ESSAY 1 – SAMPLE ANSWER 1

1. Whether the pledge is a legally enforceable contract

The first issue is whether Marcus pledge is a legally enforceable contract, such that his estate must satisfy the pledge. To be a legally enforceable contract, there must be an offer, acceptance and consideration. An offer is a communication from an offeror that signals to the offeree that acceptance will conclude the deal. The acceptance is the manifestation to the offeror by the offeree that in intends to be bound. Consideration is the bargained-for exchange between the parties. Contracts that are within the statute of frauds must be in writing to be enforceable, and include contracts in contemplation of marriage, contracts that cannot be completed within a year, for the sale of land, for an executor or suretyship, a guaranty for the debt of another and for the sale of goods more than $500. Here, Marcus' pledge would likely fall within the statute of frauds. He made a pledge to pay 10M to the university in the form of 1M per year over the next ten years, which is an obligation that cannot be completed within a year. Presuming that this pledge was in writing, identified the parties as Marcus being the pledge and was signed by Marcus, it would constitute a valid offer to the university. What is not known is it the university accepted the pledge at the time it was made in an express or written acceptance. However, acceptance could be implied from the university's actions, because it named a classroom building after Marcus and created a course named for him in its graduate business school. Marcus did not withdraw his pledge (offer) prior to the university's acceptance (naming the class and classroom after him), so it was likely a valid acceptance. The consideration of the contract is the money Marcus paid to the university and the steps the university took to establish the class and building in his name. Because the university took steps in consideration of the contract, a court would likely find that the contract was valid and enforceable under the argument of promissory estoppel. To prove promissory estoppel, there must be foreseeable reliance on a statement, actual reliance on that statement and an injury or detriment to the receiver of the promise that would cause injustice if not enforced. Marcus made a promise of a pledge that was foreseeably relied on, the university actually relied on it by using the funds and naming a course and building for Marcus, and would suffer a detriment if the pledge is not

enforced. Given that Marcus is now deceased, the contract to the university would likely constitute a debt that would need to be satisfied from Marcus' estate. Therefore, the contract is likely enforceable as a remaining debt of Marcus' estate, enforceable by promissory estoppel.

2. Will the university be liable for breach if it removes his name/class

The issue is whether the university will breach the contract by removing Marcus' name from the building and courses it established with the pledge funds. A party is liable for breach of a contract when it fails to perform its obligations per the contract. Where the obligations are unclear, a party may present parol evidence to support ambiguous conditions that were agreed to after the entry of a contract, but not before or concurrently with the contract. Where one party makes an anticipatory repudiation stating clearly and unambiguously that they do not intend to perform, the other party may rescind the contract. Here, there are no facts stating the university made bilateral promises within the contract to name a course after Marcus and name a building for him at the time the pledge was made. These were acts the university took in anticipation of the pledge, but they were not within the four corners of the contract at the time it was formed. Further, Marcus took steps to anticipatorily repudiate the contract in 2015 when he told the university that he was dissatisfied with the manner of the students' discipline by the university, wrote to the president and ceased payments on his pledge. When a party anticipatorily repudiates the contract, the aggrieved party may rescind the contract and is not required to perform. Therefore, if the university is entitled to rescind the contract and remove Marcus' name from the building and course.

3. Does the executor of Marcus' estate have legal standing to seek reimbursement of the money paid to the university

The issue is whether an executor of an estate has standing to rescind a contract and recover funds that were paid by the testator prior to death. An executor of an estate is the person designated in the testator's will to gather the assets of the estate and dispose of them in the manner prescribed in the will in accordance with the testator's wishes. The assets are

gathered and put into the estate, so that they may be distributed to creditors and devisees under the will. An executor only has a certain amount of time to bring a claim to recover assets in an estate (2 years, I believe) from the date of the testator's death. Here, Marcus likely does not have the ability to recover the funds that were paid to the university between 2010-2015. There was no claim brought to recover the funds or a breach of contract claim brought within the statutory period. Further, the university may argue the defense of latches, which prevents an aggrieved party from seeking relief because they waited too long to bring the claim such that it would cause prejudice to the defendant. Therefore, Marcus likely cannot bring a claim to recover the 4M paid during 2010-2015 to the university.

The next issue is who may have standing to sue to recover the funds that Marcus paid. Beneficiaries who would have taken under the will and would have benefited from the funds being paid to the university may have standing to sue the university. To do so, they would need to show that the university breached the pledge contract by failure to use the funds for the benefit of the university and not managing its students properly as third-party beneficiaries of Marcus' funds. If the funds would not have been paid to the university, they would have been available as an asset for the estate, which would have flowed to the devisees per the will. Therefore, the devisees under the will may have standing to make a claim for the return of the funds Marcus paid to the university.

4. The final issue is whether Marcus as executor can seek recourse in securing the funds paid if the university removes Marcus' name from the class and building. For a breach of contract claim, the court prefers to award expectation damages, which seeks to put the aggrieved party in the same position as if the contract had been enforced. Where expectation damages are not easily calculable, the court can award reliance damages, which place the party in the same position as if the contract had never been entered. If no legal remedy exists, the court can order specific performance as an equitable remedy to enforce the contract. Here, presuming that Marcus Jr. (Jr.) has standing as the executor for the estate and the university removed Marcus' name from the building and course, Jr. could seek expectation damages for the value that Marcus' estate would have realized if the pledge had been fulfilled and Marcus' name would have remained. Because the value of

Marcus' name being on the building and courses is not easily quantifiable, it is likely wiser for Marcus to seek reliance damages. Here, Marcus paid 4M of the 10M pledge and the university placed his name on the building and course. To undo these measures, the university would remove his name (which they already have done) and would need to pay back the 4M it received from Marcus. The university could also offset the recovery by incidental or consequential damages such as the cost of replacing the signage. In alternative, Jr. could seek specific performance, but it appears that the legal remedy would be available here, which would make a equitable remedy unavailable. Therefore, Jr. should seek reliance damages from the university to recover the 4M paid by Marcus, with the university removing Marcus' name from the building and courses, the place the parties in a position it had been in prior to the pledge being made.

ESSAY 1 – SAMPLE ANSWER 2

1. The issue is (a) whether Marcus's pledge is a legally enforceable contract and (b) if it is, whether his estate is contractually obligate to fulfill the pledge.

a. Marcus's pledge is likely a legally enforceable contract.

Generally, to create a legally enforceable contract, there must be an offer, acceptance, and consideration. An offeror makes an offer when he makes it clear through his words or conduct that he intends to be bound by the offeree's acceptance. Acceptance occurs when the offeree accepts the offer in the manner stated by the offer, or, if none is stated, by a reasonable means or method. Consideration occurs when there is a bargained-for exchange. In Georgia, such an exchange only requires a legal benefit or legal detriment, not both. In addition, under the Statute of Frauds, certain contracts must be memorialized in a writing with the essential terms laid out and signed by the party who is being charged. These contracts include contracts made in consideration of marriage, for suretyship, that cannot be completed in one year, and that are for the sale of goods greater than $500.

Here, it is very likely that there was an offer and acceptance. Fulton University, as part of its capital campaign, likely reached out to alumni with an invitation to donate, after which alumni made offers to donate that the school accepted. However, the question here is whether there was consideration. While Marcus promised to give money to the university, the university offered no performance in return. While it did change the building's name and add the business course in Marcus's honor, this does not appear to be as part of a negotiation between Marcus and the university. As such, the only way the contract is enforceable is if there is a consideration substitute in the form of promissory estoppel.

The court will make a finding of promissory estoppel sufficient to establish consideration if the promisor made a promise upon which the promisee justifiably detrimentally relied and if enforcing the contract is the only way to avoid substantial injustice. However, charitable organizations do not need to show reliance to enforce a promise to donate.

Here, it is likely that the university can show such reliance and injustice. The university, in reliance on Marcus's pledge, changed the name of the building and created a new course. In addition, both actions likely involved a not-insignificant monetary investment from the university, which was likely counting on receiving Marcus's pledge money. As such, it has relied on the pledge and will suffer injustice if it is not enforced. However, even if reliance cannot be shown, it may be argued that the university is a charitable organization that thus does not have to show reliance to enforce a promise to donate.

Finally, this contract is properly enforceable under the Statute of Frauds. This contract cannot be completed in less than a year as the pledge will be repaid over the course of 10 years. Thus, it is under the purview of the Statute of Frauds. However, here there is a writing signed by Marcus, the party being charged. Presumably, the pledge notes Marcus's name, the university name, and the amount to be pledged. As such, it has the essential terms. Thus, the contract may be enforced.

b. The contract is enforceable against the estate.

While offers generally die with the offeror (unless they are irrevocable), contracts will survive the death of the party unless the party's death makes the contract impossible to perform. After death, the decedent's estate will be responsible for ensuring that the decedent's contractual obligations are satisfied.

Here, an enforceable contract was made. Thus, it survives Marcus's death. This was a contract for a payment of money and there is thus no reason why performance is limited to Marcus as his estate can easily pay the money. Thus, the estate will be responsible for paying the funds.

2. The issue is whether the university will be in breach of any legal obligation to Marcus or his estate if it removes the Moneybags name from the classroom building and terminates the business ethics course.

The university will likely not be in breach of a legal obligation to Marcus (whose interests are now represented by his estate) if it removes the Moneybags name from the classroom building and terminates the business ethics course.

Under the common law, which applies to contracts that are not for the sale of goods, a party has only breached when it fails to substantially perform its obligations under the contract. The nonbreaching party is only excused from performance when the breaching party fails to substantially perform.

Here, there was an enforceable contract, as established above. Here, the question is whether the university's decision to rename the building and the class after Marcus constitutes an enforceable legal obligation to Marcus and, if so, whether Marcus's failure to pay the remaining $4 million constitutes a major breach due to a lack of substantial performance. Here, it is a close question whether the school had a legal obligation. There

was presumably no promise to rename the building or class in the written pledge, so it may be that any promise to do so is unenforceable under the Statute of Frauds. However, it could be that there was an agreement after the fact where the school agreed to put up the sign. While such an agreement would not be blocked by the parol evience rule, it likely would be blocked as an unenforceable modification under the common law pre-existing duty rule. However because the contract is enforceable, a court may still find that the school had a duty to perform by keeping the building and classroom named after Marcus.

Thus, the question is whether Marcus substantially performed. This is another close question. The court may find that because Marcus paid over half of the pledge, he substantially performed and the school must keep up its end of the bargain. However, it may also find that the failure to pay nearly half of the promised amount does constitute a material breach and will excuse the school. It is more likely that the court will find that the failure to pay nearly half of the pledged amount is a material breach because that still leaves nearly half of Marcus's obligation to be performed. Thus, the school may remove the name from the building and class without violating a legal obligation.

3. The issue is whether Marcus, Jr., has legal standing as executor of Marcus's estate to seek reimbursement of the money Marcus paid on his pledge, or, if he does not, who else may have standing.

Marcus, Jr., has legal standing to seek reimbursement of the money Marcus paid on his pledge.

The executor of an estate represents the decedent's interests that survive him. As such, an executor may bring claims on the decedents behalf. As stated above, contracts survive the parties, so an estate has standing to bring any contract claims that the decedent would have been able to bring.

Here, Marcus would have been able to bring a breach of contract claim against the university under the contract they formed if he had still been alive. The contract survives him, as established above. Thus, Marcus, Jr., as executor of Marcus's estate, may bring a breach of contract claim against the estate to seek out reimbursement. Thus, Marcus Jr. has standing.

4. The issue is whether Marcus, Jr., if he has standing, may secure the funds if the university follow through on its threat.

Marcus likely cannot secure the funds.

The usual measure of damages for a breach of contract is expectation damages, whereby the party gets the benefit of its bargain. However, in some cases, a party may seek rescission, where the contract is cancelled and all parties are placed in a position as if they had never made a contract, or restitution, by which a party may seek the value of any benefit placed on another party that has been unjustly enriched.

Here, Marcus, Jr., appears to seek either rescission or restitution damages. Marcus Jr. may be able to argue that there was a lack of consideration as the university made no return promise or performance for the pledge, thus justifying restitution. However, as stated above, there is likely consideration in the form of the consideration substitute of promissory estoppel. Additionally, Marcus, Jr., likely will not succeed in arguing for restitution damages as a result of unjust enrichment. That remedy is available only under equity when there has been a quasi-contract (or contract implied by law). Here, there is an actual contract, so Marcus Jr. will be unsuccessful under this theory as well.

ESSAY 1 – SAMPLE ANSWER 3

1.

Contract Formation

The issue is whether the written pledge signed by Marcus is a legally enforceable contract. A contract is a legally enforceable agreement. The elements required for valid contract formation are mutual assent, in the form of offer and and acceptance, consideration, and no valid defenses. An offer is an unequivocal manifestation to bound, i.e., a commitment or undertaking, on definite and certain terms. An acceptance is assent to the terms of the offer.

As a threshold issue, we must determine which law governs this putative "contract," the Uniform Commercial Code (UCC) or the common law. Contracts for the sale of good are governed by the UCC. All other contracts are generally governed by the common law. As this is a contract does not appear to involve the sale of goods, the common law will apply.

