crimes charged against Defendant?

A party to a crime is any person who aids, encourages, assists, or counsels another to commit a crime. Even though a person does not participate in the crimes of any co-defendants, a party to a crime may be charged with any crime committed by a co-defendant in furtherance of the criminal activity. Defendant and Driver agreed to rob the men congregating at the rented house and Driver assisted Defendant in the robbery by driving Defendant to the location and acting as lookout. Because Driver aided and encouraged Defendant to commit the crimes which Defendant should be charged with, Driver can also be charged with those same crimes.

What are the considerations for bail and is bail discretionary?

The factors a court must consider in setting bail are 1) will the accused return for court; 2) will the accused try to intimidate witness or destroy evidence; 3) will the accused flee the

jurisdiction; and 4) is the accused likely to commit a crime if released. Bail is somewhat discretionary as the judge determines the weight placed on each factor.

What is the purpose of a "demand for speedy trial" and what duties does it impose on the Court?

A demand for speedy trial requires the court to try the Defendant's case within 2 trial terms or dismiss the case. The purpose is to force the prosecution to try the case quickly.

QUESTION 3 - Sample Answer # 2

1. Defendant will likely be charged, in regards to Victim #1, with malice murder. Malice murder is the unlawfully killing of another human being with malice aforethought. Malice does not mean premeditation, but malice may also be proved, as here, with a "depraved heart" state of mind. Depraved heart means a reckless disregard for the value of human life. Here, Defendant shot into a residence that he knew, or at least anticipated to be crowded. He had this knowledge because he was familiar with the house and knew that there was usually a crowd of people there. Therefore, it can be shown that he exhibited a reckless disregard for the value of human life by firing a spray of bullets into the house. Malice Murder is a felony in Georgia.

At the very least, Defendant will be charged with Felony Murder of Victim #1. Felony murder is the unlawful killing of another human being during the commission of a felony. Here, the underlying felony would be armed robbery. When Defendant fired several rounds into the house, he was engaged in the commission of the armed robbery at that point. He had taken a substantial step towards its commission. Therefore, it is likely that felony murder would apply here.

Defendant will likely be charged, in regards to Victim # 2, with Aggravated Assault. Aggravated assault is an assault upon a victim, with a deadly weapon, with the intent to rape, murder, or rob the victim. Aggravated assault need not include a physical battery upon the victim as it does here, but it may also be assault in the form of the victim's apprehension of injury or death, by a defendant's use of a deadly weapon. For example, pointing a gun at someone, would also constitute aggravated assault in Georgia. Defendant would also likely be charged with Armed Robbery. Armed Robbery is theft of personal property from the person or presence of the victim by use of force with a deadly weapon. Here, Victim # 2 did not die, and the facts indicate that Defendant searched each victim in the house and took all the guns and money he could find, while he held each victim at gunpoint. Aggravated assault is a felony in Georgia.

Defendant can also be charged, in regard to Victim #2, with Aggravated Battery. Aggravated Battery is a battery (an intentional contact that causes harm to the victim) that renders a part of the victim's body useless, either permanently or temporarily. Here, the bullet that struck Victim #2 and paralyzed him from the waist down. That is sufficient for aggravated battery. Even a broken nose or a broken arm, or battery that causes a victim to lose his eyesight would constitute aggravated battery. Aggravated battery is a felony in Georgia.

2. The Driver will be charged with the same crimes as the Defendant under Accomplice Liability. An accomplice is one that aids, participates, or encourages another to commit a crime, prior to or during the crime. Accomplice liability requires more than mere presence at the scene. Here, Driver was more than merely present, he actually participated in, or at the very least aided and encouraged, the commission of the crimes aforementioned, by being the getaway driver. Driver knew that Defendant intended to rob the people in the house. That was their explicit plan, according to the facts. So here, Driver could be charged

with Malice Murder, Aggravated Assault (6 counts), Armed Robbery (5 counts because you can't rob a dead person), and Aggravated Battery.

Both Driver and Defendant can also be charged with Conspiracy to commit all these crimes as well. A conspiracy is an agreement between two or more people to commit a particular crime. Conspiracy is an inchoate, or "incomplete" crime. The conspiracy itself is the crime; the essence of which is the agreement to commit the crime. The actual crime conspired to be committed need not actually be completed in order to charge conspiracy.

3. Defendant was indicted during the pendency of the second motion for bail. Therefore, it would be in the judge's discretion whether to hear the motion and grant bail, or deny the motion and deny bail, or deny to hear the motion. An indictment is sufficient to hold a defendant in custody until the time of trial. Defendant may argue that he will be subject to an immense length of incarceration because of the delay in proceedings, but that is about the only argument Defendant has in consideration of having bail granted. The judge will look at the facts of the case, as alleged, and determine whether or not is a good idea to grant bail to Defendant based on those facts. The judge will consider the crime itself, the state of mind of Defendant, the flight risk (the risk that he may leave the state or country to avoid trial), the risk of harm Defendant poses to the community, the benefit of releasing Defendant. The judge, here, will likely deny bail based on the violent-ness of the alleged crime, the fact that there was a murder and several felonies. The nature of the crime itself, the blatant disregard for human life, and for the law in general, would likely easily sway the judge to deny bail.

4. A demand for speedy trial is a motion to compel a defendant's trial within two trial terms in the jurisdiction. Defendants have a Constitutional right to a speedy trial under the Fifth Amendment. The number of trial terms is set statutorily in Georgia. Some jurisdictions may only have two terms per year, while others may have 4 or more. When confronted with a motion for speedy trial, the court must arrange for the defendant's case to be heard within two terms of trial, or within two occurrences of a jury panel being selected. If the defendant's case is not heard within the two terms, the case must be dismissed with prejudice.

QUESTION 3 - Sample Answer # 3

1. Crimes the defendant might be charged with regarding the homicide of Victim #1 and the wounding of Victim #2

Victim #1

Rule: Felony Murder, a person commits the offense of felony murder when during the commission of a felony he causes the death of another person

Analysis: Here the victim intending to commit a burglary, entering a home with the intent to commit a felony, which in this case would be armed robbery, shot into the home as he approached the door. By firing into the home he knew or should reasonably have known that his actions were extremely reckless and could have led to the death or injury of anyone inside. The facts state that he knew the home was occupied when he fired the shots. As a result of the actions victim #1 died from bullet wounds he suffered during the commission of the felony committed by the Defendant.

Conclusion: Because defendant shot and killed victim #1 during the commission of a felony he should be charged with felony murder

Victim #2

Rule: A person commits the offense of aggravated battery when he or she cause a person serious bodily injury and cause disfigurement or permanent lost of a part of another person's body.

Analysis: Here defendant shot into a home he knew was occupied. He might not have intended to cause the death or to injure anyone inside the residence but he did intend to pull the trigger and intended for the bullets to go inside the home and went there with the intent to commit armed robbery. As a result of his action Victim #2 was paralyzed from the waist down causing him to lose the use of his legs.

