July 2006 Bar Examination Sample Answers

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Question 1 - **Sample Answer 1.**

The Basketball League of Macon

The issue is whether the Basketball League of Macon has standing to sue the GA Commissioner of Parks and Recreation. Under the Constitution, the court will only hear cases in which the plaintiff has standing to sue. The elements of standing are (1) plaintiff must have an injury in fact or threat of a immediate injury; (2) there must be causation between the plaintiff's harm and the defendant's actions; and (3) there must be redressability, meaning that if the court rules in favor of the plaintiff, this ruling will remedy their harm. There is no third party standing allowed, unless there is a substantial nexus between the parties or there was "associational standing." For associational standing, you must show that individuals are not necessary to litigate, the harm could have been brought by the individuals of the group, and the injury is the same. As for the Basketball League of Macon, this would be considered an association. This is the overall organization. Therefore, the organization could sue on behalf of its players. It is shown that the eye wear protection would interfere with the liberties of the players. The injury to the players was caused by the new legislation and the injury could be remedied by the legislation being overturned. Therefore, under associational standing, the Basketball League of Macon would have standing and the motion to dismiss should be denied.

Ima Starr

The issue is whether Ima Starr has standing to being an action against the Georgia Commissioner of Parks and Recreation. Applying the same 3 elements (above) with regard to standing, Ima Starr does have an injury in fact. It infringes upon her liberty and decreases her enjoyment of the game as well as violating her right to privacy and freedom of association. She even has some economic injury, in that she will have to buy eye protection if she wants to continue playing basketball. This injury was directly caused by the legislation. And furthermore, her injury will be redressed if the legislation is overturned. Therefore, Ima Starr has standing to sue and the motion to dismiss should be denied GA Basketball Manufacturing, Inc

The issue is whether GA Basketball Manufacturing, Inc (GBM) has standing to bring an action against the GA Commissioner of Parks and Recreation. Still applying the 3 elements (above) with regard to standing, GBM does not have injury in fact. It states that the new law will likely result in a decrease in the demand for its product. There is no economic injury at this time. However, there is fear of imminent harm becuase the legislation is now effective. So GBM has a threat of imminent economic harm due to this legislation. Furthermore, it seems clear that the new law will

be the cause of the decrease in demand for its products. Therefore, GBM most likely has standing to sue and the motion to dismiss should be denied.

Question 2

The issue is whether The Basketball League of Macon ("League") is entitled to rescind the contract. Becuase this is a contract for the sale of goods, the UCC applies. Under the UCC, a contract can be rescinded after one party has completed their promise under the contract if (1) the goods were not conforming to the particular buyer after reasonable time to inspect them, (2) the buyer has excusable neglect for not knowing of the defect before now, and (3) they give the seller notice within a reasonable time after the defect is found. Also, a contract can be rescinded if there was mutual mistake or unilateral mistake by one party that the other party knew or had reason to know of.

Here, there was a contract, including an offer, acceptance, and consideration (promise to sell goods and the promise to pay for the goods). There was a writing, so this satisfies the Statute of Frauds and the quantity was included in the contract, so the contract is valid. The delivery of the 1000 pairs of goggles on October 1 was an express condition precedent to the payment 30 days later. We Love Eyes performed their end of the bargain by delivering the 1000 pair of goggles on October 1. Time was of the essence and We Love Eyes performed their duty on the contract date.

There was also no defect with the goggles to make rescission of the contract possible. The League's staff examined the goggles and found them to be of exceptional quality. Therefore, with respect to their use by the League, they were not defective and were of good quality to this particular buyer. Furthermore, there was no mistake by either party to allow for a rescission in equity. The facts do not state any mistake. So rescission would not be allowed based on mutual mistake.

Becuase We Love Eyes completely performed their duty fully and the contract will not be rescinded, We Love Eyes will be entitled to damages. In contract, the remedy is that amount which puts the party in the position they would have been in had the contract been fully performed by both parties, or expectancy damages. Here, to make We Love Eyes whole, they are entitled to the contract price for the 1000 pair of goggles.

Question 1 - **Sample Answer 2.**

1. In order for federal courts to have jurisdiction over claims under the Constitution, there must be an actual "case or controversy." One of these requirements is standing, meaning that there must be an actual injury and this injury must be imminent, causation, and redressibility. The Supreme Court has also held that there need not be economic harm to gain standing. This question raises the issue of organizational standing. An organization can bring a suit on behalf of its members if the claim involves one that members of the organization itself would have standing to raise and if there is a direct injury to its members. Here, it seems as though there is a direct injury resulting to its players from having to purchase eye goggles arid this is one that allegedly impinges on their liberty. Therefore, the players themselves could enforce this right. Furthermore, the League itself probably has sufficient injury to sue in its own right. They are challenging that

the new law increased its costs, and this is probable enough injury for to they themelves to enjoin the law.

2. Starr also has standing to sue. For an individual to sue, there must be imminent injury (economic or non economic) causation, and the ability of the court to redress the issue. Here, although she is not alleging an economic injury, she has sufficient standing because it will decrease her enjoyment of the game, and thus her liberty rights. The Supreme Court has held that decreae in enjoyment of nature, ones surroundings, etc., although noneconomic is sufficient to gain standing. The causation requirement is fulfilled, since the legislature passed the act and is the direct cause of her having to wear goggles.

Finally, the court would be able to fashion a remedy for her as well, if her rights were violated, through equitable relief and an injunction.

3. GA Basketball Manufacturing will have a more difficult time gaining standing and will probably not survive the motion to dismiss. Here, the facts stated that the new law was "likely to reduce" those who played basketball and decrease demand for its products. Since standing requires imminent injury, a court may find that its injury is only speculative, since it has not yet suffered damages and, as stated above." A court would also have a difficult time redressing this issue, as demand for their products has not yet gone down. Furthermore, the court may find that the issue is not ripe. Ripeness requires that the injury be timely and ready for a court to hear. As stated above, the potential injury to Manufacturing has not sufficiently developed. Question 2

Recission is an equitable remedy that is available in contract law. It is available in such instances as mutual mistake between the parties, fraud, duress, illegality. When a contract is rescinded, the parties are restored to the positions before the contract as though the contract never existed. Here, there is a strong case for recission. It is clear that the parties entered into a valid agreement. There was an offer, an acceptance by the shipment of goods on the date specified, and adequate consideration.