The next issue is whether there was an offer. Here, the facts indicate that the university conducted a "capital campaign," which perhaps could be construed as an offer. However, the facts do not provide the certainty of terms (e.g., subject matter, parties) that is required for an offer. More likely, Marcus's initial communication, i.e., his "pledge," was likely an offer, on the terms that he would provide the university with $10 million over the next ten years, promising to pay $1 million dollars per year. These terms are sufficiently definite to constitute an offer.

The next issue is whether there was an acceptance. The facts do not indicate any sort of acceptance on behalf of Fulton University. In "anticipation" of his pledge, Fulton named a classroom building after Marcus and created a course in his honor. However, these do not appear to be any sort of acceptance. Perhaps these actions constitute reliance giving rise to a claim for promissory estoppel (discussed more below), but it is difficult to qualify Fulton's actions as an acceptance of a contract, mainly due to the consideration issue.

Consideration Lacking

The next issue is whether this contract is supported by consideration. Consideration is a bargained-for exchange of legal value. It exists where a each party's promises or performance induce the other party's return promise of performance. On the facts presented, it appears that there is an absence of consideration. Marcus' pledge seems to be a gratuitous promise and is not bargained-for in a legal sense. He did not seek a return performance in exchange for his promise to donate the money; in fact, it is unclear what Fulton would even be required to do under this "contract" as they made no promises to Marcus; they merely dedicated a class room for him and created a course for him in what appears to be appreciation of his donation.

Thus, given that Marcus' pledge was really just a donation, i.e., a gratuitous promise to donate money, not supported by the bargained-for exchange necessary to support a contractual obligation, he likely is under no obligation to continue paying the donation and can cease paying whenever he pleases.

Statute of Frauds

The issue is whether this pledge requires a writing to be valid. Under the Statute of Frauds, certain contracts must be evidenced in writing and signed by the party to be bound in order to be enforceable. One such kind of contract is an agreement that cannot be performed within 1 year.

Here, Marcus' donation of money was set to be paid over a 10-year period. Thus, if the elements of valid contract formation were present, the agreement would have to be in writing in order to be enforceable, and signed by the party to be bound. However, as noted above, Marcus' pledge is not supported by consideration. Accordingly, there was never a valid contract formed and the statute of frauds is not applicable as a result.

As noted above, Marcus' pledge is a gratuitous promise to donate money, not supported by consideration. As such, a valid contract was not formed.

Promissory Estoppel

The issue is whether Marcus could still be required to complete his donations under the doctrine of promissory estoppel. Even if a promise is not supported by consideration (and thus a valid contract could not be formed) a promisor may still be bound under this doctrine if his promise induced detrimental, foreseeable reliance on the part of the promisee.

Here, Fulton arguably relied on Marcus' promise by (1) naming a classroom building after Marcus and (2) creating the business course in his honor. The facts notes that these actions were taken by Fulton "in anticipation" of Marcus' donations. It is unclear whether these actions constitute reliance, given that the school didn't appear to have earmarked the funds they expected from Marcus for anything. It does not appear the school is in a worse-off position by having been made this promise of donation. In fact, it appears that it would be rather simple to just change the name of the building and discontinue the course. Moreover, the facts do not indicate that any of their actions were foreseeable by Marcus, as there would be no reason to for him to anticipate that the school would be relying on his promise to donate to their detriment. And lastly, it does not appear that there was any detriment suffered by the school. As noted above, the only potential changes the school is contemplating are the removal of Marcus' name from the building and discontinuing the course.

Given that there is not foreseeable, detrimental reliance, Marcus' promise to donate the money will not be enforceable on promissory estoppel grounds. Given that there are no grounds to enforce the promise, Marcus' estate will not be contractually obligated to fulfill the pledge.

2.

The issue is whether the University will be in breach of any legal obligation to Marcus/his estate by removing Marcus' name from the building and discontinuing the course. As noted above, the parties likely did not enter into a valid contract. Consideration was lacking, and Fulton did not ever agree to name the classroom after Marcus or honor him with a business class in exchange for his promise to donate the money. Accordingly, the Fulton is under no legal obligation to maintain the classroom with Marcus' name or to continue offering the the business course. Fulton is free to terminate the course and remove Marcus' name as they were under no contractual obligation to do either in the first place.

3.

The issue is whether Marcus Jr. as executor will have legal standing to seek reimbursement of the money Marcus pad on his pledge prior to his death. Generally, when a person dies, the executor or administrator of his estate will have standing to bring any pending actions the decedent had. Under Georgia's survival statute, the decedent's claims of action survive his death, and are properly brought by the personal representative.

Here, Marcus Jr. is the personal representative of Marcus' estate given that he is the executor. He would be the proper party to bring such an action to recover from Fulton. His best chances of success, given that there is not a valid contractual relationship between the parties, would be to maintain an equitable action in the Superior Court for unjust enrichment. He can claim that Marcus conferred a benefit on Fulton and it would be unjust to allow them to keeps these benefits

4.

The issue is whether Marcus Jr. will likely succeed in securing return of the funds donated by Marcus during his lifetime. As explained throughout, the promise to donate was not

supported by consideration, and thus was unenforceable under contract law. Perhaps Fulton can claim that the money should be paid on the basis of promissory estoppel, but as noted above, this is a weak argument given their lack of detriment. Were the school to make such an argument, Marcus Jr. could claim that the negation of all the actions Fulton made in reliance on the promise (naming the classroom, the business course) would relieve the estate of any obligation to pay the remainder of the balance. The best argument for return of the pledge already donated, however, would be on the basis of unjust enrichment. However, it is unclear that this line of argument would be successful, as it does not appear that Fulton was a wrong-doer here. They merely received donations from a former alum of the school. Even though there was not a contract, a court in equity would likely not award the estate unjust enrichment given that Marcus' gratuitous lifetime gift to the school was not the product of fraud or any other wrongful action.

ESSAY 2 – SAMPLE ANSWER 1

1. The issue is whether Mark has a conflict of interest in representing Jim, Martha, and Wendy for personal injuries from the collision.

In Georgia, a conflict of interest exists when an attorney's representing of an existing client would be materially and adversely affected by the attorney's representation of another client (or former client). In any event, an attorney is prohibited from representing parties on the opposite sides of a dispute on the same subject matter. An attorney must evaluate whether the representation would be affected by the representation of the other clients and should advise the clients of same in advance of representation.

In this case, Jim, Wendy, and Martha all appear to be plaintiffs against the other driver and Harry's Heating and Air ("HHA"). It appears that they all have a common interest in opposing the other driver and HHA. Jim believes that the other driver ran the red light and is at fault for the collision. However, the investigating officer did not investigate fault. It is possible that

Jim may be responsible for a portion of the fault of the accident. Based on those facts, it would be reasonable to anticipate a potential conflict if Mark discovered that Jim was partially (or wholly) at fault for the accident. If Jim is at fault, then Wendy and Martha may want to seek a claim against Jim for his portion of fault from the accident. That could result in a conflict of interest. Without more facts of the accident, it is difficult to determine the likelihood of Wendy and Martha needing to seek a claim against Jim.

On the facts provided, it appears that Mark could represent all 3 without a conflict of interest.

If Mark suspects that there may be a conflict, the issue is then whether the conflict is capable of resolution.

An attorney may overcome a potential conflict (assuming it is a waivable conflict) by obtain a client's informed written consent, which includes a knowing waiver of the conflict. A conflict is waivable if an attorney does not represent parties in direct conflict with each other. The informed written consent must be in a writing signed by the clients in conflict.

In this case, it appears that a conflict of interest with respect to Jim, Wendy, and Martha would arise only if Wendy and Martha should seek a claim against Jim. If that is the case, then Mark would be representing clients in direct conflict with each out. That cannot be overcome.

As it stands, Mark should advise Jim, Wendy, and Martha of the potential conflict, explaining the entire possible conflict and ask for informed consent assuming Jim, Wendy, and Martha wish to proceed. If it seems that there is a likelihood that Wendy and Martha would seek a claim against Jim, Mark should advise Wendy and Martha to seek separate counsel for representation of this accident.

2. The issue is whether a conflict of interest exists relating to former representation of HHA.

The general rules for a conflict are described above. In addition, a conflict of interest may arise between a former client and a current client if an attorney obtained confidential information during the representation of the former client that would materially and adversely affect the former client while the attorney represents the new client. In other words, an attorney is prohibited in exercising an "unfair" advantage against his former client by using information obtained during the prior representation for the benefit of his new client.

In this case, Mark was "vaguely familiar" with the name of HHA and represented HHA years ago. He did not quite remember HHA and had to check his old files to see if it was familiar. Only after checking his files, did he realize that he had represented HHA. Those facts tends to indicate that Mark may not have obtained confidential information that would be detrimental for HHA. That said, Mark could easily review his files for confidential information and so arguably the fact that Mark did not remember is irrelevant. In addition, the facts indicate that HHA's insurance carrier still holds a policy for HHA's vehicles. Mark's prior suit against the insurance carrier may have revealed confidential information that could be to the advantage of Jim, Wendy, and Martha - for example, he could have learned general settlement tolerances or litigious propensities and strategies. Finally, the owner of HHA says at his deposition that he considered Mark a "friend." If true, Mark's representation could be affected by his prior friendship with HHA's owner. Mark may have learned additional confidential information about HHA if the owner considered him a friend. On the whole, it seems likely that Mark may have obtained confidential information that would produce an unfair advantage if Mark were to oppose HHA.

Therefore, it appears there is a conflict of interest with Mark's former representation of HHA and current representation of Jim, Martha, and Wendy.

Assuming a conflict exists, the issue is then whether the conflict is capable of resolution.

The general rules regarding waiving a conflict are described above. Mark may overcome the conflict with an informed written consent signed by HHA that allows representation of Jim, Martha, and Wendy. Obtaining that conflict waiver seems unlike given that the owner of HHA is offended by Mark's representation.

3. The issue is whether Mark violated the Georgia Rules of Professional Conduct by soliciting Jim's personal injury case.

Generally, an attorney is not permitted to contact a victim of personal injury accident before thirty days after the accident at issue to solicit that victim for representation. The purpose of the rule is to avoid harassing individuals who have just been through a disturbing accident. However, there is an exception if the attorney has a close relationship with the victim, such as a close family member. The rationale is that a person in a close relationship would not be considered a both to the accident victim and perhaps welcomed.

In this case, Mark visited Jim while he was in the hospital so it does not appear that 30 days have passed before the two contacted about the accident. it appears that Jim and Mark had a prior relationship. Mark and Jim were in the same fraternity and were old roommates. However, Mark and Jim had not kept in touch over the years. Jim asked Mark what he had been up to. Jim did not even know that Mark was an attorney. Those facts indicate that the two probably did not have a close relationship. Further, since Jim did not know Mark was an attorney, he probably did not realize that he would be asked about representation. That tends to show that Jim may have been bothered by the inquisition so close to the accident's occurrence. That said, Jim may claim that he did not originally contact Jim for the purpose of soliciting representation. Jim may claim that he had heard of the accident and wanted to provide support while he was in the hospital. That is a weak position however as Mark says to Jim while in the hospital that he wants to branch out into personal injury. He does not practice personal injury and likely saw this accident as an opportunity to branch out. It appears that Mark brought a contingency fee contract with him to the hospital, which tends to indicate that Mark visited Jim for the purpose of soliciting Jim's business.

Therefore, Mark violated the Georgia Rules of Professional Conduct by soliciting Jim's personal injury case.

4. The issue is whether Mark violated the Georgia Rules of Professional Conduct by soliciting Martha and Wendy's personal injury case.

The general rules regarding solicitation of a personal injury victim are above.

In this case, Mark called Martha and Wendy the day after Jim and Mark signed the contingency fee contract, so it appears 30 days have not passed since the accident. Martha and Wendy do not have a prior relationship with Mark. They had never met, so it does not appear that there is a close relationship which would merit an exception to the general rule prohibiting contact.

Therefore, Mark violated the Georgia Rules of Professional Conduct by soliciting Martha and Wendy's personal injury case.

ESSAY 2 – SAMPLE ANSWER 2

1. The issue is whether there is a conflict of interest, or potential conflict of interest, between Jim, Martha, Wendy in the personal injury action. Under Georgia's Rules of Professional Conduct (GRPC), an attorney must not represent a client if there is a substantial risk that the attorney's duties to the client may be substantially and materially affected by the attorney's representation of a current client or former client. However, if an attorney reasonably believes that he can represent the client without his duties being substantially and materially affected, the attorney may represent the client as long as: (1) he is not representing one client against another client in the same or substantially similar matter (i.e. on both sides of the "v"); and (2) he gets informed consent confirmed in writing from the

client. When a party is representing multiple parties in the same dispute, the attorney must consult with the clients and inform them of the potential adverse consequences of the representation and get informed written consent to proceed with the representation. Informed consent occurs when the attorney talks with the client, explains the potential adverse consequences of the representation to the client, and allows the client to seek independent counsel. The consent must be confirmed in writing, either by a follow up letter or email or in a signed writing.