Conclusion: Defendant is guilty of aggravated battery because he caused serious bodily injury to victim #2 by shooting victim #2 and causing Victim #2 lose the use of his legs.

2. Status of driver as compared Defendant

Rule: A party to a crimes can be charged for all the crimes committed by a co-defendant during the commission of the crime

Analysis: Here the driver agreed to go with defendant to the house. The facts do not state that the driver was aware of Defendants intentions, but one could reasonably assume that the going to another residence at 10:30 p.m. armed with a rifle that Driver intended to carry out some sort of criminal conduct. Also the fact that driver armed himself with weapon is indicative of guilt. There is no crime in Georgia for carrying a weapon in a vehicle. So those

facts alone are not dispositive of his culpability. When the shots from the rifle rang out Driver did not flee or go to assist Defendant. There are also no facts to indicate that he summoned for help or alerted authorities that someone was firing a rifle. These fact lead to an inference that Driver was aware that defendant went to the home to commit and armed robbery.

Conclusion: Since Driver was aware of Defendants plans and assisted defendant by driving him to the crime scene and they aided Defendant in his escape he should be charged with the same crimes that Defendant will be charged with.

3. Bail

In Georgia in cases where a defendant is charged with serious felony or is imprisoned the charges must be brought before the grand jury within 90 days. If the charges are not brought before the grand jury during that time the defendant may be entitled to a bond.

Requirement for Bond:

A. Ensure the defendant will appear in court

Here the defendant will likely be charged with felony murder and armed robbery. If he were to be convicted of those crimes he could face a maximum of life in prison. The eighth amendment requires that a defendant receive a reasonable bond, so that he or she can prepare a defense, and continue with their life until the matter is disposed of. Defendant in this case not likely to receive a bond in light of the punishment he faces. There is a strong likelihood that he will abscond because facing a life sentence which would mean that there is almost no incentive for him to return should he receive bail.

B. Danger of the defendant influencing or intimidating witnesses

In this case there is not indication that Defendant has made threats to the victims or the victims' family. However, again because of the seriousness of the offense and the punishment that could ensue from conviction the victim could attempt to harass intimidate or silence a victim or witness. An argument could be made that Defendant does not know the victims and therefore does not pose a danger to them. There are no facts that indicate that Defendant knows the victims or is aware of their identity.

C. Likelihood that the defendant will re-offend

There are no facts in this case that indicate that Defendant is a danger to commit other felonies if out on bail. In basing their decision on this matter a court would look to at factors such, probation, parole, convictions for other felonies, and whether the defendant is out on bond for other offenses. There is nothing in the facts to indicate that Defendant has any such factors.

Is the courts decision on the second motion for bond discretionary.

Rule: If a defendant is held in jail for more than 90 days without indictment he may petition the court for bond. The court must hear his petition.

Analysis: Here Defendant was arrested for felony murder, aggravated battery, and presumably more charges. Because of administrative delays he was not indicted on those charges and now is entitled to a bond hearing even though he has already had a hearing in superior court.

Conclusion: The court must hold a bond hearing for Defendant because he was held in jail beyond 90 days and not indicted

4: Speedy Trial Demand

Issue: What is the purpose of a speedy trial demand

Rule: A person may file for a speedy trial within one term of arraignment or in the case of a capital offense within two terms of arraignment.

Analysis: The facts state that the defendant requested a speedy trial. To do so his motion for the speedy trial must be solely for a speedy trial and must be served state at the top of the motion "Motion for Speedy Trial" and must be served within one term of the court after his arraignment. The purpose of the motion is that the defendant is asserting right under the constitution to a speedy trial. This ensures that the defendant will dispose of the case as quickly as possible. The speedy trial demand requires the court to set a trial date during the next term of court. If the trial cannot be started in time the case is dismissed, jeopardy attaches.

QUESTION 4 - Sample Answer # 1

MEMORANDUM

TO: Senior Partner

FROM: Applicant

DATE: February 24, 2015

RE: Jim's Fast Food Restaurant

This memorandum will discuss the property currently owned by Ben and Charlie Adams and the restrictive covenants associated with the land. This memorandum will also discuss the impact of the covenants on Jim's fast food restaurant.

1. Two types of ownership tenancies recognized in Georgia are a joint tenancy with right of survivorship and a tenancy in common. A joint tenancy with right of survivorship provides an undivided interest in the property among co-tenants. When one co-tenant dies, the remainder of the property passes to the surviving tenant. Joint tenancies can be severed by sale of one tenant's interest, then making the purchaser a tenant in common with the remaining tenants. If more than one, then they keep their joint tenancies.

Tenancy in common is an undivided interest in property between two or more tenants. Upon the death of one tenant, their interest passes to their estate. A tenant can only sell the interest they possess in the property. Tenants can also choose to partition the property or have the other tenant buy their interest.

2. Ben and Charlie inherited a tenancy in common. Where two or more people are devised property in a will, and the will does not designate the interest devised, then the devisees take a tenancy in common. Here, the will did not state what interest Ben and Charlie were to receive. Thus, the interest was presumptively a tenancy in common.

3(i). Jim's will not be restricted from building and operating its restaurant under Section 13 of the Lease. The lease provides that another breakfast oriented restaurant cannot be built for 5 years, or indefinitely as to specifically named restaurant. As it has been over 5 years since the 1996 lease agreement, and Jim's is not one of the named restaurant's, then under Section 13 Jim's would be free to build there.

3(ii). Most likely Jim would be restricted from building under Exhibit C. The issue involves the effect of Charlie's interest. especially given Charlie did not sign. Generally, one can only convey what they own. However, tenants in common can still lease properties and can keep the rents due from the lease. Tenants in common cannot however obstruct the use of the land of another tenant. An agreement entered into by one tenant may still run with the land, but that tenant may be liable to the other tenant for ouster if the tenant cannot use the land, or for rents produced on the land.

Here, Exhibit C would probably block Jim's from operating as it stops any freestanding restaurants and only allows gas stations that do not derive more than 25% of revenue from

breakfast food. While Jim might be able to argue that it gets a small revenue from breakfast, it nevertheless is not a gas station. Further, the fact that Charlie did not sign the covenant may make Ben liable to Charlie, but it most likely will not void the granting of the restrictive covenant.

Thus, Exhibit C would restrict Jim's.

3(iii). Most likely the CRA prohibits Jim's from operating on the property, except that the covenant does not specifically bar Charlie from leasing or selling. If Charlie's not signing has any effect, he may be able to use the land if Charlie sells (although Charlie would either have to partition or only sell his interest).