However, recission of the contract would be available based on the fact that the federal district court has now declared the law to be enjoined. While not a declaration of illegality or impracticality, the injunction is probably enough to find grounds for recission. An injunction represents the court's view that there is irreperable harm and a likelihood of success on the merits. Therefore, the court is essentially finding a strong likelihood that the statute will be unconstitutional. Therefore, the contract should probably be rescinded. We Love Eyes might argue that since the League examined and accepted the contract, it is not now entitled to rescind the contract. However, a court will still probably find that given that the ruling occurred within a reasonable time after inspection, recission is possible. The League will most likely be able to return the goggles and not have to pay We Love Eyes the full contract price. However, We Love Eyes may be entitled to the reasonable costs of shipping and having to hire more workers in reliance on the contract.

Since this is a sale of goods, another theory the the League could rely on under the UCC is commercial impracticaility or frustration of purpose. When the basis of the bargain (here the contract for goggles) has been frustrated by an unforeseen event, making it commercially impracticable, it is entitled to rely on recission. We Love Eyes might argue that this was not an unforseen event, given the fact that there were three parties challenging the law in federal court and the League had notice of this fact when it entered into the contract. However, due to the fact that the basic purpose of the contract has been frustrated and it was relatively unforeseen, it will probably be entitled to recission.

Question 1 - **Sample Answer 3.**

Question 1

The Basketball League of Macon is suing both because of an injury to itself and an injury to its players. In order to have standing to sue in federal court, a plaintiff must allege an injury personal to that plaintiff, and show that the harm the plaintiff alleges caused the injury and that the court's relief could remedy that injury. Third party plaintiff standing is limited in federal court.

The Basketball League is suing alleging the harm it suffers will be increased costs due to the law. The league alleges that it will have to buy the goggles for its players, and so the law harms it. If true, such an injury is personal to the plaintiff.

However, the Basketball League has a problem with causation and redressability. Even if it is injured, the law may not be causing the injury. The law does not state that any organized league must purchase goggles; it only states that players must wear eye protection in league play. Thus, the harm alleged is not caused by the law; it is caused by plaintiff himself, who seems to have undertaken on its own to buy eyewear for its players. Thus, the Macon Basketball League does not have standing to sue for its direct injury.

In addition, the League does not have standing to sue for a third party. A third party may only raise a claim if the action is germane to its interests, the third party could have raised the claim, and the third party is not necessary to decide the case. The injury of "interfering with the liberty of its players" is a harm to the players, not the league. Thus, although the law is relevant to the interests of the League, the players themselves would be needed to decide any issue regarding their liberty interests.

Ima Starr, the player involved, does have standing to sue in federal court. The injury alleged is personal to her, as it would add a requirement that she personally would have to do to play in a league game. Moreover, the law she is challenging is causing the harm; she would not have to wear the goggles if not for the law. Finally, the relief she seeks (an injunction) would redress her injury, as she would no longer be required to wear goggles when she plays basketball. Therefore, she has standing. Georgia Basketball Manufacturing does not have standing to sue. The injury it alleges is a decrease in demand for its products. This injury would be personal to the plaintiff if it occurred, in that it may reduce profits. However, it is not clear that the law in question would cause that harm, or that an injunction would redress it. The harm is speculative, in that it is not known whether demand would increase or decrease, as people may be more attracted to basketball if it is viewed as safer. For the same reason, the injunction might not redress the injury, as demand for basketball equipment in the future may rise and fall for many different reasons. Therefore, Georgia Basketball Manufacturing likely does not have standing to sue in federal court.

Question 2

In this action to rescind a valid contract, one must first inspect whether the terms have been fulfilled. There is no dispute as to the validity of the offer and acceptance or as to the consideration, as the contract was written and each side gave a promise as consideration. Under Georgia law, contracts for the sale of goods require perfect tender by the seller, meaning that the quantity and the quality of the goods, and the timing of performance, must be in accordance with the terms of the contract.

Here, the contract required 1000 pairs of basketball goggles to be delivered by October 1st. As the facts indicate, the 1000 pairs were delivered by We Love Eyes to the Basketball League of Macon by October 1st. The League evidently agreed that tender was perfect, for it inspected the items and did not reject the delivery.

Moreover, the contract could not be rescinded on the grounds that no one has relied on the contract. We Love Eyes has gone to great lengths and spent much money in preparing for production of the goggles. Therefore, no excuse is permitted under those circumstances.

Therefore, the seller`performed his part of the contract; under Article 2 of the UCC, all conditions precedent are satisfied, and the buyer is then obligated to perform its part as well. Here, that involves payment by October 30. The buyer's performance of the contract may be excused under certain circumstances, however. If, between the time of making the contract and the time of execution, circumstances change in such a way as to make performance impossible, impracticable, or frustrate the purpose of the contract, a party may be excused from performing and the contract may be rescinded.

Here, the "changed circumstances" are that the law which prompted the League to enter the contract was enjoined after the contract was entered into. However, there is nothing impossible about buyer's performance; they League must simply pay money. Similarly, there is nothing impracticable about performance, for it is always practicable to pay money.

The only conceivable excuse of performance that would allow rescission is frustration of purpose. For excuse of performance, both parties must be aware of the purpose of the contract at the time the contract was made. It is not clear from the facts if We Love Eyes knew of the reason for the purchase. Moreover, even if the law is enjoined, the League may still desire to protect its players' eyesight, which was also a purpose of forming the contract. Given that the purpose is still possible, there are no grounds to excuse performance. The wearing of glasses while playing basketball remains legal in Georgia even after the injunction. The League, therfore, must pay and fulfill its contract. It may not rescind.