Mark may have a conflict of interest in representing Jim, Martha, and Wendy in this matter. Mark learned that Jim was in a car wreck. Mark learned that Jim was the driver of a car that was struck in an intersection. Martha and Wendy were in the vehicle. While Jim believed he was not at fault, the investigating officer did not asses fault to either driver. Thus, it appears that Wendy and Martha, who suffered injuries in the accident, should assert claims against both Jim and the other driver. The issue of fault will be decided by the jury, who may apportion fault among Jim, the other driver, or a combination of both. Thus, there is a potential conflict of interest in representing Jim, Martha, and Wendy if Martha and Wendy should be asserting claims against Jim. Further, Mark cannot cure this conflict of interest. As noted above, Mark cannot represent one client against another client in the same or substantially similar dispute. Mark cannot represent Jim and at the same time represent Martha and Wendy -- this would be Jim on both sides of the "v" which is a violation of the GRPC. Accordingly, Mark should not represent Jim, Martha and Wendy together in this dispute.

2. The issue is whether there is a conflict of interest by Mark representing a party against a former client. Under the GRPC, an attorney is permitted to represent a client against a former client in some instances, as long as there is not a conflict of interest. The standard for a conflict of interest is noted above. However, when it comes to representing a client against a former client, consent of the former client is necessary in some instances. If an attorney wants to represent a new client against a former client, and the representation relates to the same or substantially similar action that the attorney represented the former client in, the attorney must get written consent from the former client. Further, if an attorney

acquires confidential information during the representation of the former client, he cannot use such information against the former client in the new lawsuit. This may create an unwaivable conflict of interest.

Mark may have a conflict of interest in suing Harry's Heating. Mark sued Harry's Heating under the doctrine of respondeat superior. He believes the other driver was acting in the course and scope of its employment. However, Mark represented Harry's Heating "years ago" in a dispute with its insurance carrier, whose policy still covered the company's work vehicles. Mark will likely want to argue that the insurance covering the work vehicles covers the accident issue here. Further, Mark may have learned confidential information during his representation of Harry's Heating. Further, if a coverage dispute arises between Harry's Heating and its insurance company regarding coverage, Mark may be representing his new clients (Jim, Wendy, and Martha) in a claim that is similar or substantially similar to the claim Mark representing Harry's Heating in years ago. While Harry's Heating's interests may be aligned with Mark's (i.e. Harry's would want insurance coverage and Mark would want insurance coverage to apply for Harry's), there may be a conflict of interest. If Mark did not learn confidential information during his representation of Harry's Heating, Mark may be permitted to represent his new clients against Harry's Heating if he gets consent from Harry's Heating. However, it appears that he has not gotten consent and Harry's Heating may not give consent because it feels betrayed. However, if Mark learned of confidential information, then he may not be able to represent his new clients. Mark has a duty to zealously advocate for his new clients, while at the same time has an obligation not to reveal confidential information regarding his past representation or use such information against his former client. Thus, a close examination of the dispute between Harry's Heating and insurance company, and Mark's prior representation, would be needed to provide an answer as to whether this conflict is waivable.

3. Mark likely violated the GRPC by soliciting Jim's personal injury case. The issue is when is direct solicitation by an attorney permissible. An attorney is generally not permitted to directly solicit new clients. However, if the person being solicited is a former client, current client, family member, or "close" friend, the attorney is permitted to directly solicit the client's

business. However, even if the person being solicited is a close friend, former client, current client, or family member, the attorney is not permitted to solicit if the attorney knows the person is not in the appropriate mental or physical condition to be choosing an attorney. Thus, the issue is whether Jim and Mark are "close" friends and whether Jim was in the appropriate mental and physical condition.

Mark learned from Jim's brother, not Jim, that Jim had been in a car accident. Jim's brother told Mark that Jim was still in the hospital for his injuries. Mark called the next day, and visited Jim the following day. Jim and Mark were former fraternity brothers and roommates, which makes their relationship appear close. However, Mark and Jim had not kept in touch over the years, and Jim did not even know Mark was an attorney. Thus, it does not appear that the two are close friends, and that Mark's solicitation may violate the GRPC. However, Mark may argue that the two were former roommates and it is not uncommon to lose track of close friends over time and that this does not make them any less close. Nevertheless, Mark approached Jim in the hospital while still suffering from the injuries. Mark pulled the contract out while in the hospital to have Jim sign. Thus, this likely violates the GRPC, because Mark should have asked Jim to give him a call when he got out of the hospital. Further, to the extent that Mark did not fully explain the contingency fee agreement, this may violate the GRPC. Mark was required to explain that Jim may be liable for the costs and expenses, that contingency fees are not permitted in all cases, and whether the fee was taken out before or after expenses. Finally, Jim's accident appears to have occurred recently, and generally an attorney is not permitted to solicit a client within 30 days (45 days for airplane crashes) after the incident. However, this rule typically applies to written advertisements, not direct solicitation.

4. Mark violated the GRPC by directly soliciting Wendy and Martha. As noted above, an attorney is not permitted to directly solicit a new client unless the person being solicited is a former client, current client, family member, or "close" friend. Mark had never met Martha or Wendy. Further, neither it appears neither is a current or former client. Accordingly, Mark violated the GRPC by directly soliciting them as clients. It should also be noted that Mark may be violating the GRPC by not being competent to handle this matter. Mark primarily

handles criminal defense matters and small business disputes. An attorney has a duty of competency to his clients. An attorney may be competent despite not practicing in the area previously. Mark may become competent by becoming familiar with the laws with respect to personal injury matters or engaging other counsel, with consent from the clients.

ESSAY 2 – SAMPLE ANSWER 3

1. There may be a conflict of interest as it pertains to representing Jim, Martha, and Wendy. At issue is whether such conflict is material to the case.

Under Georgia Rule of Professional Conduct, lawyers shall not represent parties where there are conflicts of interest that are material to the representation. A lawyer may represent parties where there is a conflict that is not material adverse to either party, the lawyer informs each party of the potential conflict, and obtains written consent of the parties that he is to represent, and reasonably believes he can represent each parties' interest without harming the others' interests due to the representation. Each party should also seek advice from independent counsel.

Here, there is a potential conflict because Jim was driving the car in which Martha and Wendy during the accident. Jim may have been negligent in his actions, although the police officer did not assign fault at the time of the accident, a jury could find that Jim was negligent at trial. If Jim was negligent, Martha and Wendy could have a potential claim against Jim for his negligence that resulted in their injuries. That would make Martha and Wendy's interest materially against Jim's interest, in which Mark should not represent all three and the issue is not resolvable. If Jim was not negligent, then Martha and Wendy would have no claim against Jim. However, Mark should still inform all three parties of potential conflicts, obtain written consent to represent all three to resolve any non-material conflict.

Therefore, there may be a conflict of interest in these facts.

2. There is a conflict of interest as it relates to former representation of Harry's Heating and Air and his current representation of Jim, Martha, and Wendy. This conflict is not resolvable. At issue whether an attorney can represent a plaintiff against a defendant who was also a former client.

Under Georgia Rule of Professional Conduct, lawyers shall not represent parties where there are conflicts of interest that are material to the representation. This rule applies to former clients who are now adverse parties to current clients. This issue is not resolvable. Also, under tort law, employers may be liable for the negligence of their employees through the doctrine of respondeat superior if the employee committed the tort within the scope of his employment.

Here, Mark represented the employer of the driver who hit Jim's vehicle and caused Jim, Martha, and Wendy injuries. The employer could be liable to Jim, Wendy, and Martha through the doctrine of respondeat superior since the driver was on the job and negligent when he ran the stop light and hit Jim's car. Mark then added the employer into the lawsuit as a defendant. Since Mark represented the company and the company is now a defendant in the case with Jim, Wendy and Martha, this is a material conflict of interest. Mark may know information that he learned though the representation of Harry's Heating service that may be material to this case. Also, Mark may have a personal stake in the case because the owner of Harry's heating considered Mark and friend. Even though the representation ended years ago, it appears that there is still a conflict of interest here that may bot be resolved. Also, Mark may be opening himself up to sanctions especially since he never even informed his clients of the potential conflict of interest with the defendant in this case.

3. Mark probably did violate Georgia Rules of Professional Conduct by soliciting Jim's personal injury case. At issue is whether or not an attorney can directly solicit potential clients.

Under the GRPC, an attorney shall not directly solicit clients for his service. An attorney may advertise broadly through media such as tv ads or billboards. A lawyer may even send mail to potential client as long as the word "Advertisement" is conspicuously affixed to the mail and the lawyer makes no misleading claims as to his representation. However, a lawyer is not permitted to directed solicit potential clients such as door to door or over the phone. The rules are different for family and close friends, in which a lawyer may offer services to them.

Here, one could argue that mark directly solicited to Jim about his services. Mark asked Jim to meet with him and discuss his case. Mark tells Jim that he is a lawyer now and is looking to branch out into personal injury law. Mark even pulls out a contingency agreement for Jim to read. Also, Jim is not a close friend of Mark since they have not seen each other in years. These actions may constitute solicitation which is not allowed by the GRPC.

It should also be noted that Attorneys should only take cases that they are competent to handle. Mark has had no experience in personal injury law and mostly works criminal defense and small business cases. He should not take a personal injury case, unless he can learn more about personal injury law or work with a lawyer who is experienced in the matter.

For the reasons above. Mark probably violated the GRPC rules against solicitation.

4. Mark did violate the GRPC by soliciting Martha and Wendy's personal injury cases. At issue is whether a lawyer can call potential clients in regards to cases.

Under the GRPC, an attorney shall not directly solicit clients for his service. An attorney may advertise broadly through media such as tv ads or billboards. A lawyer may even send mail to potential client as long as the word "Advertisement" is conspicuously affixed to the mail and the lawyer makes no misleading claims as to his representation. However, a lawyer is not permitted to directed solicit potential clients such as door to door or over the phone. The rules are different for family and close friends, in which a lawyer may offer services to them.

Here, Mark directly called Martha and Wendy who were strangers, which is in direct violation of the GRPC. Therefore, Mark violated the GRPC.

ESSAY 3 – SAMPLE ANSWER 1

1. Elements of a valid marriage in GA.

In Georgia, in order to create a valid marriage, the two parties must be able to contract for marriage. Contracting for marriage requires contractual capacity, so they must be 18 years or older (or an emancipated 16+ year old or a 16+ years old with parent's consent) and they must have capacity. The bar for martial capacity is relatively low. The parties needs to know that they are contracting for marriage and what marriage is.

The other two elements of a valid marriage are that the marriage be consummated and that the parties obtain and sign their marriage license. In Georgia, consummated does not mean sexual relations. It means that the marriage was performed by a person entitled to perform a marriage, such as an ordained minister or judge. Georgia does not have a waiting period nor does it require genetic testing in order to be able to marry. Georgia also allows marriage by proxy so if one party cannot be physically present, the marriage is still valid so long as the person seeking to enter the marriage directs a proxy to stand in his place.

Georgia has some bars on marriage, such as consanguinity, which make the marriage void. Georgia also has some voidable circumstances, such as lack of capacity, but those can be cured by ratifying the marriage.

2. Common law marriage

Jeb may be able to claim that Susie was his common law spouse back in 1996. In order to claim common law spouse, the two people wishing to enjoy the protections of marriage must reside together for an extended period of time with the intent to remain together. Jeb and Susie resided together for 4 years. While they were unable to file their taxes together, they partook in other activities in support of Jeb's claim of common law marriage. They opened joint bank accounts and listed each other as beneficiaries on life insurance policies. They held themselves out as married in public and managed a household as a married couple would, ie sharing expenses and getting an apartment in both of their names.

3. 2005 Common Law marriage

Jeb could not renew his claim for common law marriage in 2005. Common law marriage was done away with in Georgia in 1997. Georgia recognizes common law marriages entered into before 1997, but not common law marriages entered into after that time. Since Jim and Susie split up, established different residences, removed each other from life insurance policies, and otherwise removed each other from their lives, they terminated the previous common law marriage, if there was one, and cannot start a new one because they are no longer recognized in Georgia.

4. and 5. Jake Morris

Jeb could establish a legally enforceable right to have custody, parenting time, and visitation with Jake. Jake would need to establish paternity in a paternity (or legitimization) action. Children born to a married woman are presumed to be the children of the married woman's spouse. Since Jeb and Susie were not married that time of Jake's birth, Jeb could have voluntarily signed Jake's birth certificate. Since Jeb did not do this, Jeb would have to show by clear and convincing evidence that Jake is his son. He may do so by illustrating the circumstances of Jake's birth for a court, such as testifying that he was sexcually active with

Susie and that she became pregnant as a result of that sexual activity. He would also have to show that he and Susie were in a monogamous relationship or at least that it was unlikely that anyone else fathered Jake. But instead of airing his dirty laundry for the court, he could simply ask for DNA testing to confirm that Jake is his son. If the DNA tests shows with 97% or more certainty that Jake is Jeb's son, then the court will enter a judicial decree stating as such. Even if DNA testing is never performed, Jeb can argue that he participated in the care and raising of Jake for the entire duration of Jake's life.