4. Yes, the recorded lease is relevant. The issue is notice. For the burden of a restrictive covenant to run with the land, the covenant has to touch and concern the land, intent, be in horizontal vertical privity, and there be notice. Notice can be actual or constructive

Here, without the Lease on file giving record (i.e. constructive) notice, it is arguable that Jim's could purchase the parcel and not be bound by the burden of complying with the restrictive covenant. In this case, when Jim's saw the Lease, they had actual and constructive notice of the restrictive covenant. Thus, if Jim's buys the land, Jim's would be subject to the covenant.

Thus, the recorded lease is relevant because it places prospective buyers on notice that the restrictive covenant is meant to run with the land and applies to the prospective buyer.

QUESTION 4 - Sample Answer # 2

To: Senior Partner
From: Examinee
February 24, 2015

Re: Adams Property Rights and CRA

Memorandum

1. Types of ownership interest recognized in Georgia

Georgia recognizes tenancy in common, joint tenants with the right of survivorship and tenancy for years. A tenancy in common occurs when two or more people own a fee simple percentage interest in all of a piece of property. Joint tenants with the right of survivorship is created when the owners take title all at the same time, in one instrument, to equal ownership of all of the land, and each has a right of survivorship to the others. If a joint tenant devises his portion to someone else, the new person takes as a tenant in common and the right of survivorship is destroyed; the remaining joint tenants stay joint tenants and their right to survivorship remains. When a joint tenant dies, their portion automatically goes to the other joint tenants. A tenancy for years occurs when there is a lessor and a lessee and the lease is for 5 years or more. the lessee has present legal title in the land.

2. Ben and Charlie inherited the Adams Property as Tenants in Common

In Georgia, if a joint tenancy with a right to survivorship is not expressly, and specifically created, a tenancy in common is created. Ben and Charlie received the Adams property as a specific bequest in their father's will. However, the facts show neither the will nor the deed state it was creating a joint tenants with a right of survivorship. As a result, Charlie and Ben are tenants in common and each have a one half interest in the whole of the property.

3. Jim will probably not be restricted from building and operating its restaurant on Parcel 2

Section 13 of the Lease

Jim probably will probably be restricted some under this section of the lease. Georgia law will enforce covenants as long as they are reasonable in duration, geography, and subject matter. Under Section 13, Landlord cannot convey property to be used within one block or 1,000 feet of twenty four/seven for the use of an breakfast oriented restaurant for a period of 5 years. The one block radius is certainly reasonable, and the duration and breakfast food portion is also reasonable. However, the portion about not operating a hot shot or anything that serves eggs and such is probably to broad to be enforceable. Eggs are a pretty basic food and may be used in a variety of ways at many types of restaurants. Jim's restaurant is known for hamburgers and eggs can be served on hamburgers. The fact that Jim's has a full service breakfast though, may make it applicable to the restriction, and Jim

may be restricted to hamburgers and non-breakfast items. This section however, does state that it only applied for 5 years. 5 years have clearly gone by, so Jim may be able to serve breakfast food now, as well.

Exhibit "C"

The Lease restricts the landlord from selling, leasing or making available parcel 2 for the operation of a freestanding restaurant. It may be used for food services if it is attached to the gas station in Parcel 1, provided it does not derive 25% of its profits from breakfast food. Jim may be able to get around this provisions if it is Charlie who devises the property to Jim, rather Ben. Charlie did not initial Exhibit C of the lease, and thus may not be held as contracting to the provision, though this may be a weak argument since Charlie and Ben are landlords under the lease and Ben agreed to it.

CRA

The CRA prohibits Ben from selling, leasing, or using Parcel 2 for the operation of a freestanding restaurant. Jim may be able to build his restaurant under this provision, however, if he agrees to attached his restaurant to the gas station located on Parcel 1 and Jim does not derive more than 25% of its revenue from breakfast items. Jim may easily get around the CRA because it specifically prohibits Ben from leasing or selling the land to a restaurant, but it does not mention Charlie.

So if it is Charlie that conveys the land to Jim, may just have to follow the restriction of not serving breakfast items at his restaurant.

4. The lease being recorded simply puts the world on notice of the covenants held in it. A purchaser or leasee cannot be conveyed the land, minus the covenant provisions, and then claim they did not have notice of the covenants, and thus should not be held to them. Recording gives constructive notice to all potential devisees of the land.

QUESTION 4 - Sample Answer # 3

To: Senior Partner
From: Applicant
Date: February 24, 2015
Re: Jim's Restaurant

1. Types of Ownership: Georgia recognizes tenancies in common and joint tenancies. A joint tenancy requires that the interests of both parties come into being at the same time in the same document and that the parties share an equal interest in the property, meaning where, as here, there are only 2 parties, each must have a 50% share. Joint tenancies typically exist with a right of survivorship, meaning that when party A dies, party B takes the entire property, and nothing will pass in Party A's will to his heirs. Joint tenancies are not presumed. For a joint tenancy to be created, the document creating the tenancy must use language specifically creating a joint tenancy with right of survivorship. Where, as here, no such language is used, a tenancy in common is presumed. There is a preference for tenancies in common, and there are several acts which parties can engage in that will dissolve a joint tenancy and turn it into a tenancy in common. For instance, if a foreclosure sale takes place on the property due to one joint tenant's ownership, a joint tenancy will cease and become a tenancy in common.

Tenancies in common do not require the same unity of ownership interest that a joint tenancy requires. It is okay for one party to have a disproportionate share of the property. An interest in property which is shared with another tenant in common can be passed down in a will.

2. Tenancy Established: Because the will does not use language specifically creating a joint tenancy with right of survivorship, a tenancy in common is created. There exists a preference for tenancies in common, which is why specific language is required to create a joint tenancy.

3(i): Under section 13 of the lease, Jim's will be restricted if it had attempted to serve breakfast at its establishment were it within five years of the original lease agreement. This provision of the lease is signed by both tenants in common and would be binding on any subsequent purchases of the land. However, even were it within the first five years of the lease, Jim's could make an argument that it's not a breakfast-oriented restaurant since it is best known for its hamburgers. If 5 years have passed, then Jim's is not one of the three businesses that is prohibited from operating on the land.

3(ii): Exhibit C is attached to the end of the release and contains a more restrictive clause than the one mentioned in the language of the lease. Only one of the tenants in common acknowledged this exhibit, which would seem to indicate that Charlie did not agree to be bound by this covenant. While this lease may serve to put Jim's on notice of these restrictive covenants, this particular covenant has not been properly acknowledged by both owners of the leased property. This portion of the lease appears to have been added on without Charlie's knowledge and without Charlie agreeing since Charlie has valid 50%

ownership interest in the property, and he is not a party to this particular part of the agreement, it is probably unenforceable. It will depend on whether or not both owners can be deemed to have agreed to the terms found in this restrictive covenant.