Question 2 - Sample Answer 1.
(disclaimer)

Dr. Adams' physician

I. 1. At issue is whether this hearsay statement meets a hearsay exception that would make it admissible in court. Hearsay is an out of court statement offered to prove the truth of the matter asserted. The statement to the physician was made out of court and it's offered to prove the

matter asserted (Dr. Adams may have made a mistake). If an admission is made by a party, that admission can be offered against them by the other party. This is a hearsay exception. Therefore, it appears an objection to 1. At issue is whether this hearsay statement meets a hearsay exception that would make it admissible in court. Hearsay is an out of court statement offered to prove the truth of the matter asserted. The statement to the physician was made out of court and

Dr. Adams' husband

2.At issue with this statement is whether this hearsay is admissible. Once again, it's an out of court statement offered to prove the truth of the matter asserted. It would meet the party-opponent admission, because the statements were an admission by Dr. Adams. However, an objection should be raised on the basis of marital confidential communications privilege. In Georgia, a communicating spouse can prevent her spouse from repeating statements she made in confidence to her spouse. Nothing indicatesAt issue with this statement is whether this hearsay is admissible. Once again, it's an out of court statement offered to prove the truth of the matter asserted. It would

Dr. Adams' accountant

3.As far as the statements made to the accountant are concerned, the issue is whether the accountant client privilege applies to make it admissible. This statement is hearsay (out of court statement offered to prove truth of the matters asserted). Additionally, it was made by a party, so the party-opponent admission exception applies. Yet, in Georgia, communications between a client and accountant are privileged. Whether this will block the testimony depends if the information was relevant to obtaining acAs far as the statements made to the accountant are concerned, the issue is whether the accountant client privilege applies to make it admissible. This statement is hearsay (out of court statement offered to prove truth of the matters asserted). Additi

Karen

4.As far as Karen is concerned, the main issue is whether her presence at the attorney meeting makes the attorney-client privilege inapplicable. Statements made to an attorney in the process of seeking legal advice are protected and inadmissible if they were made in confidence. The party must intend for them to be confidential and take action to protect its confidentiality. Additionally, the privilege is lost if the statements are made in the presence of others who are not necessary for the attorney to do As far as Karen is concerned, the main issue is whether her presence at the attorney meeting makes the attorney-client privilege inapplicable. Statements made to an attorney in the process of seeking legal advice are protected and inadmissible if they were made in confidence. The party must intend for them to be confidential and take action to protect its confidentiality. Additionally, the privilege is lost if the statements are made in the presence of others who are not necessary for the attorney to do As far as Kar

5.a. As far as the malpractice claims are concerned, an objection should be raised. At issue is the relevance and possibility of improper character evidence. Events occurring at another time and with different people are not as relevant as current circumstances. Otherwise, to be admissible there would have to be a finding of identity of events so as to put Dr. Adams on notice of her negligence. If found relevant (due to the law standard), this is character evidence and character evidence is not allowed in a civil case to show conformity with character (not allowed for prosperity). An objection should be made and should succeed.

5.b. Although the statements of sympathy are hearsay and would qualify as a party opponent

admission, Georgia does not allow statements of sympathy in medical malpractice claims as hearsay exceptions. An objection should be made.

5.c. At issue is whether evidence of Dr. Adams insurance is admissible. Georgia bars evidence of insurance to show liability and culpability. Therefore, an objection should be made.

5.d. The contents of the file are hearsay, however, it appears the business records exception would apply if these are kept and made in the regular course of conduct. Also, there is no physician privilege and if there was, the patient will waive it. An objection should be not be made.

II. At issue is whether the collateral source rule bars this evidence. Georgia follows the collateral source rule which does not allow evidence of payments made to the plaintiff from outside collateral sources. The payment from the insurance company is a payment from a collateral source. Therefore, the plaintiff's attorney will object to its admissibility under the Collateral Source Doctrine, and most likely, they will succeed.

Question 2 - **Sample Answer 2.**

(disclaimer)

- 1. For Dr. Adams' physician, I would raise 2 objections. First, under common law, there was a doctor/patient privilege. However, Georgia evidence law does not have such a privilege. So I would argue that these statements made to her doctor are privileged; however, this argument would fail. Second, I would object and argue that any testimony about what Adams said to her doctor is hearsay. Hearsay is an out of court statement made by the declarant while not testifying at trial introduced into evidence for the truth of the matter asserted. The statements regarding her confession to drinking the night before and having a headache during surgery would qualify as hearsay. However, the opposing counsel will still likely get these statements in as an exception to the hearsay rule. First, hearsay is admissible when it is a statement made to a doctor for diagnosis. Here, Adams' statements could qualify. Also, an admission by a party opponent is an exception to the hearsay rule. Here, if Adams told her doctor she was negligent, that statement would also be admissible as an admission.
- For Dr. Adams' husband, I would object to his testimony based on the marital communications privilege. This privilege is available in civil suits and covers communications made during marriage. The privilege survives divorce and death. The privilege is held by the communicating spouse. Thus, even if Adam's husband wanted to testify to the statements she made to him, Adams could assert her privilege to have those statements kept out of court.
- Georgia recognizes an accountant/client privilege with regard to communications related to financial and accounting advice. Since Dr. Adams' visit was for the purpose of discussing a trust, this communication is privileged.
- For Karen, I would object to her testimony arguing that Adams' statements to her lawyer and those made by her lawyer to her were privileged under the attorney-client privilege. To qualify for this privilege, the statements had to be made in seeking legal advice. However, the opposing party could argue that these statements were not privileged. To qualify as a privileged statement, the statement must be made in private between a lawyer and client,

to evidence that the client expected such comments to remain confidential. However, since Karen was present, the opposing party can argue the conversation was not confidential. One possible counter-argument I could make is that Karen is working as an assistant to the lawyer, much like a secretary or paralegal, so the confidentiality was not destroyed. There is no such evidence of this to support this argument. Further, there is not a family member privilege like that of marital, so it would be hard to keep these statements out. I would also include an objection like that listed with the doctor's analysis above treating these statements as hearsay and inadmissible in court. Another argument I could make is that such statements fall under attorney work product and are privileged. Work created by an attorney in anticipation of litigation is privileged. Statements by Adams' attorney on his opinions or impressions of the case would fall in this privilege and be admissible.