Once paternity has been established, then courts will look to the best interest of the child. When weighing the best interests of the child, the factors or illustrative, so the court may consider whatever is reasonable. The most common factors courts look to when determining best interest of the child is the child's relationship with its parents, the child's relationship with its siblings if it has any, the parents' relationship with each other, the child's social and academic needs, the parents' abilities to care for the child (this includes whether housing is suitable, whether the parents take the child to medical appointments, whether the parents can provide financially for the child, etc), and any other factors the court determines to be material in making a determination of hat is in the best interest of the child. Courts try to order split custody whenever practical, and there is no preference given to women as there once was, so Jake should seek at least partial custody of his son. Additionally, since the child was born in December of 2006, the child is 13 years old. Courts may consider the wishes of a child between the ages of 11 and 13. The wishes of a child 14 years or older are controlling unless the court finds that they are not in the child's best interest. Since modifying a custody agreement requires a substantial change in circumstances, Jeb may wish to wait until Jake is 14 in order to persue his paternity actions since by that time Jake's preferences will be controlling.

6. Susie's claim

Like Jeb, Susie may bring a paternity action against Jeb in order to obtain child support. The paternity action would likely be the same as Jeb's which was discussed above, with the exception that child support and child visitation are separate issues, so she may be able to

bring the paternity action against Jeb to compel support of their child, but the court may not necessarily explore the issue of visitation and custody unless the parties request it.

7. Susie's alimony

Susie does not have a right to alimony. Alimony is awarded to one spouse from the other following the dissolution of a marriage. If they were never married, then Susie could not ask for alimony. Alimony supports the former spouse while child support is separate and meant so support and maintain the child. Without a marriage in the first place, alimony is not an award Susie can seek.

ESSAY 3 – SAMPLE ANSWER 2

To: Partner

From: Examinee

Re: Jeb and Susie's Martial and Child Dispute

Memorandum

1.

Georgia law requires that marrying parties be able to contract for marriage, which requires they (1) be of 18 years of age (or 16 or 17 with parental consent), (2) not be of close sanguinity (cannot be parent-child, uncle-niece, aunt-nephew, siblings, or grandparent-grandchild), and (3) have the requisite mental capacity to understand the nature and consequences of marriage. Georgia law also requires two additional elements, (a) that the marriage be "consummated" (i.e., a ceremony is conducted) and (b) that the ceremony is

conducted by one authorized by the tenants of his religion to carry out the ceremony. The facts regarding Jeb and Susie point to no valid marriage having taken place, because the marriage was not consummated by a ceremony conducted by a person authorized by his religion to carry out such a ceremony.

2.

Jeb and Susie can point to any fact showing that they held themselves out as a married couple. Under Georgia law, common law marriages entered into prior to 1997 are recognized by Georgia courts. A common law marriage exists where (1) two individuals are living closely together as a married couple would, and (2) they hold themselves out to others as married, in a way that would permit others to reasonably assume they were married. Here, the facts establish that Jeb and Susie were living together from 1996 until 2000, relevant to the first element, though more facts would be helpful to determining whether they were living together as a married couple (sharing chores, improving the home, raising children, etc.). As to the second element, Jeb and Susie likely held themselves out to others who would have assumed they were married because they held a joint bank account, rented an apartment in both their names, shared monthly expenses, named each other as beneficiaries on life insurance policies, and told others that they considered themselves married.

3.

Jeb and Susie's renewed relationship in 2005 could likely not establish a common law marriage. Under Georgia law, only common law marriages that were entered into prior to 1997 are recognized as valid, though common law marriages entered into in another state according to the laws of that state will be held valid in Georgia. Here, because a potential common law marriage was entered into in 2005, several years after 1997, it would not be held valid in Georgia, unless Jeb and Susie started living together in 2005 in another state.

4.

Jeb can establish a legally enforceable right to have custody, parenting time, and/or visitation rights with the child, but he must establish his fatherhood of the child. In Georgia, both parents of a child, if fit, are entitled to raise their child, which includes custody, parenting time, and visitation rights, though the degree to which these are given to each parent depends on what the court determines is in the best interest of the child. Under Georgia law, a married husband is presumed to be the father of his wife's children, as is any man listed as the father on the child's birth certificate. In addition, a man may establish his fatherhood to a child if he participates in a paternity test that establishes him as the father to at least a 97% chance of certainty. Here, knowing that Jeb was not listed as Jake's father on his birth certificate and assuming Jeb was never validly married to Susie, he will have to prove he is the father of the child by obtaining a paternity test showing that he is the father to a 97% chance of certainty. With this evidence, he can bring a legal action to establish parental rights. After establishing him as the father, a court will grant him custody, parenting time, and/or visitation rights according to what is in the best interest of the child. To make this determination, the court will weigh a plethora of factors, including: the age of the child, the fitness of the parents, the level of involvement in the child's life each parent has had, the level of adjustment the child would have to make in any new environment, the wishes of the child, the wishes of the parents, the relationship the child has with each parent and their extended families, and the degree of animosity between the parents.

5.

Under Georgia law, the court must consider the wishes of the 13-year-old child, but no heavy weight or presumption is given to these wishes, they are merely considered together with the other factors. This applies to children of 13 years of age or younger. However, when for children of age 14 or older, the Georgia courts apply a slightly different rule. For children 14 or older, the court must consider the wishes of the child, and must follow those wishes unless they are contrary to what is in the best interest of the child. In other words, the factor

of the wishes of the child is given much more deference by the court, and the court will not go against those wishes unless the other factors clearly outweigh them.

6.

Assuming Jeb and Susie were never married, Susie can bring an action to establish Jeb as the father of the child, and only then can she obtain a court order requiring him to pay child support. Under Georgia law, only those who are judged by the court to be the parent of a child can be required to pay child support for that child. As discussed above, because Jeb and Susie were never married, there is no presumption that Jeb is the child's father. Consequently, Susie will have to establish Jeb's parenthood, likely by him taking a paternity test that establishes, to a 97% chance of certainty, that he is the child's father. After that, the court will use a predetermined table, which balances the needs of the child and the resources of the parents, to set a presumptive level of child support that Jeb will owe to support the child. The parties may offer evidence to counter this presumptive amount, but any final determination the court must deem to be in the best interest of the child.

7.

Susie has no right to alimony from Jeb if they were never married. Under Georgia law, only validly married spouses owe a duty of support to each other, and alimony is based on the needs of the spouse in view of this duty. However, if there is no valid marriage, there is no duty of support, and thus nothing to give rise to the imposition of alimony. Therefore, because Jeb was not validly married to Susie, he owes her no duty of support, and thus a court will not award her alimony.

ESSAY 3 – SAMPLE ANSWER 3

1.

Under Georgia law, in order to have a valid marriage the parties must a least 18 years old (or 16 years old with parental consent), they must have the mental capacity to enter into a marriage, they must not be related (incest), and they must not be married to anyone else (bigamy). Bigamous and incestuous relationships are against public policy and will be considered void. Additionally, the parties must be able to consummate the marriage. Although, that does not mean they must be able to have children.

2.

Common law marriages can no longer be formed after January 1, 1997. However, common law marriages formed prior to January 1, 1997 are still recognized. In order the prove common law marriage, a couple must have held themselves out to be married. This can be evidence by co-habitation using the other person's last name, having joint bank accounts, filing joint tax returns, the couple considering themselves to be married. The burden of proof is on the party seeking to claim a common law marriage.

Here, the facts that the couple lived together in an apartment under both their names, had a joint bank account, shared monthly living expenses, made each other the beneficiaries of their life insurance policies, and holding themselves out to their friends as married support a claim of common law marriage. However, mere cohabitation is not enough to prove a common law marriage. The fact that they filed separate tax returns and only considered themselves married "at times" works against a claim for common law marriage.

3.

As discussed above, common law marriages cannot be formed after January 1, 1997. Thus if a court found that the court never had a common law marriage back in 1996, Jeb and Susie would not be able to establish one based on their 2005 relationship. If, on the other hand, the court found that the couple did have a common law marriage back in 1996, they would be required to get a divorce in order to terminate the marriage. Given that neither party filed for or obtained a divorce in 2000 when the couple separated, they would have still been married when they got back together in 2005.

Therefore, the couple's 2005 relationship cannot establish a common law marriage.

4.

In Georgia, in order to establish paternity, an unwed father must file for legitimize the child. Legitimization is the process by which the unwed father establishes a legally enforceable right to custody of the child. Once a father legitimizes the child, he can petition for custody or visitation rights. When determining custody matters, the court looks at what is in the best interest of the child. These factors include the stability of the child's current living situation, the child's physical, mental, and emotional wellbeing, the child's school and community, the child's relationship with each parents, among other factors. Additionally, depending on the child's age, the child's wishes may be considered. The court does not favor either parent on the basis of gender. There is also no favored custody arrangement between (joint or sole physical and legal custody). Physical custody is who the child lives with. Legal custody is who makes decisions for the child. A non-custodial parent is typically entitled to visitation or parenting time with the child, unless the court finds that it would be dangerous or otherwise not in the best interest of the child. A court will not withhold visitation of a child due to a parent's failure to pay child support.

Here, as an unwed father, who did not sign the birth certificate, Jeb does not currently have a legally enforceable right to Jake. In order to establish such rights, Jeb must file a legitimization action and demonstrate paternity. He can demonstrate paternity by taking a DNA test. Once Jake is legitimized by Jeb, Jeb can file for custody or visitation rights. Additionally, the court will consider the stability of Jake's current living arrangement with his mothers as well as his ties to the community including which school he attends. The court will consider how active Jeb was in Jake's like prior to Susie cutting off contact and the strength of Jeb's relationship with Jake. Even if the court determines that giving sole physical custody of Jake to Susie is in his best interest, the court will grant visitation to Jeb because the facts do not indicate any reason Jeb should not be allowed to be around his child.

Therefore, Jeb should petition for legitimization of Jake and petition for joint physical and legal custody.

5.

The issue is how a child's age affects the determination of any custody award.

For a child 14 years old or over, the child's wishes are controlling unless the court finds that living with the parent of the child's choice is not in the child's best interest. For children 11-13 years old, the child's wishes are considered but not controlling.

Since Jake Morris was born in December 2006, he is currently 13 years old. He is old enough to let the court know his wishes for which parents to live with. His wishes will be considered but not controlling.

6.

Susie can file an action against Jeb for child support. She will be required to prove, likely through a DNA test, that Jeb is the father. After that the court will consider both parties' gross income into the statutory child support calculation to determine how much is owed. Typically, the non-custodial parent pays child support to the custodial parent.

7.

Alimony, which can be temporary or permanent, is support for a spouse during the pendency of a divorce to maintain the spouses's standard of living during the marriage. Georgia law does not recognize a right to alimony for co-habitations who are not married. Instead Susie may want equitable division of the joint assets of the couple.

ESSAY 4 – SAMPLE ANSWER 1

Q1 Threshold Requirements

The issue here is determining the requirements for the maintenance of a class action. The requirements for a class action under federal and Georgia law are similar. They both require (1) numerosity; (2) commonality of the claims; (3) typicality of the claims; and (4) adequate representation. The commonality requirement demands that there be at least one common question of law or fact to the class. The typicality requirement demands that the class representative maintain claims that are typical of the entire class. Finally, the adequate representation requirement demands that the class representative adequately represent the interests of the class and maintain effective counsel for the class. Georgia has some additional requirements and procedures for class actions, however. In Georgia, the court that is assigned the class certification will hold a conference/meeting with counsel to

establish a discovery schedule for class certification only. Discovery at this point is not related to the merits of the case unless authorized by the court. After this conference, the court will hold a hearing not less than 90 and not more than 180 days after the conference to determine class certification.

The numerosity requirement here would likely be satisfied because DOG's PuppyPalace sales totaled $100 million during the 2018-2019 year, which means that there are many consumers out there that would also be potentially disappointed in the design of the PuppyPalace. This is further supported by the mixed reviews found online because if those 100 reviews were mixed, then there are likely a multitude of other consumers that also have mixed reviews about the product. The commonality requirement here would be satisfied because the only question here would be whether DOG's advertising quality fell below its actual quality and that would be common to the entire class. For the same reason, the typicality requirement would be satisfied because that is the only claim that Ann is bringing here, so it would be typical of the class. There may be an issue with the adequate representation because this is my first time handling a class action and these types of cases typically require experienced counsel if this case is going to involve consumers nationwide, which it presumably will. If I can associate counsel on, then there will likely not be an issue here. Additionally, there is no indication from the facts that Ann would not be an adequate representative. The class certified here will likely be for all purchasers of the PuppyPalace. If this is going to involve all consumers of PuppyPalace, then this action will have a binding effect nationwide on other class members unless they opt-out. Therefore, it is fairly likely that Ann's claim satisfies these requirements because there are a plethora of consumer sales (i.e. potential plaintiffs), there are questions common to the class, Ann's claims are typical of the class, and there is adequate representation.