3(iii): The CRA is almost certainly invalid as the agreement between the parties is not acknowledged by Charlie, who has a half interest in the property in question. Ben cannot enter into further restrictive covenants as to this land that exceed his share. Further, because this is a tenancy in common, the tenant should have known that he needed both parties consent. Even were Charlie to predecease Ben, this interest would pass to his heirs if he died intestate or pass according to his will. This provision wouldn't be binding on Jim's because it isn't properly executed by both owners of the property.

4. Recording the lease serves to put future purposes on notice of the restrictive covenants. To the extent that the covenants are invalid, however, it has no effect. Recording a title when the chain is incomplete can certainly serve to put future parties on notice of a claimed title, but if it is not valid title, (i.e., if there is an incomplete chain of title), then recording it properly still does not serve to create a valid title. Georgia is a race-notice state, which means that a party must record a valid title to put further purchasers on notice.

MPT 1 - Sample Answer # 1

MEMORANDUM

To: Esther Barbour
From: Examinee
Date: February 24, 2015
Re: Daniel Harrison matter

You have asked me to evaluate the theories under which Daniel Harrison might pursue a claim of inverse condemnation against the City of Abbeville.

There are three theories that can be used to make a claim of inverse condemnation under federal law and one possible theory under Franklin Law. (1) Total regulatory taking where the regulation deprives the property of all economic value; (2) a partial regulatory taking where the challenged regulation goes "too far"; (3) a land-use exaction which occurs when governmental approval is conditioned upon a requirement that the property owner take some action that is not proportionate to the projected impact of the proposed development *Newpark Ltd. v. City of Plymouth* citing *Lingle v. Cheveron*. While the federal courts do not recognize the substantially advanced a legitimate governmental interest test, Franklin has not discounted it's use. *Newpark* see also *Venture Homes Ltd. v. City of Red Bluff*.

1. Total regulatory taking

In a claim of a total regulatory taking, the court should look to whether or not the regulation deprives the owner of all economic value. *Lucas v. Carolina Costal Council*. This does not mean that property owner is deprived of all use of the land, or that the owner will not make a profit on the land; it means that the land would be valueless. *Newpark*. The economic viability test entails a relatively simple analysis of whether value remains in the property after governmental action. *Id.* In *Newpark*, both parties agreed that the regulation would make the cost to develop the property with one acre lots would exceed the potential for revenue. Even though the land had been purchased for \$10,000 per acre the fact that it might be worth no more than \$2,000 per acre didn't make it a total regulatory taking. *Id.*

Here, Harrison paid \$100,000 for the property, and it was estimated that it is worth about \$200,000 if it could be used as is for a training facility. Based on the realtor's estimate, the land as it stands, would only be worth a few hundred dollars per acre. It still has some value. Therefore it would not be a total regulatory taking.

2. Partial regulatory taking

A partial regulatory taking where the challenged regulation goes "too far." *Penn Central Transp. Co. v. New York City*. For a partial regulatory taking to occur, the government regulation must at a minimum diminish the value of an owner's property. *Venture Homes*. Investment backed expectations are important, and the historical uses of the property are critically important. *Id.* In regard to historical use of the property, a buyer is not precluded from bringing an inverse condemnation action even if the buyer was aware of a zoning ordinance because unreasonable zoning regulations do not become less so through the

passage of time or title. *Palazzolo v. Rhode Island*. The test for a partial regulatory taking is a balancing test of three factors (1) the economic impact of the regulation; (2) the extent to which the relation interferes with the property owner's reasonable investment-backed expectations; and (3) character of governmental action. *Sheffield Dev. Co. v. City Hall Heights*.

In *Venture Homes*, the reduction in value was minimal. At most there was a 4% reduction, and Venture Homes could still build additional units to increase their profits. The land could still be used for the purpose intended by the buyer. The character of the action was merely to increase competition by allowing more apartments to be built in the area.

Here, we do have a substantial economic impact. The property that Harrison bought could be rented immediately as a school for truck driving. Without that use he could lose \$10,000-\$15,000 per year for taxes and maintenance. He put a substantial investment into the property by purchasing it for \$100,000. While he knew of the zoning regulation, he believed the facility would be grand fathered in since it had been a national guard armory where training had been taking place for years. The government action to deprive him of the use is due to a concern about an adjacent park which has been adjacent to a military training facility.

Harrison would be able to recover under this theory.

3. Land-use exaction with a disproportionate impact

A land-use exaction which occurs when governmental approval is conditioned upon a requirement that the property owner take some action that is not proportionate to the projected impact of the proposed development. *Newpark*. Here the only impact on the community would be a nearby park. While the city has suggested some alternate uses for the facility, Harrison's concerns that a day care center, office building, or medical facility that's away from other residential areas would fail are well founded. Also, while the building is safe to occupy as is, renovations would be cost prohibitive due to the lead and asbestos used in its construction. That makes the city's counter proposal impractical. Harrison would succeed under this theory.

4. Regulatory Taking that does not substantially advance a legitimate governmental interest

Franklin courts still hold out the possibility of using the "Substantial Advancement" Takings Test. A court examines the effect of the ordinance and the legitimate state interest it is supposed to advance. *Venture Homes*. This standard is higher than the rationally related test because it requires that the ordinance substantially advances a legitimate state interest sought to be achieved. *Id.*

In *Venture Homes*, the court looked at a claim of a pretext being used to allow new, community development in an area. The court found that there was a governmental interest in allowing for more housing into a an area.

Here, the government does have some interest in keeping a commercial operation from interfering with a park, but that interest should be looked at based off of the historic use of the facility. It's been used as a training facility, and it will continue to be used as a training facility. The government's interest is insufficient to deny Harrison's use of the property.

Harrison would probably prevail on the partial regulatory taking test, the land-use exaction test, and under the "substantial advancement" test. His strongest position would be under the Partial Regulatory Taking test, and I recommend that we put most of our effort into that claim.

MPT 1 - Sample Answer # 2

MEMORANDUM

To: Esther Barbour

From: Examinee

Date: February 24, 2015

Re: Daniel Harrison matter

This memo identifies the inverse condemnation theories under Franklin and federal law and examines whether Harrison might succeed.

1. Identifying each of the inverse condemnation theories available under Franklin and federal law

Within the state of Franklin, there are five inverse condemnation theories: 1. Physical taking; 2. Total regulatory taking; 3. Partial regulatory taking; 4. Land-use exaction; and 5. Substantial advancement taking.

Per your memorandum, there has been no physical taking so this memorandum will not address this issue.

A total regulatory taking is, under federal and Franklin law, where the regulation deprives the property of all economic value. *Newpark v. Plymouth*, citing *Lingle v. Chevron*. The U.S. Supreme Court has laid out that a total regulatory taking happens where "no productive or economically beneficial use of the land is permitted" and where the owner keeps "only a token interest" in the land. *Lucas*, cited in *Newpark*. Franklin courts have construed *Lucas* so that a total regulatory taking is one that occurs only when the property's value has been "completely eliminated" by the regulation. *Newpark*, citing *Sheffield v. Hill Heights*. Even if the value of the land post-regulation is "utterly lacking," there has not been a total regulatory taking. *Newpark*. As long as there is some value to the land, economic or otherwise, and without there being any extraordinary circumstances, there has not been a total regulatory taking. *Sheffield*, citing *Wynn v. Drake*.