5.(a) For Dr. Adams, first I would argue that prior malpractice claims filed against her are not admissible. I would argue that specific act evidence is inadmissible to show propensity to act in a certain way. Further, specific act evidence is not admissible in a civil suit, unless it is defamation or case where character is at issue. A negligence suit does not qualify. The opposing party will argue that such evidence is admissible because it goes to show that Adams was on notice of her negligent behavior. Evidence that shows notice is an exception to the hearsay rule. Further, the opponent might argue that these malpractice claims all show a common identity of her failure to act non-negligently. Evidence purporting to show things like motive, common identity, and modus operandi are admissible. My counter argument would be that the judge cannot admit evidence when its probative value is substantially outweighed by unfair prejudice. These complaints would prejudice a jury against my client unfairly and their probative value does not warrant admissibility.

(b) Adams' statements of regret to Boyd's family are inadmissible under the provisions of the Georgia Tort Reform Act.

(c) I would argue that the existence of Adams' insurance is admissible based on public policy exclusions. Proof of insurance to show ability to pay is not admissible evidence as it would be highly prejudicial to the defendant. It is admissible to show ownership; however, that exception is not applicable here. I would be able to keep this evidence out.

(d) The contents of the file on Boyd that Adams handed to her lawyer would be difficult to keep out. The attorney client privilege protects testimonial statements and confessions made to a lawyer. The privilege does not protect documents that are otherwise discoverable. The files are discoverable. I would argue they are inadmissible hearsay and not authenticated. However, the records could easily be authenticated by a witness stating that they are what they purport to be and qualify as direct evidence that the opposing party would be entitled to access.

II. I anticipate an objection under the Collateral Source Rule. Under the Rule, money being paid to a party from a third party, like insurance coverage or gifts, is not admissible. The insurance payments would fall under this rule and be inadmissible. They could also argue this evidence is not relevant to the case because it has nothing to do with Adams' negligent act and resulting damages.

Question 2 - Sample Answer 3.
(disclaimer)

(I) Dr. Adams' physician

No objection is appropriate to Dr. Adams' physician's testimony. The statements of Dr. Adams' physician constitute hearsay, which is defined as an out-of-court statement offered to assert the truth of the matter. Generally, hearsay is inadmissible but there are several exceptions to the general rule. Such exception covers statements made to doctors for the purpose of diagnosis and treatment. Here, Dr. Adams consulted with her personal physician for treatment for her severe headaches. Although the facts also indicate that she "confided" her concerns about Mr. Boyd's surgery to the doctor, Georgia does not recognize a doctor-patient privilege. Where privileges are recognized, the effect is to protect the confidential communications between individuals with special relationships. Because no privilege exists for the doctor-patient relationship in Georgia (the suit is brought in a state court), Dr. Adams' physician will be compelled to testify.

Dr. Adams' husband

An objection is appropriate for Dr. Adams' husband's testimony and will most likely be sustained. There are two privileges for married couples. The spousal privilege protects a witness spouse from being compelled to testify against a defendant spouse in a criminal trial. This privilege covers confidential information learned before and during marriage but requires that the couple be validly married at the time of trial. The other marital privilege applies both in civil and criminal cases and covers confidential information between the two spouses during marriage. This privilege continues even where the parties are no longer married and can be asserted by either spouse. Here, the facts indicate that the conversations between Dr. Adams and her husband were meant to be confidential. She told him all the concerns she had about potentially negligently performing the surgery and he responded that she should not admit liability. They did not have these conversations in the presence of other people - one way of destroying the privilege. Therefore, Dr. Adams can object to having her husband testify. The existence of a privilege is determined by a judge, and while not absolute, protects special relationships.

Dr. Adams' accountant

Yes, an objection is appropriate for the accountant's testimony. Georgia recognizes an accountant-client privilege and it operates much the same way as the attorney-client privilege and it operates much the same was as the attorney-client privilege. Here, Dr. Adams consulted her accountant about setting up a trust or annuity for Mr. Boyd's family. Her statements about the surgery were made in relation to her getting advice about establishing such a trust or annuity. The fact that Mr. Boyd recovered and Dr. Adams decided not to pursue the idea does not destroy the privilege of the confidential information that she told her accountant.

Karen

Yes, an objection to Karen's testimony regarding Dr. Adams' statements to her lawyer is appropriate but may not be successful. Georgia recognizes an attorney-client privilege and communications intended to be confidential will be protected. However, the presence of a third party that is not necessary (i.e., lawyers's secretary or child's guardian) will destroy the privilege. Here, Dr. Adams brought her sister Karen to the meeting with the lawyer for emotional support. Whether the court will allow Karen to testify turns on whether it determines that she was a necessary party. Dr. Adams probably intended that her conversation with the lawyer would be private and confidential (and in any event, her lawyer should have warned her that the presence of Karen could destroy the privilege of confidentiality). Weighing the interest in protecting the relationship and communication with the interest of making the information available to the court,

the court will probably determine that Karen's presence destroyed the attorney-client privilege and she will have to testify.

Dr. Adams

I. Objection. This request is too wide. Under Georgia law, evidence of prior malpractice claims are typically inadmissible unless it can be proven that Adams had some notice of this type of condition. As a result, this request should be more specific to the type of operation involved here: liposuction and blood clots.
II. Until passage of the Georgia Tort Reform Act the statements of regret would have constituted an admission which is an exception to hearsay in Georgia. Under the GTRA, however, these statements to the Plaintiff's family are not admissible.
III. No, Dr. Adams does not have to disclose the extent of her insurance. This would improperly prejudice the court as to her ability to pay.
IV. Dr. Adam will have to produce the contents of her file regarding Mr. Boyd's surgery. Facts are not privileged, only confidential communications and relationships. Here, her litigation may be protected (i.e., not discoverable). Giving the file to her attorney did not make the file covered by attorney-client privilege.
V. Georgia law incorporates the collateral source rule. Under the collateral source rule, evidence of a plaintiff's payment from third-party sources including insurance or disability payments are inadmissible. The rationale for this rule is that the defendant's obligation to pay, as determined by the jury, should not be reduced because the plaintiff receives payment from a third-party. Note that proof of insurance is generally not admissible to prove ability to pay, liability or reduce obligation to pay. Insurance can be admitted to show proof of ownership or control. In this case, if opposing counsel objected to my introduction of the insurance payments as evidence as an attempt of offset liability for the insurance company, the court would sustain the objection.