Q2 Additional Factors to Consider

The issue here is identifying the additional factors to determine whether a class action meets the standard of certification as a FRCP 23(b)(3) class action (predominates and superior to any other mechanism). Generally, with this type of class action, the court considers whether

the damages or other questions of law or fact will be individualized such that they predominate over the common questions, whether there are other mechanisms (joinder) that are just as feasible as this class action, and whether a favorable determination will solve the case in one fell swoop or whether the court will be required to make individual determinations with respect to each claim. Here, the facts suggest that there is only one question of law and one question of fact, that is, the state law claim for deceptive advertising and whether the consumer was actually deceived by the advertising. However, there may be an issue with damages here because some consumers purchased using installment contracts and presumably others purchased in full. The determination of these damages may be such that they are too individualized to be determined in this type of class action; however, it is always possible to bifurcate the liability and damages portions of the trial. Additionally, no facts suggest that the class action is not the superior mechanism. It would likely be impracticable to join 100+ plaintiffs in a single suit under the rules of joinder. Therefore, given that the common questions of will likely predominate over the individualized questions and that the class action is the superior mechanism for this suit, the court will likely grant a motion for such certification.

Q3 Federal Court Jurisdiction

The issue here is whether a federal district court in Georgia could exercise personal jurisdiction over Ann's claim. Generally, personal jurisdiction exists where a defendant consents to jurisdiction, he is served with jurisdiction in the state, he is a resident of that state, and where there are minimum contacts with the state such that they have purposefully availed themselves of the laws and benefits of that state and the traditional notions of fair play and substantial justice are implicated. Further, Georgia has a long arm statute for businesses that transact business within Georgia. If jurisdiction is based on minimum contacts, the lawsuit must arise from those contacts. Here, Ann, by filing the claim in Georgia, is consenting to the jurisdiction of the court. The question becomes is DOG subject to personal jurisdiction in Georgia. DOG has subjected itself to personal jurisdiction in Georgia because it maintains a place of business in Atlanta, GA that sells DOG's products. Additionally, Ann signed a contract in Georgia pursuant to a sale made in Georgia. The

cause of action in this case concerns this sale. Although DOG uses this printed form nationwide, it was signed here in Georgia. Furthermore, DOG sold 1,000 PuppyPalaces each year in 2018 and 2019. These would likely be considered minimum contacts for purposes of personal jurisdiction. Moreover, these actions fall within Georgia's long arm statute that cover businesses that transact business within Georgia. Therefore, since DOG has minimum contacts with Georgia and satisfies the long arm statute, DOG is subject to personal jurisdiction in Georgia.

The other issue is diversity jurisdiction. Diversity jurisdiction exists where the amount in controversy exceeds $75,000 and there is complete diversity of citizenship. Citizenship for a person is determined by their domicile (intent to remain and physical presence) and a corporation's citizenship is determined by where they are incorporated and where their headquarters are located. However, CAFA (Class Action Fairness Act) provides that if a class consists of over 100 members and the amount in controversy exceeds $5 million, then only minimal diversity is required. Here, the facts are unclear as to how many class members there are considering the class has not even been certified yet. DOG would be considered a Nevada resident because they are incorporated there and maintain their principal place of business there. Ann would likely be considered a Georgia resident because she lives in Georgia. If this class action is not covered by CAFA, then Ann cannot include any residents that live in Nevada in this suit because they would destroy diversity. If CAFA does apply, then Ann can include Nevada residents because only minimal diversity is required. There also must be enough plaintiffs to bring the amount in controversy over $75,000 or else it will not qualify for diversity jurisdiction. More facts are necessary to make this determination, but if Ann can maintain a class action based on the nationwide sales of $100 million, she can likely maintain the action in federal district court.

Q4 Appeals

The issue here is determining how to appeal an unfavorable ruling. Under both federal law and Georgia law, a determination of class certification is immediately appealable. Under federal law, notice of appeal must be provided within 30 days of the ruling while in Georgia

law, notice must be provided with 14 days of the ruling. Once the notice of appeal is filed with the court, then you can proceed with your appeal of the class certification determination.

Q5 Issues

There may be an issue of competency and adequate representation here. The Georgia Rules generally require lawyers be competent in the representation they take on. See adequate representation analysis. Here, there may be an issue of competency because this is my first class action and I am a freshly minted lawyer (3 months ago). I would likely have to associate counsel here to assist with my representation because I am inexperienced and class actions are difficult to manage. I could also familiarize myself with class actions, but that may take a while. Therefore, there may be some issues related to representation but they can be remedied.

ESSAY 4 – SAMPLE ANSWER 2

1. Threshold requirements

The issue is what threshold requirements must be satisfied to bring this putative class action suit.

a. Federal Law - Personal Jurisdiction

Generally, for a class action to be brought, as with any other suit, the plaintiff must establish personal jurisdiction over each named defendant. Personal jurisdiction exists if the court has jurisdiction bring the defendant into court. The personal jurisdiction analysis proceeds in two steps. First, personal jurisdiction exists if, under the law of the state where the suit is brought, the exercise of personal jurisdiction would be proper. Second, that exercise of

personal jurisdiction must comport with the due process clause of the Fifth Amendment. Georgia has construed personal jurisdiction to extend to the reaches of the due process clause. Thus, the two analysis combine.

Personal jurisdiction exists of the defendant resides in the state where suit is brought, if the defendant is served with the suit while in the state where the suit is brought, if the defendant consents to personal jurisdiction, if the defendant has engaged in minimum contacts in the forum state, or if the defendant is substantially at home in the forum state. A corporate defendant resides in the state where it was incorporated and the state where it's principal place of business (typically, the headquarters) exists. A defendant's minimum contacts with the state create personal jurisdiction if the defendant purposefully availed itself of/engaged in activity in the forum state, the claim arises out of that purposeful availment, and the exercise of personal jurisdiction would not contradict principles of substantial justice and fair play. A defendant is "at home" in a state if the perform substantially all of their operations there.

Here, personal jurisdiction would exist over DOG, Inc. DOG is a Nevada corporation with its principal place of business in Nevada. Thus, it is not a resident of Georgia. However, DOG does have the minimum contacts with Georgia necessary to subject it to suit. DOG sells large numbers of PuppyPalaces in Georgia (1,000 a year), and this suit arises out of those sales. DOG has thus availed itself of the Georgia commercial market, and it would not be unfair or unjust to sue DOG in Georgia. Thus, PJ would exist in Georgia federal court.

b. State court - Personal Jurisdiction

The personal jurisdiction analysis in state would be very similar. The same bases for establishing personal jurisdiction apply as above. Under Georgia's long arm statute, a business that transacts substantial business in Georgia and thereby causes a tortious injury is subject to personal jurisdiction in Georgia. Further, a state conducting business in Georgia must register with the Secretary of State and thereby consents to be sued in Georgia and for the Secretary of State to serve as an agent for it for purposes of process. Because DOG

conducts substantial business in GA and is (presumably) registered with the Secretary of State, personal jurisdiction exists.

c. Federal court - venue

The other threshold requirement is that the suit be brought in the proper place (called venue). In federal court, venue exists in the district where the defendant resides, or if the suit is brought in a state where the defendant does not reside, the district where a substantial part of the events took place. For class actions, only the named defendants and plaintiffs are considered in establishing venue. Here, DOG does not reside in GA, but the purchase was made/contract was signed in Atlanta. Thus, venue would generally be proper in the Northern District of Georgia. If a nationwide class action was certified, however, then venue would arguably be best in Nevada.

d. State court - venue

In Georgia state courts, venue is proper in the county where the defendant resides or, if the defendant is a nonresident, in the county where the facts giving rise to the suit occurred. Thus, venue would be proper in the county where DOG's store is located (Fulton?).

2. Class Action Requirements

The next question is what the threshold requirements for class action suits are.

To bring a class action, the named plaintiffs must show four things. First, the plaintiffs must show that the individuals with claims are too numerous to be individually joined in a single action (numerosity). Second, the plaintiffs must show that common issues of law and fact predominate (commonality). Third, the plaintiffs must show that the named plaintiffs bear claims typical of those of the class as a whole (typicality). Fourth, the named plaintiffs must show that they will adequately represent the interests if the class (adequacy).

Here, numerosity is clearly met. DOG sell huge amounts of PuppyPalaces every year all over the country. There are thousands of potential plaintiffs---far too many to be named in a suit. Commonality also likely exists. The claims will all arise from the same theory: the Puppy Palace was badly made (all consumers viewed the same model) and DOG's online advertising (which was uniform nationwide) was misleading. Most states recognize claims for deceptive advertising. Thus, the issues of fact will be largely identical, and the issues of law will have tremendous overlap. Although there are variances among the state law, it's probably not enough to prevent class certification. The commonality requirement does not require identical causes of action, merely that common issues predominate. Typicality is also met: there is nothing special or unusual about Anne's claim. Finally, Anne will be an adequate class representative. Her interests are aligned with the rest of the class, and she has good credit, stable employment, no criminal record, and is a respected citizen. Thus, she is neither particularly impeachable or unsympathetic nor likely to compromise the class claims based on financial desperation.

Thus, all four requirements for class certification are likely met. The closest question comes regarding commonality. But the court will likely grant class certification. (The analysis will be the same if filed in Georgia state court).

3. Diversity Jurisdiction

The next question is whether the federal court will have diversity jurisdiction over Anne's claim if brought as a class action.

For a suit to be brought in federal court, the court must have subject matter jurisdiction. As relevant here, a federal court has "diversity jurisdiction" over suits between two parties from different states with over $75,000 dollars in dispute. There must generally be "complete diversity," meaning no defendant can reside in the same state as any plaintiff. Under the Class Action Fairness Act, the diversity requirements are lowered for class actions involving 100 or more members and over $5 million in dispute. When those requirements are met,

the federal court has jurisdiction if there is "minimal diversity," meaning any plaintiff resides in a state different from any defendant.

Here, if class certification is granted, diversity jurisdiction will likely be lacking under CAFA applies. If a nationwide suit is certified, then at least one class member will likely reside in Nevada, defeating complete diversity. However, DOG sells huge amounts of product all over the country, so the certified class will almost certainly exceed 100 members and $5 million in claims. Thus, CAFA will apply, minimal diversity will exist (because it already exists just between Anne and DOG), and the federal court will have diversity jurisdiction.

If the suit is filed in state court, there will be no need to conduct a diversity analysis (that's a requirement only for federal court). State courts possess subject matter jurisdiction over all suits for which they can exercise personal jurisdiction.

4. Appeal Rights

The next question is how I might appeal a denial of class certification.

Generally, appellate courts have jurisdiction over final judgments, which require that the case be over and a final order issued. In limited circumstances, however, interlocutory appeals are permitted. Once such exception is when the court denies class certification.

Thus, despite the general rule, class certification is one of the exceptions which allows for immediate appeal as of right. (The analysis is the same in state court).

5. Ethical Issues

The final question is whether I have ethical constraints on my personal ability to serve as lead counsel.

Lawyers owe a duty of competence to their clients. That means that the lawyer must only accept representation that the lawyer can provide in conformity with minimum standards of professional competence. A lawyer that is incompetent to accept a case may become competent through study, not just experience.

Here, I have been practicing law for only three months (as a sole practitioner). I've never handled a class action, and they can be complex (especially if nationwide). Thus, my competency is questionable, and I should consider bringing on experienced co-counsel.

ESSAY 4 – SAMPLE ANSWER 3

1.

At issue are the requirements for a class action. A class action law suit requires commonality, adequacy, numerosity, and typicality. Commonality refers to the shared claim among class members. Adequacy refers to the ability of the named plaintiffs and class counsel to represent the interests of the class. Numerosity demands a large enough number of claims to warrant class action. And typicality requires that the named plaintiffs be typical of the larger class.

Here, Ann's claim runs into some trouble. Numerosity should be no problem, as there are an estimated 1,000 puppy palaces sold through retail installments in the past two years. Typically, over 40 claimants will satisfy the numerosity requirement. Commonality should also be satisfied. Ann's claim and the other potential claimants would all be bringing the same state law claim for deceptive advertising based on the same contract used across the nation. Ann should be alright on typicality as well, as her claim appears to be quite standard. Furthermore, Ann meets the adequacy requirement because she would be a good named plaintiff: she has good credit, stable employment, no criminal record, and is a respected GA

citizen. However, class counsel must also meet adequacy, and that will be difficult. I was admitted to the GA bar just three months ago and I just opened an office as a solo practitioner. I am in no way prepared to litigate a class action effectively. Therefore, I would require adequate co-counsel if the case is to succeed.

The geographic scope of the class could affect whether the class members have a claim. Under the Erie doctrine, a federal court sitting in diversity applies the substantive law of the state in which it sits. Statutes of limitations are textbook substantive law, as they are outcome determinative. In Georgia, the SOL is 2 years, but in other states it might be different. This could require considering how many people could join from Georgia, and how many would be in other states, as well as what the SOLs are in those states.

2.

At issue is the extra requirements when a class action seeks more than injunctive relief. If a class action seeks money damages, and not merely injunctive relief, it must also show that the common questions of law and fact predominate over any individual questions that would affect a class member's claim and that class action is the superior way to resolve these claims when compared to all other forms of adjudication.