A partial regulatory taking is, under federal and Franklin law, "where the challenged regulation goes 'too far'" and causes an "unreasonable interference" with the owner's rights to the land. *Venture Homes v. Red Bluff*, citing *Penn Central v. New York City*. It is not enough that a regulation diminishes the value of the property. *Venture Homes*. The Franklin Supreme Court and the U.S. Supreme Court both lay out three factors for determining whether the regulation goes beyond a mere diminishment in value and becomes a partial regulatory taking: 1. the economic impact of the regulation; 2. the extent to which the regulation interferes with the property owner's reasonable investment-backed expectations; and 3. the character of the governmental action. In Franklin, the court balance these factors to determine whether "fairness and justice demand" that the public has the burden of the regulation rather than the landowner. A small economic impact weighs for the regulation. Minimal interference with the landowner's reasonable expectations of use of the property also weighs in favor of the regulation. If the regulation

does not alter the existing or permitted use of the property, there has not been interference with the property owner's reasonable expectations. If the regulation impacts the owner disproportionately then the third factor weighs against the regulation, but if the regulation is general in character then it weighs for the regulation. Franklin courts consider the first two factors more important than the third factor. *Venture Homes*.

A land-use exaction occurs when, under federal and Franklin law, a regulation requires the property owner to take some action that is "not proportionate to the projected impact of the proposed development." *Newpark*, citing *Lingle*. The relevant case law does not expound greatly on this topic, but it does seem that a land-use exaction lies for the plaintiff when the government imposes a duty on the landowner to take some affirmative action whose benefit are tangential to the purpose of a landowner's proposed development of the land.

A substantial advancement taking is, under state law, where a regulation does not substantially advance a legitimate governmental interest. *Venture Homes*. The Court, in *Lingle*, rejected this theory but the issue has not been decided in Franklin. Under this test in Franklin, the courts examine the nexus between the effect of the regulation and the legitimate state interest the regulation is supposed to advance. The state has a high bar to clear because the test requires that the regulation "substantially advance the legitimate state interest sought to be achieved" rather than the easier test of whether the government merely could rationally decide that the regulation achieved a legitimate objective. *Venture Homes*.

2. Analyzing whether Harrison might succeed against the City under each of these theories.

Because your memorandum states that there has been no physical taking, this memorandum does not address whether Harrison may succeed in arguing that there is a physical taking.

Unfortunately for Harrison, a large difference in value and change in use of the land does not seem support a claim that there has been a total regulatory taking. Harrison and the real estate appraiser believe the land is worth \$200,000 if its economic potential is maximized. If the land is not re-zoned to C-1 then, according to the real estate agent, the land sitting unused is worth only about \$3,000. Even though there is a massive loss in value if not re-zoned and a massive economic loss to Harrison, neither of these qualify as a total regulatory taking. Because the zoning regulation does not diminish the economic value to \$0, there has not been a total regulatory taking. *Newark*. Furthermore, the regulation does not stop Harrison from entering the land for personal pleasure, nor does it stop him from developing the land in accordance with the zoning. *Newark*. Because the land still has some residual economic and personal value (no matter how small), there has been no total regulatory taking.

As to a partial regulatory taking, Harrison is more likely to succeed because the denial of his zoning application caused a large diminution in value of the land and it interfered with his investment-backed expectation of converting the land to commercial use. Daniel's

purchase and the bids of others indicate that the land, if re-zoning was not allowed, was worth at a minimum 10% of the potential value of the land if re-zoned. Because this loss was such a large part of the property value, this factor weighs heavily in favor of Harrison. *Venture Homes*. Additionally, Harrison invested money in the expectation of developing valuable commercial property and not valueless residential property. This factor does not weigh as heavily for Harrison, though, because it is arguable whether his expectations were reasonable in light of the already-existing R-1 zoning. Taken alone it would seem that he may have hoped to develop commercial property but shouldn't have expected to do so. But, this ignores the fact that the existing use was industrial and commercial use and seemingly had never been put to residential use. Therefore, he reasonably surmised that the re-zoning would return the property's zoning status to what it had always been. *Venture Homes*, citing *Sheffield*. Because he invested in the expectation of developing commercial property and because the land was already used as commercial property, this factor weighs in favor of Harrison. For the third factor, the character of the governmental action, the denial of the application seems to be general in character because it would allow the land to become residential and become cohesive with the surrounding land such as the park. This factor weighs against Harrison, but because the two factors should weigh in favor of him, a court should declare the denial of the zoning application to be a partial regulatory taking.

As to a land-use exaction, this probably weighs in favor of the government because the denial does not make Harrison take some affirmative action. It instead only denies Harrison from building certain types of structures.

As to the substantial advancement taking, Harrison does not have a strong case. With there being a park nearby, it appears that the City re-zoned the property to R-1 to promote development of single family homes in that area. Although this has not been successful, this desire is a legitimate government interest to create new housing for the population. The land's R-1 zoning substantially advances this legitimate state interest because it allows for only the building of single family homes.

Because the value of the land has not been reduced so much as to effectively deprive Harrison of the land, his claim for total regulatory taking is unlikely to succeed. He is likely able to succeed on the issue of partial regulatory taking because the regulation decreased the value of the land to such a high degree and interfered with his reasonable investment-backed expectation. He is unlikely to succeed on a land-use exaction theory because the regulation does not make him take an affirmative action, it merely denied him the ability to develop the land in certain ways. He is also unlikely to succeed on a substantial advancement taking because the R-1 zoning substantially advances the legitimate state interest of promoting residential housing.

MPT 1 - Sample Answer # 3

TO: Esther Barber
FROM: Examine
DATE: February 24, 2015
RE: Daniel Harrison Matter

This memo addresses Mr. Harrison's potential causes of action under various inverse condemnation theories. Because the City of Abbeville ("City") did not physically "take" Mr. Harrison's property, this memo speaks only to regulatory takings under the Franklin and Federal Constitutions.

The case of Newark Ltd. v. City of Plymouth Franklin Ct. Of App. (2007), ("Newark"), is binding on this matter and identifies four theories under which Mr. Harrison may proceed.

The first is a total regulatory taking where a regulation deprives the property of all economic value. This was the theory advanced by the plaintiff in Newark.

As preliminary matter, the fact that City's R-1 zoning ordinance was in place at the time Mr. Harrison purchased his property is not a bar to his action. If the R-1 zoning ordinance is unreasonable as applied to the property it will remain so upon later purchase. Newark citing Palazzolo. And whether the R-1 ordinance amounts to a compensable regulatory taking - i.e. regulation is so onerous that it is unusable by Mr. Harrison - is a question of law under the Franklin Constitution as informed by the Federal Constitution and the case law interpreting the constitutional language.