Question 3 - **Sample Answer 1.** ***(disclaimer)***

Bob can bring a negligence action against Abe. In order to establish a claim of negligence, the plaintiff must show (1) that the defendant owed him a duty of care, (2) that the defendant breached that duty, (3) the defendant's breach caused injury to the plaintiff, and (4) that the plaintiff in fact suffered damages. Here, Bob can argue that Abe was negligent per se. A defendant is negligent per se when he violates a clearly defined law that is designated to protect against the type of harm that occurred and injures a plaintiff who is within the class of persons to be protected by the statute. Here, Abe was speeding and driving under the influence. These laws are designed to prevent traffic accidents and to protect other drivers on the road. Thus, Abe was negligent per se. Abe, however, can assert that Bob was contributorily negligent since he too was speeding. Because Georgia follows a modified comparative fault regime, Bob will still be able to recover unless he was more than 50% at fault. If Bob can recover, he can claim general damages for pain and suffering caused by his broken leg. He can also seek special damages for medical bills and any lost wages if he pleads special damages and presents evidence of them. He might also be able to claim punitive damages. Punitive damages are available if the defendant's conduct is so malicious and wanton as to raise a presumption of reckless disregard for the consequences of his

actions. This can be shown based on the fact that Abe was speeding and driving under the influence during a severe thunderstorm. Additionally, because Abe was under the influence, there are no recovery caps.

Big Chick ("Big") v. Abe

Big can sue Abe on a negligence theory for damage to its truck. The same elements as above will apply. Additionally, as above, Abe will be able to assert the defense of contributory negligence. Damages will be limited to actual damages to the truck.

Tasty Chick Foods ("Tasty") v. Bob, Big, and Abe

Tasty can sue Bob under a negligence theory for the damage to its chickens. Bob was violating a statute (speeding), but Tasty may not be able to avail itself of negligence per se. Vehicular accidents are within the class of harm to be avoided, but Tasty may not be considered within the class of plaintiffs protected by the statute. Even without negligence per se, Tasty can probably prove negligence and thus recover damages in the value of the lost chickens.

Additionally, Tasty can bring a suit against Big under the doctrine of respondeat superior. An employer is liable for the negligence of its employees when the employee is acting within the scope of his duties during the commission of the tort. Here, Bob was making a delivery for Big, so Big will be liable to the same extent as Bob. Additionally, Big may also be liable for breach of contract, but more facts are needed.

Tasty can also recover against Abe. Again, it is not clear whether negligence per se is available, but it should still be able to prove negligence.

Chuck v. Abe, Bob, and Big

Chuck can sue Abe, Bob, and Big (vicariously liable) on a negligence theory to recover for the damages to his van and his personal injuries. Chuck will be able to assert that Abe and Bob were both negligent per se and that Big is vicariously liable for Bob's tort. He will be able to recover special damages for the actual damage to the van (the amount needed for repairs or, if totaled, the replacement price valued at the time of the accident), for medical bills, and lost future wages (if applicable, reduced to present value). He can also receive general damages for his pain and suffering based on the enlightened conscience of an impartial jury and punitive damages. Again, as against Abe, there will be no cap on punitive damages. Chuck might be able to recover punitive damages for Bob if his speeding in the thunderstorm was sufficiently malicious, but they will be capped at $25,000.

Dee v. Abe, Bob, Big, and George

A survivor action can be brought on her behalf by the representative of her estate for pain and suffering caused before her death and medical expenses. She can claim that all defendants were negligent. Her claims against George, however, will only be those injuries sustained after his involvement.

Chuck, as Dee's surviving spouse can bring a wrongful death action on her behalf. He can recover the full measure of Dee's life, loss of consortium, and funeral expenses. No punitive damages are permitted.

Helen v. Abe, Bob, Big, and George

Suit can be brought on Helen's behalf [by a gaur for pain and suffering and past and future medical bills (including additional therapy)]. She may not be successful against Abe, Bob, and Big due to the fact that George is an intervening cause, but he would likely be considered foreseeable and thus they will not be relieved of liability.

Eva v. Abe, Bob and Big

She can bring a negligence action for her personal injuries. She can claim special damages for medical bills and lost wages, general damages for pain and suffering, and punitive damages (with no cap against Abe). She can also bring an action for negligent infliction of emotional distress because she witnessed the death of her son and was physically impacted by the same cause. The measure of damages will be the enlightened conscious of an impartial jury.

Frank v. Abe, Bob and Big

A survivor action can be brought by Frank's personal representative. Eva, as his surviving mother (even though he is illegitimate) can bring a wrongful death action. No punitive damages will be permitted.

Question 3 - Sample Answer 2.
(disclaimer)

First, no plaintiff could maintain an action of negligence if he was as or more negligent than the defendants. In joint tortfeasors situations, the aggregate fault is measured, so the defendant's negligence must be 49% or less compared to all tortfeasors.

Abe could possibly bring a suit against the DOT based on faulty road design, if this was the cause of the hydroplaning, but without more facts we cannot know this. He would also have to mail notice to the DOT pursuant to statute.

Bob can bring a personal injury action in negligence against Abe, for his broken leg. The elements of the negligence action would be duty, breach, causation, and harm. Abe owed a duty to drive in a reasonable manner, he breached that duty by driving too fast for conditions and drunk, his actions were the but for cause, and Bob was a foreseeable plaintiff and this was a foreseeable injury. The harm is Bob's broken leg. The measure of damages would be Bob's medical bills, any lost wages, and pain and suffering. In addition, punitive damages are possible since Abe was negligent while intoxicated. Note that Bob's damages may be offset by his own negligence, as he was traveling at an excessive speed, just like Abe.

Big Chick can bring an action for damages to its truck and its chickens against both Bob and Abe as joint tortfeasors. The same elements of negligence apply, except, Bob owed a duty to drive with reasonable care, which he breached by driving too fast. The speeding was both the "but for cause" and foreseeable result of the negligence, and the harm was the damage to the truck and the chickens. In negligence cases, the measure of damage is the amount of money it would take

to repair the property, or the replacement cost, the amount the property was worth before the accident and the fair market value. Big Chick can only collect from Bob and Abe their specific percentage of fault under tort reform, joint and several liability is probably not applicable. Further, Big Chick can recover punitive damages from Abe because he was intoxicated.