Here, common questions of law and fact predominate over individual ones. Everyone in the potential class would have seen the same display, heard the same advertising pitch, signed the same contract, and received the same disappointing result. Additionally, if Ann's complaint is not alone, resolving the many potential claims through one action would be more efficient and superior to hundreds of individual claims. Again, this will be affected by the distribution of likely claims across the country.

3.

Diversity of citizenship requires complete diversity between the parties--meaning no one plaintiff the same citizenship as any defendant--as well as an amount in controversy that exceeds $75,000. An individual is a citizen of the state where they are domiciled and a corporation is a citizen of two places, where they are incorporated and where they have their principal place of business. In a class action, the requirements of complete diversity are relaxed, and as long as the named plaintiffs are a citizen of a different state than the defendants, then diversity exists. The Class Action Fairness Act may also apply if the amount involved is sufficiently large, further relaxing the standards for bringing a federal class action in federal court and making it so diversity exists where any one plaintiff has different citizenship from any one defendant.

Here, Ann's claim would likely get diversity. She is a GA citizen, as she resides in GA with the intent to remain. Furthermore, the defendant corporation DOG would be considered a citizen of Nevada. Therefore, as long as no further named plaintiffs are added with NV citizenship, diversity exists.

The bigger question is whether the Georgia federal court has personal jurisdiction over DOG. Personal jurisdiction must be permitted by GA statute and it must be constitutional. Under the GA statute, personal jurisdiction may be acquired through presence, consent, and the long-arm statute. Under the GA long arm, personal jurisdiction is proper over a defendant that committed a tort in GA. Personal jurisdiction must also be constitutional. There must be minimum contacts equalling fair play and substantial justice. Basically, the defendant must have purposefully availed itself of the forum state, it must not be unfair or unforeseeable for it to be haled it into court there, and it must be given notice.

Under the GA long-arm statute, personal jurisdiction over DOG in GA is proper because the tort of deceptive advertising was committed in GA. Alternatively, if her claim is a contract claim, the contract being executed in GA should be sufficient. Personal jurisdiction over DOG in GA is also constitutional. DOG purposefully availed itself of GA by exhibiting and

selling the PuppyPalace in DOG's Atlanta store. These contacts are sufficient to make it foreseeable that DOG might be sued in GA for its contacts here. Therefore, provided that notice is given to DOG, personal jurisdiction over it in the federal court in GA should be proper.

4.

Yes, we could appeal. At issue is the appealability of interlocutory orders. A denial of class action certification is one of the few interlocutory orders that is immediately appealable as of right. Thus, if we received an unfavorable ruling we could file a notice of appeal within 30 days and argue for reversal in front of the circuit court of appeals.

5.

As mentioned above, I am not qualified to be class counsel on this case, due to my novice experience level and solo practice. Class actions are huge amounts of work and I could never adequately represent the class on my own. I can try to overcome these problems by finding adequate co-counsel who has the resources to take on a large class action and the experience of having handled them before. If I cannot do so, I should withdraw or I would violate the GRPC and doom this class action to fail.

MPT 1 – SAMPLE ANSWER 1

To: Hiram Betts

From: Examinee

Date: 2/25/2020

RE: *Downey v. Achilles Medical Device Company*

Examinee was presented with 2 questions for consideration and will answer them in two parts.

Part One: Whether the plaintiffs' lawyers or their representatives may communicate, without our consent, with the current and former AMDC employees regarding their knowledge about the manufacture and/or sale of the walkers?

Generally, according to Franklin Rules of Professional Conduct 4.2 and 5.3, an attorney may not speak with a person known to be represented by counsel regarding the subject of representation, nor may he direct another person over whom he has supervisory authority to speak to a person known to be represented by counsel without first obtaining counsel's consent. This is true even if the represented person voluntarily chooses to speak with the attorney. The first general issue to be addressed is whether Ashley Parks is a nonlawyer agent of opposing counsel for the purposes of FRPC 5.3. Since Ms. Parks was hired by opposing counsel, is investigating on behalf of opposing counsel, and is all but certain to report her findings to opposing counsel, it can be said that she is a nonlawyer whom opposing counsel has direct supervisory authority over. As such, references to opposing counsel in this memorandum will include references to Ms. Parks when analyzing whether either may speak with current or former employees.

Ron Adams: Mr. Adams is a former employee of AMDC. He has been retired since 2017. While employed with AMDC, Mr. Adams was in charge of the quality control department.

Ordinarily, opposing counsel would not be able to speak with Mr. A *if he were still employed with AMDC* since his act or omission may be imputed to AMDC. The Franklin Board of Professional Conduct (FBPC) rendered an opinion interpreting the above mentioned rules (4.2 and 5.3). Since Mr. A is no longer employed by AMDC, FBPC Ethics Opinion 2016-12 states that 4.2 limits contact with *current* agents and that "counsel may communicate freely with former agents." Therefore, opposing counsel may speak with him regarding the subject matter of the representation unless he has hired separate counsel. To our knowledge, he has not. Even if he does, the decision of whether to communicate with opposing counsel is between him and his attorney.

Gus Bartholomew: Mr. B is a current employee of AMDC. He is the executive assistant for the president of the company. As such, he has sat in on board meetings, as well as attorney client meetings. Typically, opposing counsel is not automatically prohibited from speaking with a mere employee with does not consult with the lawyer for the organization, does not have the authority to obligate the organization (such as accepting a settlement), or whose actions may not be imputed to the organization. On first look, Mr. B appears to meet this criteria. His position is not one in which he consults with or makes legal decisions with the lawyer, nor is it likely that his actions can be imputed to the organization since he is an executive assistant and this matter deals with products liability, and finally, he has no authority to obligate the organization. However, since Mr. B sat in on meetings with the counsel, took notes during those meetings, and has access to most of the president's communications, Mr. B was privy to communications that are protected by attorney client privilege. Opposing counsel would have reason to believe that the employee is privy to these communications since this employee is the executive assistant to the president of the company. As such, opposing counsel may speak with Mr. B for the reasons stated above, but, according to FBPC Ethics Opinion 2016-12, "[opposing] counsel must make every reasonable effort not to breach [attorney-client] privilege. Indeed, [opposing] counsel is prohibited from asking directly or indirectly about any of those communications."

Agnes Corlew: Ms. C is a current employee of AMDC. She is head of public relations. Communication with Ms. C will likely not be limited by rules 4.2 or 5.3. Ms. C is a current

employee, but her position within the company is not one in which she consults with or makes legal decisions with the lawyer, nor is it likely that her actions can be imputed to the organization since she is head of public relations and this matter deals with products liability, and finally, she has no authority to obligate the organization. Since she does not meet any of the three criteria for obligating opposing counsel to seek permission from AMDC counsel, opposing counsel or its agent may speak with her regarding the subject matter of the litigation without first seeking our approval.

Elise Dunham: Ms. D. is a current employee. She is the plant manager at the plant in which the walkers in question were manufactured. Mr. A would have reported to her during his time at AMDC. Ms. D is currently represented by separate counsel in relation to this matter. While Ms. D cannot obligate the organization nor does she consult with counsel, her "acts or omissions with the matter may be imputed to the organization." (FRPC 4.2) Ms. D was a plant manager where the alleged defective walkers were produced. In that capacity, Mr. Adams or subsequent quality control managers would have reported to her. Because of her managerial and supervisory position, if she were to carelessly allow for defective products to leave the plant, that liability would be imputed to AMDC. She has also hired separate counsel. Therefore, if opposing counsel wishes to speak with her regarding the subject matter of the pending litigation, then they must seek our permission because of our vicarious liability as well as permission from her present counsel.

Penny Ellis: Ms. E is a current employee of AMDC. She was formerly the Director of Marketing. She would have over seen the sale of the walkers in question. She is presently the CFO and on the Board of Directors (BOD) serving as the treasurer. Opposing counsel may not speak with Ms. E without obtaining our consent for two reasons. The first, and weaker reason, is that her actions while she was director of marketing may impute liability to us since her responsibilities included the sale of the walkers in question. The second reason is that she is currently on the board of directors. She may not participate in directing counsel, but she does have the apparent authority to obligate the company. By her own admission, she would be working out the financials if there was a settlement. She can also vote on issues relating to the pending litigation. Ms. E may not be active in the litigation, but

since she is on the BOD, she is represented by counsel to the extent that AMDC is represented by counsel (not personally), so speaking with her without obtaining consent would be inappropriate.

Part Two: Whether we, as AMDC's attorneys, may communicate with any of the named plaintiffs or potential class members without the consent of opposing counsel?

Generally, an attorney must have actual knowledge that a person is represented by counsel. In Downey's filing, they would have named the initial plaintiffs. Those plaintiffs are clearly represented by counsel and the "high standard" of knowledge is met. *Mahoney*. We cannot speak with any of the named plaintiffs without consent of their counsel, even if they initiate or consent to the communication.

The issue is whether we can speak to potential class members without counsel's consent. In Mahoney, The Franklin Court of Appeals decided a similar issue. In that case, certification for class status had been granted and counsel was in the 6 month opt out period. Even when class status had been met, counsel was still permitted to speak with potential plaintiffs since counsel could not know for sure they were represented by other counsel until the end of the 6 month period when both parties would know who had opted out. So we may communicate with potential plaintiffs **up until** the time period for opting out has ended. Once that time period has ended, we will know who exactly are the members of the class and will not be able to speak with them without obtaining opposing counsel's consent.

MPT 1 – SAMPLE ANSWER 2

BETTS & FLORES
Attorney at Law
300 Stanton St.
Franklin City, Franklin 33705

MEMORANDUM

TO: Hiram Betts

From: Bar Applicant

Date: February 25, 2020

Re: Downey v. Archilles Medical Device Company (AMDC)

Introduction

Downey v. Achilles Medical Device is a case in which the plaintiff's have alleged that AMDC whom we represent manufactured and sold defective walkers during the years 2010 - 2015. The plaintiff's are attempting to bring a class action, through five named plaintiffs led by a Ms Marie Downey regarding AMDC walkers model number 2852 which was manufactured in 2010 and marked as sold between 2010 and 2015.

Discussion

This memorandum will address and identify 3 major key areas:

1. If plaintiff’s lawyers or their representatives may communicate, with or without the consent, with former AMDC employees regarding knowledge about the sale and manufacture of walkers?

2. Weather AMDC attorneys, or our representatives may communicate with any named plaintiff's or potential members of the class with or without the consent of opposing counsel.

3. Other important issues to be considered. Whether a class may be properly certified.

First issue to be addresses is item #3. The plaintiff's are contemplating bring forth a class action suit. The first action will be the determination is if Ms. Marie Downey is an adequate representative of the class which will be bring action against AMDC. Did she in fact purchase a model 2852 walker in question and are the damages she is requesting typical of the other potential class members. If customer records or proof of purchase cannot be demonstrated that a purchase was made by Ms. Downey then she would have no standing in the case and therefore could not be a class representative. Therefore certification of the class will fail. I would argue that Ms. Downey does not represent the proposed class as a whole therefore the class cannot be certified. Opposing counsel will attempt to show that she does represent the class and did purchase the product. Again evidence to prove or disprove her standing as a class member would need to be gather from plaintiff's side. However, a motion could be made from our side that could disapprove that a purchase of the product was made during the required time period by her or the other five representative plaintiffs thus destroying the class action suit.

As to item 1.

a. AMDC is our client - we are the attorney's for AMDC therefore we are allowed as part of work product in preparation for litigation to interview any and all current employees of AMDC. Rule 4.2 "In representing a client, a lawyer shall not communicate about the subject or the representation the lawyer knows to be represented by other lawyer in the matter, unless the lawyer has the consent of the lawyer or to authorized to do so by law or court order. In this case the company is our client. The employees of the client or company may be interviewed by us. Unless during the course of our interview it has been determined that they are represented by their own individual attorney. If this is the case then an interview may still be conducted with that individual's counsel present.

b. During litigation a discovery plan would be agreed upon by the court and by both parties. During the discovery process our attorney will be allowed to request and to secure depositions with anyone we deemed useful from plaintiff's side. Therefore during these formal dispositions plaintiff's attorney will be present during all questioning. Thus Rule 4.2 must be strictly complied with during this process.

As to Item 2:

a. Rule 4.2 is quite clear that we may not communicate with any member of opposing party once they are named as part of the class unless we have the consent of the opposing party. However, until the class is certified and until the members are made a part of the class they communication between our lawyers and associates will be permitted. If our client AMDC has kept records as to whom their product was sold to during the years 2005 - 2007. This information may be gathered as work product through customer warranty submissions. It also may be gathered from the plaintiff's requirement to notify all buyers that they are members of the class and have an opportunity to opt out. Until they are official member so the class then investigators and our team is allowed to conduct interviews and gather information as part of attorney work product.

b. Training will be done with members of our legal team to ensure that once members become a part of the class or individuals state they do not wish to address anything further without consulting with counsel they all efforts must stop at that time from our side unless as part of a proper discovery plan approved by the court.

Conclusion

Following actions must be taken:

1. Class action certification should be challenged in the form that Ms. Marie Douney does not fully represent the class of consumers who purchased the product during the years concerned.