I. Total Regulatory Taking

The Newark court found no total regulatory taking and under Mr. Harrison's facts, while more onerous, there is likely no total regulatory taking as well.

A total regulatory taking occurs when a property owner must sacrifice all economically beneficial uses of his property, leaving him only a token interest. Lucas v. S.C. Coastal Council (1992). The Newark Court held that the government has no duty to underwrite the risk of developing and purchasing real estate and any of the purchaser's investment-backed expectations would only be relevant in a partial taking analysis. The ultimate factor in a total regulatory taking claim will be if the value of the property has been completely eliminated through government action. Sheffield Dev. Co. (Franklin 2006). While this was clearly not the case in Newark because the ordinance at issue merely decreased the permitted density of residential development, the same will likely hold true for Mr. Harrison.

First, Mr. Harrison presents us with evidence that there is still some financial value in his property as zoned, even its only "a few hundred dollars an acre." See Conner emails.

Second, Mr. Harrison likely assumed the risk of making this investment and the public should not bear the burden of his investment loss. He knew the zoning regulation was in place and mistakenly assumed that he would be able to get a variance to his benefit.

Third, Mr. Harrison could hold the property for future development in the hopes that the residential market expands in his area though it is unlikely since there hasn't been much growth since the 1960's.

Finally, Mr. Harrison retains the value of the property by way of his quiet enjoyment, right to exclude and recreational or horticultural uses. See Lucas; see also Wynn v. Drake (Franklin 2003). Therefore, Mr. Harrison will likely not have a claim based on a total regulatory taking.

II. Partial Regulatory Taking

Mr. Harrison likely has a good chance of success on a theory of partial regulatory taking. A partial regulatory taking occurs when the challenged ordinance goes "too far". Lingle v. Chevron (2005). In a partial taking analysis, reasonable investment-backed expectations and the historical use of the property are highly relevant considerations.

In Venture Homes v. City of Red Bluff Franklin Ct. App. (2010), the Court addressed this theory specifically and relied upon the "Penn Central" analysis in finding no partial regulatory taking. The initial bundle is that the regulation must at least diminish the value of the property which is clearly the case for Mr. Harrison. The three factors to consider under the Penn-Central analysis are (1) the economic impact, (2) interference with reasonable investment-backed expectations, and (3) the character of the action. The ultimate decision weighs whether fairness and justice demand that the burden of the ordinance be borne by the public rather than by Mr. Harrison.

The Venture Homes Court found no partial regulatory taking primarily because the decrease in value was only 4%. Here, Mr. Harrison's investment of \$100,000 and the market appraisal of \$200,000 have been reduced to merely a few hundred dollars as is and residential development is prohibitively expensive.

Next, Mr. Harrison had reasonable investment-backed expectations because the prior use was essentially industrial or commercial amory and he reasonably believed that a similar use could be grand-fathered in. Unlike in Venture Homes, the primary use (Mr. Harrison's "primary expectation") was altered upon his purchase of the property. Moreover, the surrounding land uses have not changed and are not residential in nature. Therefore, even without taking into account the third factor of disproportionate harm, Mr. Harrison should prevail under a partial regulatory taking theory.

III. No "Substantially Advancement

This third theory, while precluded under Federal law, is available to Mr. Harrison in Franklin. To prevail under this theory, Mr. Harrison must show that the ordinance does not

“substantially advance” the City’s legitimate interest in claims. Here, the apparent interest of the City is to provide quiet enjoyment to a particular area and maintain residential uniformity.

Here, Mr. Harrison’s property is surrounded by a baseball field and the airport. Therefore, his proposed commercial use without not interfere with anyone’s quiet enjoyment of their residential property. Also, due to the lack of residential development for decades, it is unlikely that anyone will even come in to his purported nuisance.

Additionally, the prior use of the property which was apparently permissible-or at least ignored by the City-was at least as much of a disturbance as Mr. Harrison’s proposed use. Therefore, Mr. Harrison will likely prevail under the “substantial advancement” takings test.

Finally, Mr. Harrison does not have a claim under this fourth type of regulatory taking because he has not been required to take any affirmative action or make expenditures on his property by the City.

MPT 2 - Sample Answer # 1

Community General Hospital
600 Freemont Blvd.
Lafayette, Franklin 33065

February 24, 2015

Office of Civil Rights
1717 Federal Way
Lafayette, Franklin 33065

Re: Response to Results of Audit for Compliance with HIPAA Regulations

Dear Robert Fields,

Our office respectfully responds to the three patient disclosures discussed in your letter February 9, 2015 prior to your 20 day deadline in order to justify our disclosures in each instance. Although no signed authorization was present for any of the three patient disclosures, as you've noted, the hospital did find extrinsic information that aligns our behavior to applicable laws and HIPAA regulations. For the first patient, who suffered a gunshot wound, the hospital is subject to federal law requiring that any gunshot or stab wounds treated by one licensed to practice health care be reported to the chief of police of the city in which treatment was rendered by fastest possible means with a companion letter by first-class US mail to be sent within 24-hours under Franklin Statute 607.29. This reporting is mandatory and the mailed letter fully complied to the requirements of only briefly describing the wound and providing the name and address of the victim/patient. This disclosure was kept to a minimum and with limit to requirements of the Franklin statute. By HIPAA regulation 45 CFR 164.502(b)(2) minimum necessary disclosure does not apply where uses and disclosures are required by law and the relevant requirements of such law are followed. As to the patient's objection to the disclosure, the hospital was not under a duty to entertain agreement or objection by the patient because the disclosure was permitted as pursuant to the mandatory reporting of certain types of wounds or other physical injuries under 45 CFR 164.512(f)(1)(I). Thus, the hospital requests that the disclosure should not be found to be a violation of HIPAA.

For the second patient, who died of arsenic poisoning, the patient's death does not, as a matter of course, remove the hospital's general standard to comply with minimum necessary requirements under 45 CFR 164.502(f). The specific facts around this particular patient's medical history and relationship to the hospital do, however, provide justification for the hospital's actions. When a patient is a suspected victim of a crime, the hospital may disclose protected health information to alert law enforcement to a person's death under 45 CFR 164.512(f)(4). Here, the pathology report determined cause of death as arsenic poisoning which is reasonable to assume resulted from a criminal activity and not accidental ingestion of 12 times the expected amount from environmental exposure. The hospital disclosed the information regarding the autopsy to law enforcement to report this

possible criminal act and only further discussed the family's known struggles between patient and his family due to personal knowledge. This last step was a direct result of personal information known to the hospital through a personal relationship with the patient's family. As to the amount of information provided to the police from this patient, the "entirety of the record" consisted of a total of two hospital stays (one at his death and the other six months prior) and this evidence was directly used in formulating the pathology report as a comparison and means to rule out other possible causes of injury. Given the age of the decedent, on its face the entire record can certainly be assumed to be beyond minimum necessary, but here, because the only other record was a comparative basis for finding the patient's normal levels of poison and preexisting conditions relevant to analyzing his organ failure, this information was narrowly provided to report an unnatural death as allowed by HIPAA regulation such the hospital requests that no violation should be found to have occurred.