Tasty Chick may be able to recover for breach of contract from Big Chick, if the delivery was FOB[TC's POB]

Chuck Can recover for both his van and his injuries. Note in Georgia by statute one can maintain separate actions for property and tort claims in an automobile accident, so there is no need for one suit. The measure for damages to the van is the same as for the truck above. Damages for Chuck's back injury include medical bills, pain and suffering, lost wages, and possibly punitives against Abe. The suit should be brought against Abe and Bob as joint tortfeasors, with no joint and several liability. The suit should also name Big Chick, as Bob's employer answerable under respondeat superior- and jointly and severally liable. Big Chick can also file for indemnity from Bob, since it was only passively negligent and Bob was actively negligent. Note that Chuck's recovery will be lessened by his negligence in parking on the side of 75, if it was negligent-unless complying no-parking-on-right-of-way statue would be more dangerous than not.

Chuck can also maintain a personal injury survival action for Dee, as the executor of her estate (assuming he is) and a wrongful death action in his own right as her spouse. Dee could have maintained personal injury actions against Abe, Bob, and Big Chick under the same requirements as listed for Chuck above, with the same measure of damages. In addition, Dee could name Chuck as defendant, citing his negligence in parking on the side of the interstate. Georgia has not completely abrogated husband- wife tort immunity, but it has been judicially eroded. It will not be applied where the policy reasons are not present-preserving the harmony of the family, tortfeasors inheriting from victim, fraud, and collusion. None of them appear to be present, especially since insurance will likely cover the loss. Chuck can recover medical expenses, lost wages, and pain and suffering by Dee up to Dee's death. The damages will be distributed to her heirs at law, or under the residuary clause of her will.

Chuck as surviving spouse, can also maintain a wrongful death action. He can recover the full value of Dee's life, including lost wages (reduced to present value) for life, his claims of loss of services, loss of support, loss of consortium, and hedonic damages, the measure of which are the enlightened conscious of an impartial jury. No punitive damages are available, since wrongful death is considered punishment in itself.

Chuck should name as defendants in the survivor and wrongful death action George, who was negligent per se, (violation of statute meant to protect this plaintiff against harm) Abe, Bob, and Big Chick. Accidents occurring while transporting a victim to the hospital are also likely foreseeable. Note that injury may apportion fault to Chuck as well.

Chuck can also bring an action on behalf of Helen as next of friend, since she is too young to maintain on her own. Although there is no action for wrongful birth recognized in Georgia, Helen could recover for injuries sustained in the accident in the same manner as above. Lost future wages may be appropriate. Further, any recovery under $15,000 can be held by Chuck, but anything over must be held separately for Helen's benefit.

Eva can maintain a personal injury action against Abe, Bob, Big Chick, and Chuck as joint tortfeasors. Her measure of injury and negligence analysis are the same as above, except for one difference. Eve, as the mother of a child killed by negligence in which she was also injured, can

recover in Georgia for negligent infliction of emotional distress. She can also maintain a survivor action and a wrongful death action with the same measure of damages as above. The fact that the child was illegitimate is irrelevant, in Georgia a mother can always inherit from an illegitimate child.

Question 3 - Sample Answer 3.
(disclaimer)

Bob has a claim against Abe based on negligence in driving the vehicle after drinking at an excessive rate of speed. Bob may recover damages based on his medical expenses for the leg, his pain and suffering, his lost wages, and possibly punitive damages based on Abe's wanton and willful conduct in driving after drinking.

Big Chick, Inc. has a claim against Abe and against Bob (jointly and severally based on the common harm) for negligence; Abe for driving after drinking and at an excessive rate of speed; Bob for driving at an excessive rate of speed. Big Chick may recover damages from both based on the damage to the tractor trailer rig and any lost or damaged chickens from the scattering all over the interstate, and possibly punitive damages against Abe based on Abe's wanton and willful conduct in driving after drinking.

Big Chick, Inc. has a claim against Bob for indemnity. Based on Bob's negligence in driving at an excessive rate of speed, while Bob was in the scope of his employment by Big Chick, Big Chick will be exposed to vicarious tort liability to others (see below). Big Chick may recover damages from Bob to the amount of its vicarious tort liability to others.

Tasty Chick Foods, Inc, will likely have a claim against Big Chick for breach of contract, as it seems likely that the chickens being sold to Tasty Chick Foods will not make it to Tasty Chick Foods on time. Tasty Chick Foods will be able to recover the difference from the contract price and the price Tasty Chick Foods ends up paying someone else to cover the chicken contract.

Chuck has a claim against Abe and against Bob for negligence, and against Big Chick, Inc. for vicarious liability based on Bob's negligence while in the scope of his employment by Big Chick (all are jointly and severally liable here); Abe for driving after drinking and at an excessive rate of speed; Bob and Big Chick for Bob's driving at an excessive rate of speed. Chuck may recover damages for his van, for his medical expenses for his back, lost wages, for the wrongful death of Dee, Chuck's own loss of consortium caused by Dee's injury and wrongful death, and possibly punitive damages against Abe based on Abe's wanton and willful conduct in driving after drinking.

Chuck has a claim against George (jointly and severally liable along with Abe, Bob, and Big Chick, for these damages) for negligence in running a stop sign. Chuck may recover damages for the wrongful death of his wife and for Chuck's own loss of consortium caused by Dee's injury and wrongful death.

Dee's estate has a claim against Abe and against Bob for negligence, and against Big Chick, Inc. for vicarious liability based on Bob's negligence while in the scope of his employment with Big Chick (all are jointly and severally liable here); Abe for driving after drinking and at an excessive

rate of speed; Bob and Big Chick for Bob's driving at an excessive rate of speed. Dee's estate may recover damages based on pain and suffering alone, and possibly punitive damages against Abe based on Abe's wanton and willful conduct in driving after drinking. Dee's estate can only recover for damages prior to Dee's death, as after that the damages are part of Chuck's recovery for wrongful death (while Dee's action would survive her death, there can be only one recovery for the post-death damages, which is usually done through the wrongful death action).