2. Past and current employees of AMDC may be interviewed by our team unless they are represented by attorney. Until this is known interviews may be conducted as allowed by Rule 4.2.

3. Pre-class customers may be interviewed up until they become members of the class. Once class status has been determined then Rule 4.2 will require compliance with court ordered discovery plan and or permission if person is represented by counsel to conduct questioning.

MPT 1 – SAMPLE ANSWER 3

Memorandum

To: Hiram Betts

From: Examinee

Date: February 25, 2020

Re: *Downy v. Achilles Medical Device Company*

Our client, Achilles Medical Device Company (AMDC) is the defendant in this case regarding the manufacture of and sale of defective walkers during the years 2010-2015. AMDC has had one former and four current employees contacted by an investigator from

the Plaintiff's law firm, Ashley Parks, wishing to speak with them. None of the former or current employees has yet talked with the investigator.

I have been tasked to analyze:

1. Whether the plaintiffs' lawyers or their representatives may communicate, without our consent, with the former and current employees regarding their knowledge about the manufacture and/or sale of the walkers. I will address each employee in turn;

FRPC Rule 4.2 and Rule 5.3. Franklin Board of Professional Conduct Ethics Opinion 2016-12 establishes a 3 prong test to determine if an employee is protected by Comment 7 of FRBS Rule 4.2. Prohibiting communications with a constituent of the organization.

Prong 1 prohibits unauthorized communication with a person in the organization who supervises, directs or regularly consults with the organizations lawyer regarding the matter.

Prong 2 prohibits unauthorized communication with a person in the organization who has "authority to bind the organization in this matter", and includes only those agents or employees who have authority to enter into binding contractual settlements on behalf of the organization. This authority can be actual or apparent.

Prong 3 prohibits unauthorized communication with an agent or employee of the organization whose "act or omission in connection with the matter at hand may be imputed to the organization for purposes of civil or criminal liability.

(a) Ron Adams, retired director of quality control from 2003-2017.

Mr. Adams, as a former and not current employee, can be communicated with freely by opposing counsel or nonlawyer employed or retained by or associated with a lawyer and is

not protected by FRCP 4.2, Comment 7. Franklin Board of Professional Conduct Ethics Opinion 2016-12 reinforces this Rule.

(b) Gus Bartholomew, current employee, employed since 2003 as executive assistant to the President of AMDC.

Mr. Bartholomew as executive assistant would neither supervise, have authority to bind or whose act or omission could be imputed to the company.

He is likely not protected by rule 4.2, and may be contacted by opposing counsel, or their representative.

(c) Agnes Corlew, current employee, employed since January 2017 as head of the public relations department.

Ms. Corlew would not be covered by Rule 4.2, Comment 7 as she doesn't supervise or supervise the attorney, but in the course of her job as head of public relations she might consult the attorney so that she might be able to answer questions from the press regarding pending litigation so that she might communicate the official position of the company to the public. In doing so, she is probably privy to the strategy and tactics of the AMDC attorney so that she can present the best image possible of the company. Ms. Corlew doesn't appear to have any authority to bind the company, at least in a contractual sense. Ms. Corlew has made no act or omission in connection with pending class action so Prong 3 of the FBPC Ethics opinion likely does not apply.

Ms. Corlew is likely protected by FRPC 4.2, comment 7

(d) Elise Dunham, current employee, employed since March of 2009 as plant manager, represented by independent counsel

Ms. Dunham as plant manager is protected on 2 levels. Since she has hired independent counsel, the opposing counsel must get personal counsel to approve any communication with her. Further, opposing counsel, or their representative, FRBC Rule 5.3, must immediately terminate communication upon learning that the individual is represented. Ms. Dunham is also protected from being contacted by opposing counsel by Prong 1, 2 and 3 of the FBPC analysis. She, as plant manager, regularly consults the organization's lawyer, she has actual authority to bind AMDC to contractual obligations and her alleged act or omission in supervising the director quality control and the director manufacturing might be imputed to the company.

(e) Penny Ellis, current employee, employed since 2008, 2008-2016 was director of marketing, 2016 to present chief financial officer of AMDC.

Ms. Ellis is likely protected by Rule 4.2, Comment 7. She was director of marketing during the relevant period and is currently the chief financial officer of the company. As director she could bind the company contractually for sales and her act or omission in sales could be imputed to the company and now, as CFO, she would again satisfy the requirements of Prong 2 of the opinion and she probably consults with the company lawyer on a regular basis as CFO.

All analysis as to who would or would not be protected, and the potential violations of FRPC 4.2 can be inputed to opposing counsel by the acts of their investigator under Rule 5.3.

2. Whether we, as AMDC's attorneys, or our representatives may communicate with any named plaintiffs or potential members of this class without the consent of opposing counsel. I will address each issue in turn:

Rule 4.2 prohibits AMDC's attorneys, or their representatives, from communicating with a person the lawyer or representative knows is represented by counsel.

Here, there is a potential class action, and we intend to oppose plaintiffs motion for class certification. The class has not yet been certified, but we are prohibited from communicating with any named members of the class without permission.

The prohibition only extends, however, to the named plaintiffs in the lawsuit. Communication with potential members of a class, without the permission of the class counsel, is not prohibited. *Mahoney et al v. Tomco Manufacturing.*

MPT 2 – SAMPLE ANSWER 1

In Re Eli Doran

PETITIONER'S CLOSING ARGUMENT

Your Honor, this Court should annul the January 2019 Marriage of Paula Daws and Eli Doran and set aside Eli Doran's October 2019 will for the following reasons:

I. This Court Should Annul the January 2019 Marriage of Paula Daws and Eli Doran Because He Lacked the Capacity to Consent to Marriage As He Equated Marriage With Being Cared For and Could not Think Abstractly About Anything or Make Any Rational Judgments

Although a marriage that complies with the requirements of the Franklin Uniform Marriage and Dissolution At (FUMDA) is presumptively valid, that presumption can be simply overcome by evidence that is clear and convincing such that it shows that it is substantially more likely than not that a party lacked capacity to consent to a marriage. In Re Mason. The capacity to consent to marriage is a high one that requires the individual to understand the nature, effect, and consequences of marriage and its duties and responsibilities. Each party must *understand* what the marriage is and that capacity is measured at the time of marriage.

In Mason, the individual had terminal cancer and was taking medications to control the pain from the cancer that had a high probability of creating mental changes in any patient. Mason. However, there was also testimony that patients can and do have periods of lucidity. Id. The court found that since the marriage was presumptively valid under FUMDA, the oncologist believed that she had the capacity to consent to stopping treatment, and that the individual had the capacity to grant a POA to her sister, the petitioner, the marriage was valid. Id. The court also crucially added that Mason and Green had been engaged to be married for two years and that they had planned for a marriage and life together. Id. In contrast, in In Re Simon, Simon had suffered the fourth in a series of strokes and the individual she married was a medical technician employed at the facility where Simon lived. Simon. They had no prior romantic relationship and they were arranged to get married two weeks before Nancy's death. Id. The court found that Simon did not have the capacity to enter marriage because she had no understanding of what marriage is and that she was incapable of receiving or evaluating information and should not make any decisions for herself or others. Id.

The case before us is just like the Simon case. Eli Doran had no prior relationship with Paula Daws before he moved into her facility and then not even one year later, they were married. We heard testimony from Dr. Anita Bush, a specialist in clinical psychology that works with patients who have cognitive or mental disorders, that Eli Doran did not possess the capacity to consent to marriage because he could not think abstractly about anything or make any rational judgments. She told us that during her very first visit, Eli did not even understand why he was there and stated that he was healthy and needed no medication, even though he took several medications to address chronic conditions. She also told us that he was not oriented to time and that he lived with his deceased wife, Janet, who died two years prior to that visit. Most importantly, she also told us that he said he was married to Vera Wilson, who was his housekeeper. They had never been married. Based on this, Dr. Bush determined that Eli Doran equated marriage with being cared for, which is inconsistent with what the capacity to marry requires. The law requires that each party must understand what marriage is at the time of marriage, including the effects and consequences of marriage. Equating marriage with being cared for is completely inconsistent with the requirements under the law. Moreover, the testimony at the hearing also indicated that Eli was being cared

for Paula, which explains why he may have stated that he wanted to marry Paula. He clearly did not understand the meaning of marriage.

Opposing counsel may argue that this case is similar to Mason, where the individual had lucid moments from time to time and that Eli Doran had a lucid moment when he decided to marry Paula Daws. They will likely try to base this on the testimony we heard that Dr. Bush did not meet with Eli during the time of the marriage and that the preacher that married Paula and Eli did not notice any cognitive defects. This is very problematic and the court would err if they were to rely on this because the preacher did not have any medical experience and could not possibly determine that Eli had the requisite capacity for marriage. Moreover, based on Dr. Bush's testimony, even if Eli had lucid moments—which was unlikely, he would still not be able to make rational judgment calls. This case is entirely distinguishable from Mason because the oncologist in that case testified that lucid moments were possible and the relationship between the individuals was not a new one. Here, Eli had no relationship with Paula prior to the living situation and the potential for lucidity was very small.

Therefore, the court should annul this marriage because Eli Doran did not possess the requisite capacity for marriage given that he equated marriage with being cared for.

II. This Court Should Set Aside Eli Doran's October 2019 Will Because He Lacked Testamentary Capacity As He Did Not Know the Nature and Extent of His Property, and He Did Not Know Who His Niece Was and Believed His Deceased Wife Was still Alive and Living With Him

Generally, the law requires that the testator have testamentary capacity. Dade. This means that the testator at the time of executing the will is capable of knowing the nature of the act he is about to perform, the nature and extent of his property, the natural objects of his bounty, and his relation to them. Id. (finding testamentary capacity where the testator had a history of alcoholism with a noticeable decline in cognitive ability, a loss of short-term memory, instances of speaking to people that were no longer present, forgot to pay bills

and forgot to keep appointments for the doctor or the car because the testator was lucid during the time he made the changes to his codicil given that he was not drinking alcohol at the time). We bear the burden of proving that Eli lacked testamentary capacity by a preponderance of the evidence and we readily carry that burden.

This case is completely distinguishable from the Dade case. Here, Eli was diagnosed with Dementia and his cognitive functioning was on a consistent decline that Dr. Bush determined to be a permanent, progressive condition. We heard from his niece that she first began noticing this decline well before she moved him in with Paula Daws. At times he could not even remember who she was married to or who she even was in relation him. He did not know that his parents had passed away. He was forgetting to pay bills and could not remember answers to simple questions posited by his niece just like the testator in Dade. The difference is Eli did not have the same lucid moments that the testator in Dade had. Knowing the relationships of the individuals you are related to is a crucial consideration for determining testamentary capacity because those people are who your property would ordinarily go to. To make matters worse, Eli believed his deceased wife, Janet, was still alive and living with him even though she had died years earlier. According to Dr. Bush, Eli Doran was simply incapable of any ordinary judgment or reasoning. He lacked the ability to meet his most basic needs and provide for his safety and health. These are simply not characteristics of an individual that has testamentary capacity. Additionally, we heard from Dr. Bush that each time she conducted the proper state tests on Eli, his cognitive functioning was on a steady decline and that it was highly unlikely that he would have a lucid moment to make a will, and that even if he did, he would not be able to make rational judgments. He could not even pay a bill or verbalize reasonable understanding of a will. We heard that Eli's initial will, which was tendered into evidence, provided that he wanted to provide the local church with his entire estate. The petitioner would not stand to take anything here and has no other motive than to protect the interests of Eli Doran contrary to opposing counsel's assertion that petitioner is jealous of Paula Daws.

Opposing counsel will likely argue that the will was properly executed with two witnesses that stated that Eli was lucid and all he wanted to do was give his property to Paula.

However, credibility determinations of those witnesses are crucial in determining testamentary capacity. Paula Daws' daughter was one of the witnesses to the will and she absolutely has a motive to lie to say that Eli was lucid because she would stand to take under the will once her mother passes away. Moreover, the only other witness, Paula Daws, has a significant motive in that she has $15,000 in debt. These witnesses are unreliable and are simply insufficient to make the determination that Eli Doran was lucid and had testamentary capacity when he made this new will.

Therefore, we ask this Court to set aside Eli Doran's October 2019 will because he lacked testamentary capacity at the time he made the will—he did not know the objects of his bounty.

MPT 2 – SAMPLE ANSWER 2

To: Robert Cook

From: Examinee

Date: February 25, 2020

Re: Eli Doran matter

Neither the marriage between Eli Doran and Paula Daws nor the Will executed by Eli Doran are valid. Doran lacked the capacity to consent to the marriage as well as the testamentary capacity to create a will.

Because Doran lacked the capacity to consent to his marriage to Daws in January 2019, the marriage should be annulled.

Doran lacked the capacity to consent to his marriage with Daws. Under Franklin Uniform Marriage and Dissolution Act (FUMDA) a marriage is presumptively valid if it complies with

licensing and officiating requirements. In re the Estate of Carla Mason Green. This presumption comports with the public policy of favoring the validity of marriage, but even this policy may be overcome with clear and convincing evidence. Evidence that is clear and convincing establishes that it is substantially more likely than not that a party lacked capacity to consent to a marriage.