The last patient, who made overt threats to his boss and whose threats were reported to the police, was in good faith considered to be a potential future danger to the public such that disclosure was allowed. Under 45 CFR 164.512(j)(1)(I), the hospital can permissively and ethically disclose protected health information because we in good faith believed it was necessary to prevent or lessen a serious and imminent threat to the health and safety of a person, here, the patient's boss. When the hospital treated this patient, the patient's relative without hospital prompting, informed us that the patient not only had damaged property prior to being admitted, but also had the actual means to carry out threats of violence by admission that the patient owned a gun. Thus our good faith belief was based upon this reliance on a credible representation by a person we reasonably felt would have apparent knowledge (as the patient's representative during hospital intake). This complies completely with CFR 164.512(j)(4) to validate our good faith knowledge and assuage any violation of disclosure mandates. Further, the hospital limited the information disclosed to the police to not include the specific cause of the patient's combative behavior, as this would likely have been outside the scope of minimum necessary disclosures.

As such, it is our reasonable belief that no enforcement action under HIPAA is warranted and request that you use your available discretion to similarly conclude.

Respectfully signed,
Applicant

MPT 2 - Sample Answer # 2

To: Mr. Robert Fields, Investigator; OCR, U.S. Dept. of HHS; 1717 Federal Way;
Lafayette, Franklin 33065
From: Jackson, Gerard, and Burton LLP
Date: Feb. 25, 2014
Re: Results of Audit for Compliance with HIPAA Regulations

Dear Mr. Fields,

We appreciate your letter to Community General Hospital concerning the HIPAA complaints your office received and would like an opportunity to address each complaint. Please find the following justifications for the disclosure with respect to each patient below.

1. Patient #1

After treating the patient for a gunshot wound, Dr. Luke Ridley called the Lafayette PD and reported the wound and the next day sent a written report by first-class mail to the police department identifying personal health information (PHI) covered by HIPAA. Under HIPAA, a covered entity such as Community General Hospital is permitted to release PHI if it is required by law. See 45 C.F.R. § 164.512(f)(1)(I). Even though Patient #1 objected to disclosure of PHI, that objection is not relevant under section 164.152(f)(1) and the patient's objection would only apply if the disclosure was not otherwise required by law. See 45 C.F.R. § 164.512(f)(3).

Here, under the Franklin Statutes § 607.29, a physician "shall make a report to the chief of police of the city . . . in which treatment is rendered by the fastest means possible." Dr. Ridley complied with this clause of the statute by calling the chief of police after treating the wound. Next, the statute requires that "within 24 hours after initial treatment . . . a written report shall be submitted, including a brief description of the wound and the name and address of the victim . . . shall be sent by first-class U.S. mail to the chief of police of the city . . . in which treatment was rendered." § 607.29. Dr. Ridley complied with this section of the statute also by mailing with USPS to the Chief of Police the following day the name and address of the patient and the type of injury. Community General was required by the state of Franklin to call the chief of the police about this wound and also to send a mail the following day with PHI to the chief of police. Because the state required this disclosure of PHI this is not a HIPAA violation. Further, although disclosure of PHI for patient #1 was only the minimum PHI necessary to comply with Franklin's statute § 607.29, technically the minimum necessary requirement under 45 C.F.R. § 164.502(b) is inapplicable to disclosures required by law under 45 C.F.R. § 164.512(a). See 45 C.F.R. § 164.502(b)(ii)(v).

2. Patient #2

Patient #2 died of arsenic ingestion. Under 45 C.F.R. § 164.502(f) the HIPAA rules regarding PHI apply to deceased individuals. However, a covered entity such as

Community General Hospital may, "use or disclose PHI about an individual who has died to a law enforcement official for the purpose of alerting law enforcement of the death of the individual if the covered entity has suspicion that such death may have resulted from criminal conduct." 45 C.F.R. § 164.512(f)(4). Here, the executive vice president of Community General Hospital knew that there was strife around the decedent's large-scale manufacturing business. She reviewed the decedent's pathology report the day after he died - it is noted that disclosure of PHI within the covered entity internally for its own treatment and health care operations is permissible. Suspecting that a crime had been committed because of the strife within the family and the nature of the patient's death (possible intentional arsenic poisoning because it is a traditional poison and the amount was 12 times higher than environmental), she alerted a police detective. This is permissible under section 164.512(f)(4) because the covered entity suspected that the death may have been from intentional poisoning, which is criminal conduct. The executive vice president then directed the Medical Records Dept. to send to the police department the PHI from the most recent hospital stay and from a previous hospital stay six months prior. This information was relevant and also minimally necessary because records from both stays were used by the pathologist to determine the cause of death as arsenic poisoning. All of these records are important for the investigation because the arsenic poisoning may not have been intentional - there is some evidence that the patient had eaten garlic prior to being hospitalized and the arsenic could have come from a natural source like food. But, it is for the police to determine and when there is a suspicion of foul play but not concrete evidence then more PHI will naturally be necessary to disclose to the police. It is understandable that a family member of patient #2 may be upset because Community General contacted the police and therefore suggested that the family member may be a suspect in the death, but Community General was well within its permissible rights under 45 C.F.R. § 164.512(f)(4) to make this disclosure, especially given the cause of death.

3. Patient #3

This patient was admitted to the emergency room accompanied by his sister who had been called by a concerned neighbor and observed the patient exhibiting dangerous behavior at his apartment (destroying plates and glassware by throwing them on the wall). Staff at Community General Hospital determined that the patient had taken PCP and alcohol and that was the cause of his strange behavior, which included rapid speech, disorganized and chaotic thoughts. He became increasingly agitated and belligerent as the staff spoke with him and he reported being threatened by people his sister said had died long ago. Near the end of the interview with the staff, the patient said he felt constantly belittled and undermined by his employer and began demanding to leave the hospital shouting "I hate my boss I hate what she's done. I'm going to get her . . . ". After those statements he then ran out of the hospital and the patient's sister told the staff that the patient had a gun at home. Shortly after a state trooper came to the emergency room on an unrelated matter and the staff, wary about what they had observed patient 3 do and say, decided to tell the trooper that he had a combative demeanor and had threatened his boss.