Eva has a claim against Abe and against Bob for negligence, and against Big Chick, Inc. for vicarious liability based on Bob's negligence while in the scope of his employment by Big Chick (all are jointly and severally liable here); Abe for driving and drinking and at an excessive rate of speed; Bob and Big Chick for Bob's driving at an excessive rate of speed. Eva may recover for her medical expenses, pain and suffering, lost wages, emotional damage caused by witnessing the death of her son by an accident that hurt her, for the wrongful death of Frank, and possibly punitive damages against Abe based on Abe's wanton and willful conduct in driving after drinking.

Frank's estate has no claim; Frank was killed instantly and Frank's post-death damages are part of Eva's recovery for wrongful death (while Frank's estate could bring the claim, there can be only one recovery for the post-death damages, which is usually done through the wrongful death action).

George does not appear to have any claims, as there is no evidence that the ambulance was negligent.

Helen has a claim against Abe, against Bob, and against George for negligence, and against Big Chick, Inc. for vicarious liability based on Bob's negligence while in the scope of his employment by Big Chick (all are jointly and severally liable here); Abe for driving after drinking and at an excessive rate of speed; Bob and Big Chick for Bob's driving at an excessive rate of speed. Helen may recover for her medical expenses, her pain and suffering, for her permanent disability, and possibly punitive damages based on Abe's wanton and willful conduct in driving after drinking. Georgia does not recognize a loss of parental consortium claim, so Helen may not recover damages for the death of Dee.

Question 4 - Sample Answer 1.

(disclaimer)

1. Smith has a valid statute of limitations defense. In Georgia, when a plaintiff files a law suit, they have 5 days in which to perfect service. Service can be served by a sheriff or by any person over 18 not a party to the litigation that is a process server under the Civil Procedure Act. Bell filed his cause of action before the statute of limitations had run, so he was given five days in which to have process served on the defendants despite the fact that such service would occur after the actual expiration of the statute of limitations. He did not meet this deadline and service was not accomplished until October 1, 2005, well after the running of the limitation date. It doesn't matter that the delay in the services was due to a back log at the sheriff's office; Bell could have chosen one of the other available means of service, including seeking waiver. Because he chose the method of services and controlled the timing of the litigation, he bore the consequences of not perfecting service before the expiration of that statute of limitations.

2. Jones does not have a valid statute of limitations defense. Bell filed before the expiration of the statue of limitations and process was served on Jones as required by statute before the end of the limitation period. The fact that a co-defendant wasn't served in time does not give Jones a defense as he and Smith were joint tortfeasors. Georgia subscribes to joint and several liability for tortfeasers despite tort reform, meaning that Smith's presence in the litigation isn't necessary to protect Jones. Even if Georgia didn't have joint and several liability, there would be no need for Smith to be present because Jones could be accorded only his proportion of the fault.

3. The fact that the stature of limitations defense was not included in the pre-trial order is not determinative. Smith asserted this affirmative defense in his answer as required by Georgia law but then neglected (or chose not) to include it in the pre-trial order. Because the tolling or expiration of the statute of limitations is a matter of law, deciding issues based on the statue of limitations is the responsibility of the judge. Therefore, there would be no need for any witnesses to be called on this issue, and the pre-trial order serves primarily as a list of the evidence that a party is going to present and witnesses that a party is going to call. However, one of the purposes of the pre-trial order generally is to avoid surprises at trial. While Bell may be surprised that Smith is asserting this affirmative defense at trial, such surprise is probably not reasonable because Smith notified Bell that he as going to mount a statute of limitations defense in his answer. Therefore, the fact that the statute of limitations defense was not mentioned in the pre-trial order does not constitute waiver of this defense.

4. In order for a motion to be properly granted, it must be both procedurally and substantively proper. Here, Smith, a defendant, moved for directed verdict as a matter of law after the close of the plaintiffs case. This is one of the times when a defendant is able to make this motion, so Smith's motion came at a procedurally proper time in the case. Whether or not the motion was subsequently proper depends on if the judge had enough facts, either from the verified pleadings or from the testimony at trial, to make the determination of whether or not the statute of limitations had actually run. Smith's answer laid out both the date that the statute of limitations would run on and the date that service was perfected on. If the plaintiff presented no evidence on these points, the court could find that even interpreting the evidence in the way that was most beneficial to the plaintiff, there was a valid statue of limitations claim. Despite Bell's claims of prejudice, it is unlikely that he can claim reasonable surprise because the defense was laid out in Smith's answer. Also, even with valid notice, there would be no way to overcome the running of the statute of limitations under these facts, so there was no prejudice because the lack of notice was harmless.

5. In Georgia, venue is generally proper only in the county where the defendant is from, if the defendant is a resident. There is a special rule, however, for joint tortfeasors; if both are from Georgia, venue is proper in either defendants' home county or where a substantial portion of the events giving rise to the cause of action took place. Bell laid venue under this special rule because Jones is not a resident of DeKalb County. While it is unclear from the facts where the cause of action arose, venue in DeKalb was initially proper because that is where Smith is from. However, once Smith was dismissed, the reasons for applying the special rule no longer exist. Therefore, venue in DeKalb County is no longer proper in a case against Jones. Instead, the case should be transferred to Gwinnett County because that is the residence of Jones, the one and only plaintiff left in the case. This result is not a product of Georgia's vanishing venue rule. Here, the defendant with the home court advantage was judged not responsible while the defendant from another county may go on to be found liable. Liability has not been assigned to Jones yet, however, so vanishing venue should not apply. Instead, transfer of venue is proper here because there is no special rule that applies, so the mandate of the Georgia Constitution that venue be in the

defendant's home county applies. Because this is a constitutional prerogative, the fact that judicial economy might be better served by the case staying in DeKalb, especially since trial was. . .

Question 4 - Sample Answer 2.