Capacity to consent is defined as "the ability to understand the nature, effect, and consequences of marriage and its duties and responsibilities." Id. Each party must understand what marriage is and freely intend to enter into it. Id. Capacity is measured at the time of marriage. Courts have held that where an individual has had a series of strokes such that the individual was incapable of receiving or evaluating information and should not make any decisions for herself, that person lacked capacity to marry. In re Marriage of Simon. The time that two married individuals knew each other and the nature of their relationship prior to the marriage are also relevant factors. Id.

Here, Doran lacked the ability to to receive or evaluate information and should not make decisions for himself. Carol Richards, Eli's niece, testified that he was incapable of doing basic chores like cleaning his home. He was unable to keep a check book and constantly forgot his family. He also referred to Vera Wilson as his wife when in fact she cleaned his house. Although the defendant may argue that Carol's testimony is not credible, such an assertion is incorrect. In many cases a niece's testimony would not be credible due to the inheritance she would likely receive from the original will. However, that rule is not applicable here. Carol was not set to inherit anything from Eli. All of his estate under the original will was set to go to his favorite church. Therefore it cannot be asserted that Carol is testifying out of self interest. She is actually acting out of a desire that he be "safe and cared for" and that the defendant not take advantage of Doran.

Furthermore, Dr. Bush, a clinical psychologist, testified that it was her opinion that Doran did not "possess the mental capacity to consent to marriage." According to Dr. Bush, Doran equates marriage to being cared for. Dr. Bush testified that it is unlikely that he had periods of lucidity such that he could exercise judgment. The ability to exercise judgment is

paramount in a determination of capacity to marry. Dr. Bush's testimony is extremely credible as she has spent more than one occasion with Doran and is an expert. While she is not a medical doctor, she is specially trained in cognitive decline. The fact that she failed to alert authorities under the Franklin Elder Protective Services act is not dispositive of her credibility. Under the facts known to her, Doran was receiving proper care.

Doran and the defendant did not have the kind of relationship that would naturally lead to marriage, like the parties in Green did. In Green, the parties knew each other for two years and for two years they had talked of and planned for marriage. That is not the case here. Although Doran and the defendant did know each other for a while, their relationship was more in the nature of patient-caregiver. The defendant's testimony otherwise is not credible because she is set to inherit a substantial sum from Doran.

It is clear that Doran equated marriage with being cared for, and that is the only reason he married Daws. Daws, according to her own testimony, cleaned his home, provided his meals and laundry service and supervised his medications. He stated that he loved the defendant merely because she was caring for him multiple times to multiple witnesses, including the Defendant herself. He told her that they should get married immediately after he told her he liked how she cared for him. He also accidentally referred to Vera Wilson as his wife merely because she cared for him. Doran cannot be held to have capacity to understand marriage when he believes that marriage involves simply being cared for by someone.

Because of this Doran could not have had the requisite capacity to form a valid marriage.

Because Doran lacked testamentary capacity, his will executed in October 2019 ought to be set aside in favor of his valid 2016 will.

At the time of execution, Doran lacked testamentary capacity. Testamentary capacity means the testator must be capable of knowing the nature of the act he is about to perform,

the nature and extent of his property, the natural objects of his bounty, and his relation to them. Proving a lack of testamentary capacity must be done by a preponderance of the evidence. Such a determination cannot be proven by legal incompetence alone. Therefore a determination of incompetence alone is not sufficient to prove lack of testamentary capacity. The court in In re Estate of Dade held that severe alcoholism was not enough to invalidate testamentary capacity because the testator in that case had periods of lucidity.

Doran had no clue who his family was and therefore did not know the natural objects of his bounty. Several months prior to the execution of the will, in June 21, 2019, he referred to Carol as his driver. He denied that they were related according to Dr. Bush's testimony. This is the key element of this case. Carol was arguably the most important and central figure in Doran's life at the time. He saw her regularly according her testimony, yet prior to and leading up to the execution of his October 2019 will, he did not realize her true identity. He certainly did not realize she was family. The same time he denied that Carol was related to him, he said that he lived with his now deceased wife, Janet. In reality he lived with the defendant. He believed his parents, long deceased in June 2019, were still alive. He likely did not have periods of lucidity at the time of execution of the will that would bring him out of his confusion, as the defendant will likely argue. Although he was coherent and understood things at times, such as when he was married, according to Rev. Simm's testimony, this was well before the execution of the will. And all testimony to the contrary by the defendant and her daughter are not credible because they stand to inherit significantly if the will is validated.

Furthermore, Dr. Bush's testimony regarding the decline of Doran's mental capacity through the use of the MMSE test is extremely persuasive. according to this test by the time he executed his will, he had severe progressive dementia.

As stated above, the defendant's testimony lacks all credibility, because she is set to inherit significantly through this new, surprise will. Her son's testimony is not credible for the exact same reason. Furthermore, she clearly attempted to cover up her machination by not telling

any of his family members. Her purposes may be merely to pay off her significant credit card debt of $15,000.

He forgot who was in his family and what the nature and extent of his estate was. Because of this Doran lacked testamentary capacity and his will is invalid.

Conclusion

It is clear that Doran had neither capacity to marry nor testamentary capacity. In the interest of fairness, the defendant should not be allowed to profit from her close confidential relationship with Doran. This court should annul the marriage and set aside the will in question.

MPT 2 – SAMPLE ANSWER 3

Carol Richards, as legal guardian of Eli Doran, seeks to have the marriage to Paula Daws annulled and the October 2019 will set aside because during both events, Doran lacked capacity to consent to marriage and lacked testamentary capacity to execute a will.

Because Eli Doran Lacked Capacity to Consent to Marriage, the January 2019 Marriage to Paula Daws Should be Annulled

In *In re Green*, the Franklin Court of Appeal defined the capacity required to consent to marriage is the ability to understand the nature, effect, and consequences of marriage and its duties and responsibilities. The parties must freely, without duress or coercion, intend to marry and understand what it is. The capacity to marry is considered at the time of marriage. A legal guardian, or other petitioner, may overcome the presumption of a valid marriage by clear and convincing evidence one of the parties lacked capacity at the time of marriage.

Thus, the petitioner must show it is substantially more likely than not that a party lacked capacity on the date of marriage.

On January 15, 2019, Eli Doran did not have the capacity to understand what he was doing when he married Paula Daws, nor did he understand what marriage meant, what the consequences were, or the duties or responsibilities required. For over three years, Doran has been evaluated by a clinical psychologist and his primary care doctor. Over the last three years, after testing and evaluations, these doctors concluded that Doran has experienced significant decline in his cognitive abilities. Since May 2018, he has been diagnosed with multiple cognitive dysfunctions and more recently in June 2019, Dr. Bush, the clinical psychologist diagnosed Doran with a permanent cognitive condition that will only continue to worsen. Over the three year period prior to the marriage, Doran's score on the Mini-Mental State Exam, MMSA, dropped from 21 to 17, which Dr. Bush calls a significant decline.

Paula Daws married Doran after he asked her twice when he said she took good care of him. What Doran fails to understand is that he was paying Daws to take care of him. It was and still is her job to feed and house Doran and ensure he receives his medication. It is impossible that at the time of the marriage, Doran understood what it meant to be married. Dr. Bush testified that Doran only understood marriage as being cared for, and Doran did not understand the duties and responsibilities associated with marriage. Moreover, Dr. Bush testified that in July 2019, after Doran has lived in Daws' house for over a year, he did not know where he lived and believed his wife, who has died several years earlier, was alive. At the time of his last visit with Dr Bush, she testified that Doran believed his parents were alive despite the fact that they had passed away decades prior.

The Franklin Court of Appeals did not annul a marriage in *In re Green* because at the time of the marriage, the woman was able to participate in decisions concerning her medical treatment, she participated in the discussion, and her doctors testified that on the say of the marriage, she was lucid despite the pain medication she was taking. While Dr Bush was no present on the day of the marriage and cannot testify to Doran's lucidity on that day, the

present case is distinguishable. In Green, the woman was on medication that impaired her thinking, she was not facing actual cognitive dysfunction or deterioration. Her doctors knew that she could be lucid and participate in discussions about her treatment and made rational decisions. Unlike the woman in Green, Doran cannot experience rational decision making, and was not able to participate in discussions about his treatment. His niece chose to put him in an assisted living facility at the advice of his doctor. While Doran agreed to go, he in no way participated in a discussion to determine his course of treatment. Additionally, Dr. Bush testified that Doran could not experience rational decision making or understand abstract thought and concepts. Moreover, Dr. Bush testified that is it unlikely Doran has any moments or lucidity and states that she seriously doubts his ability to exercise any judgment.

Like the case in *Simon*, Doran met his suitor because she was his caretaker and only knew her as such. Doran and Daws did not have any previous relationship and she presents no evidence of any courtship prior to Doran asking her to marry him. Like *Simon*, Doran's doctor has testified that he cannot make decisions for himself. Doran cannot be said to understand what marriage is. As Dr Bush testified, he equated marriage to care-taking. This is evidenced by his mental decline and the fact that he asked his previous caretaker to marry him, again because she took good care of him and again without any evidence of a courtship.

Doran lacks the ability to think abstractly, so he could not plan a life or a future with Daws. Doran is only able to understand that she takes care of him. Daws did not provide any evidence of a courtship nor did she express her feelings for Doran. She said he only had to ask twice and she got married the next day. No rational person would take Doran's ask as a true marriage proposal. Especially one without any evidence of a relationship between them. The testimony of the Rev. Simms cannot be controlling because he does not know Mr. Doran and it is unclear what his relationship with Daws is. Daws and her daughter have something to gain from the marriage. As Daws' reverend, Rev. Simms may have something to gain as well. In addition to the lack of evidence, Daws has not produced any credible witnesses to testify to the legitimate marriage and relationship between her and Doran.

Your honor, please annul this marriage because of the clear and convincing evidence that Doran is unaware of what is means to have married Daws and cannot understand the nature of the commitment.

Because Eli Doran Lacked Testementary Capacity, the October 2019 Will Should be Set Aside in Favor of Eli Doran's Earlier Will

The Franklin Court of Appeal defined testamentary capacity in *In re Dade*. At the time the will is signed, a testator must be able to know the nature of the act of executing the will, the nature and extent of his property and those natural object of his bounty, and his relation to them. If a petitioner proves by a preponderance of the evidence that the testator lacked testamentary capacity at the time of execution of the instrument, it will be void. In order to void such an instrument, there must be a finding of more than just legal incompetence, there must be a lack of understanding.

Doran lacked capacity when he signed the will in October 2019 because he did not understand the extent of his property, he did not fully understand who his relatives are nor did he know which of them were alive. In order to have capacity to execute a will, Doran must have been able to understand what property, including money, he owned and how much he owned. At the time of the will, Doran lived in a home operated by Daws because he was unable to care for himself. He was also unable to manage his checkbook, or pay any bills, so his payment to the facility owned by Daws had to be automatic because he was unable to manage his finances. Doran is clearly incapable of understanding the nature and extent of his property.

Daws and her daughter testified that Doran said he wanted Daws to have all of his "stuff." Stuff can in no way be interpreted as a term encompassing knowledge of the extend of one's property. The first time Daws claimed Doran wanted her to have his stuff is when she commented on his belongings in his room. It is unclear what Doran means by stuff but it is unlikely that any rational person would understand "stuff" to mean all of my belongings and money. Daws claims she wrote the will at the direction of Doran, it is impossible to believe

Doran knew what he was doing and what he meant when he signed a will to give Daws all of his stuff.

The court, in *In re Dade*, denied the appeal of a son and daughter seeking to invalidate a codicil to their father's will. The court held the father knew what he was doing because although he added gifts to three people, he left a significant sum to his son and daughter. Additionally, the court questioned the motives of the children seeking invalidation of the codicil. If the court invalidated the codicil, the children would increase the size of their gifts from the estate. Here, however, is a very different situation. Carol Richards, Doran's niece and legal guardian seeks to gain nothing from invalidating the new will. She is not in the previous will, in fact Doran left all of his property to his church. Her testimony in the case is not "colored by her interest."

The testimony of Daws and her daughter is "colored by their interests." Daws would receive Doran's entire estate if the will remains valid, which includes the proceeds from the sale of his home. Daws' daughter would gain under the will because she would inherit anything that remained from her mother. The new will greatly disturbs the previous will, which had been in effect since 2016, before any diagnoses of mental impairment. As discussed previously, Doran was facing significant cognitive impairment around the time of the execution of the will. He has been diagnosed with cognitive dysfunction since May 2018. The credibility of the will must be questioned because the one beneficiary who stood to gain the entire estate was the drafter of the will. This beneficiary is also the sole caretaker of Doran. It is the responsibility of the trial court to make determinations of credibility which are crucial to detemining testamentary capacity. This court must find the testimony of Daws and her daughter incredible and cannot bear on the validity of the will.

The court must find Doran lacked testamentary capacity to execute the will. Doran is more than legally incompetent. He is unable to understand the property he owns and is unable to understand who his relatives are. There is a preponderance of evidence proving Doran did not have capacity or understanding to execute this will.