Under 45 C.F.R. § 164.512(j)(1), a covered entity may, following ethical conduct, use or disclose PHI if it believes it is necessary to "prevent or lessen a serious and imminent

threat to the health or safety of a person or the public" and the disclosure of PHI is to a person "reasonably able to prevent or lessen the threat including the target of the threat." Here, the staff alerted the state trooper because they were worried that the patient was acting dangerously under the influence of an illegal drug mixed with alcohol, and had made specific threats about his boss even saying "I'm going to get her . . ." and then running away. Further, after he had already left his sister told the staff that he owned a gun. Reasonably construed by the staff at the time, the patient could have been threatening his boss and could have left to act on that threat. The trooper was in a position to prevent or lessen the patient's threat and did so: the patient was arrested two blocks from his workplace where he was apparently headed (the patient was, however unarmed). The staff also only gave the minimal amount of information necessary, and did not disclose to the trooper, for example, the cause of patient's combative behavior (illegal drug use and alcohol). Finally, the OCR should give Community General Hospital the presumption of good faith under 45 C.F.R. § 164.512(j)(4) which states that if the covered entity's belief under (j)(1) of imminent threat to another person is based on "reliance or credible representation by a person with apparent knowledge" then the OCR should give the covered entity the presumption of good faith. Here, Community General Hospital based its belief on the sister who knew the patient better than anyone present and was called by the neighbor initially to investigate.

We respectfully request, on behalf of Community General Hospital, that the OCR close it's investigation on these complaints and use any discretion where necessary

MPT 2 - Sample Answer # 3

Jackson, Gerard, and Burton LLP
222 St. Germaine Ave.
Lafayette, Franklin 33065

February 24, 2015

US Dept. of Health and Human Services
Office of Civil Rights
1717 Federal Way
Lafayette, Franklin 33065

Re: Results of Audit for Compliance with HIPAA Regulations

Dear Mr. Fields,

This letter is in response to the letter we received on February 9, 2015. I hope this letter serves to alleviate your concerns about the disclosures that were made concerning the three relevant patients. After reviewing the records and interviewing our personnel, we feel as though there was not a violation of 45 CFR § 164.500. Please review the letter and respond at your earliest convenience.

First, I will discuss the disclosures concerning patient # 1. Under 45 CFR § 164.512, it states that there are some disclosures for which an authorization is not required. Under 45 CFR § 164.512 (a) (1), it states that an entity may disclose protected health info to the extent such disclosure is required by law. The Hospital is under the authority of the Franklin statutory law, thus section § 607.29 Gunshot or stab wounds to be reported is applicable statute. Under the § 607.29, it states that health care professional treating a gunshot wound or stabbing shall make a report to the police by the fastest possible means. Additionally, the Hospital shall send a report within 24 hours of the treatment describing the wound and name and address of the victim. § 607.29. This should be sent first class mail. Id. On Sept. 20, 2014, Patient #1 was brought to the ER for a gunshot wound. Although the patient objected the disclosure, unfortunately our hospital does not have the discretion when to report these incidents. According the § 607.29, the Hospital must make this report to the appropriate law enforcement. As stated in § 607.29, the hospital must report it in the fastest means possible. Thus, the Doctor call the Lafayette police. Pursuant to § 607.29, the Doctor followed up by sending the appropriate report first class mail. Moreover, as stated in 45 CFR § 164.502 (2) (v), since the disclosure was required by law the minimum necessary requirement does not apply. Unfortunately, in the above circumstances, the Hospitals hands are tied we must make this disclosure to comply with the law. Please let me know if I can provide any additional information on this specific patient.

Second, I will discuss the disclosure concerning patient # 2. Under 45 CFR § 164.512 (f), an entity may disclose protected health info for a law enforcement purpose to a law enforcement official if the (f) (1) through (f) (6) are met. Under 45 CFR § 164.512 (f) (4),

an entity may disclose protected health info about an individual who has died to law enforcement officials for the purpose of alerting them of the death of an individual if the covered entity has a suspicion that such death may have resulted from criminal conduct. Here, Patient #2, was admitted on Nov. 7, 2014, where he began displaying symptoms arsenic poisoning. After the patient's death, the autopsy confirmed that the patient died of multi-system organ failure caused by arsenic poisoning. Our Executive Vice President happened to know the patient's family well and was aware of a possible motive for the family to poison the victim. Because she was concerned there was foul play involved she contacted the appropriate law enforcement authorities. We feel as though the Vice President's actions are directly on point with the 45 CFR § 164.512 (f) (4) disclosure exception. Here, the patient died from a bizarre and unexpected death. Coupled with the family's motive to kill the patient, it reasonably raised the suspicions of our Vice President. Thus, she felt the need to alert the authorities of a possible serious crime. Although the hospital includes records from a previous visit, the reason was that the pathologist used those records to rule out other possible causes for the fatal illness. I assure you that no more than the necessary records were revealed. Thus, we believe the Hospital complied with the minimum necessary rules of 45 CFR § 164.502. Please let me know if I can provide any additional information on this specific patient.

Third, I will discuss the disclosure concerning patient # 3. Under 45 CFR § 164.512 (j), if in good faith an entity believes the disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or public and the disclosure is to a person who would be reasonably able to prevent or lessen the threat the disclosure is permitted. 45 CFR § 164.512 (j) (4), the entity is presumed to be acting in good faith. Here, the patient was brought to the hospital because his sister was concerned with his extremely erratic behavior. After the Doctor questioned the patient, the patient admitted to him that he was under the influence of PCP. During the interview, the patient stated he displayed anger towards his employer and stated the "he would get her." Additionally, the patient's sister stated that she thought he had a gun at home. The Doctor begged that the patient stay for some treatment. However, the patient left the hospital. Acting under the authority of 45 CFR § 164.512 (j), the Doctor, concerned for the safety of the patient's employer, reported the threat and patient's behavior to a Franklin State Trooper. The Doctor did not disclose the reason behind the patient's behavior, because he does not want to incriminate him. Thus, reviewing the above circumstances, we feel as though there was a serious imminent threat to the patient's employer because he was on PCP, made a direct threat physical threat against the employer, and the Hospital had reason to believe he owned a gun. Also, the Franklin State Trooper is someone that would be reasonably expected to be able to prevent the harm to the employer by arresting the patient or protecting the employer. Also, I would like to point out that the trooper found the patient only a few blocks from his place of employment. This suggests that the patient was going to act on his threat. Nonetheless, the Doctor made sure not to disclose any information that was not necessary. This is evidenced by the fact he did not tell the police the patient was on PCP. Thus, complying with the 45 CFR § 164.502 minimum necessary requirement.

In conclusion, we believe that the Hospital's above disclosures were permitted by the HIPAA rules. In each case, the Doctors followed the rules specifically and made efforts to

minimize unnecessary disclosures. We feel as though the Hospital did not commit any of the alleged violations and would more than happy to discuss this issue in further detail. If you have any questions or concerns feel free to contact me.

Thank you,
Examinee