(disclaimer)

1. The statute of limitations serves to provide potential defendants with certainty about their legal obligations without the threat of undefined future liability. Expiration of the statute of limitations thus serves as an affirmative defense to a claim that must be asserted with the answer. Even though the filing of the complaint here was the day before the expiration of the statute of limitations, service to defendants must thus be timely to notify defendants of their legal obligations. Although service came well within the 120 day limit for adequate service, service must still be proper with respect to the statute of limitations. Service was not perfected on Mr. Smith here until October 1, 2005, nearly a month after the expiration of the statute of limitations. Furthermore, administrative delay does not excuse improper service in Georgia. Because service of process and thus notice of the complaint was not received by Mr. Smith until 30 days after expiration of the statute of limitations, Mr. Smith has a valid affirmative defense based on the statute of limitations.

2. The service of process to Jones was not as untimely as the month-long delay in Smith's service, but the service was still after the statue of limitations had expired. Thus, Jones had no notice of a possible pending claim based on the expiration of the statue of limitations, and he could have justifiably relied on this expectation. While the delay here was not as egregious, service of the process was not achieved in a reasonably timely fashion before the expiration of the statute of limitations. Thus, Jones could make a claim that the statute of limitations serves as an affirmative defense to Bell's claim.

3. Defendants must assert affirmative defenses with their answer, and these defenses ordinarily must be reasserted and placed in the pre-trial order. The pre-trial order notifies parties of all witnesses, evidence, claims, and defenses that will be asserted in the trial, so if a defense or claim is not presented in the pre-trial order, it is considered to be waived. Here, the statute of limitations defense was not included in the pre-trial order, so this has the effect of waiving the defense. However, under Georgia law, the court may freely amend the pre-trial order as justice requires to permit "waived" defenses such as the statute of limitations issue here.

4. Under Georgia law, a judge may freely modify a pre-trial order to include new or waived defenses, claims, and witnesses as justice requires as long as it does not result in undue prejudice or delay to the other party. Here, the statute of limitations defense is related to the same transaction and occurrence as Bell's claim. Despite the clear interests of justice favoring revival of defense, revival would present prejudice to the opposing party, Bell, because the statute of limitations would serve as an absolute bar to his claim. Such prejudice would not constitute undue prejudice that would bar a judge from amending the pre-trial order, however – this is harm to his legal claim and issues, not a matter of "prejudice" based on the timing delay. Thus, the judge had the authority to modify the pre-trial order and revive the statute of limitations defense based on the justice interests for the defendants.

A defendants motion for directed verdict can be made at the close of the plaintiff's case or the close of the trial. Smith thus properly raised the motion at the close of Bell's case. A motion for directed verdict should be granted if, after taking the opposing party's evidence in the best light, no reasonable jury could find for the opposing party. Due to the statute of limitations defense in the modified pre-trial order, Bell's claim is absolutely barred, and no reasonable jury could find for the plaintiff. With the statute of limitations defense, the motion for directed verdict was thus proper.

5. Under general Georgia practice, venue is normally placed where all defendants reside – if defendants are domiciled in multiple counties and separate causes of action are asserted, the plaintiff must file separate cases in each home county. When multiple defendants are joined in a joint liability claim, however, venue can be placed in any county where any of the plaintiff's reside. Since Smith and Jones were joined as joint tortfeasors here, the original venue fell under the multiple defendants with joint liability exception to the general rule on venue. Thus, venue could have originally been set in either DeKalb County, where Smith resides, or Gwinnett County, where Jones resides. If the action against Smith were improperly dismissed and Smith remained a defendant, Jones would thus have no claim to transfer venue.

Since the action against Smith is dismissed, however, the other joint tortfeasor, Jones, has a right to transfer venue to his home county. When venue is based on the residence of the joint-tortfeasor whose case is later dismissed, the other defendants have a right to transfer venue to their home county. After Georgia law briefly altered this common law rule of "vanishing venue" before 2003, the recent Georgia Tort Reform Act restored the "vanishing venue" rule, which may be asserted at any point which the joint tortfeasor is dropped from the case, even post-verdict. Since the action against Smith was dismissed with the directed verdict, the venue exception for joint tortfeasors ceased to exist. Venue could thus be established under the general venue rules upon motion by the remaining tortfeasor, and Jones thus had a right to transfer venue to Gwinnett Superior Court, his county of residence. Transfer of venue is the proper remedy here, not dismissal of the action.

Question 4 - **Sample Answer 3.**
(disclaimer)

1. The statute of limitations is an affirmative defense which must be raised in the answer or it's waived. Here both Smith and Jones raised the statute in their answers, so the defense was timely raised and not waived.

Plaintiff is given five days from time of filing to effectuate service, but that deadline is waived by the court if good cause for delay is shown (e.g. you've been diligent in trying to effectuate service). If a case is filed before the statute of limitations runs, then as long as service is timely it will relate back to the date of filing, so a claim filed before the statue runs and timely service after will not violate the statute of limitations.

Here Smith was served one month after filing. One month is much longer than five days. The reason for the delay in service was "backlog in the sheriff's office." In Georgia, service may be made by 1) a sheriff, marshall, or deputy, 2) civilian nonparty specially authorized by the court, or

3) civilian nonparty specially authorized as a permanent process server. Bell gave process to the correct person (though not the only person) to serve it on Smith; he was not aware that they didn't do it in a timely fashion.

The delay probably didn't unduly prejudice Smith, because a defendant has 30 days from service to answer (or risk default), not from filing. If the court found that the backlog at the sheriff's office was "good cause" then it would waive the statute of limitation defense and allow it to relate back. Even though a month is a considerable delay, it seems unfair to penalize Bell when the delay in service was the fault of the sheriff's office and didn't substantively penalize Smith. On the other hand, Bell could have followed up OR could have paid a permanent process server to serve. On balance, however, it seems that if state law says you can use a sheriff to serve, then a backlog in the sheriff's office should be excusable good cause for delay (and the filing should relate back and the statute of limitations should not bar suit).

2. As to Jones, the statute of limitations defense isn't applicable (though timely raised). The case was filed before the statute ran. As stated above, the plaintiff is given five days from time of filing to make service on defendant and service relates back to filing date. Here, the claim was filed on Sept, 1 (one day before the statute ran) and served on Jones on Sept. 4 (three days later). This is within the window. Assuming service was proper (served by proper party and in proper manner; facts do not indicate otherwise), service relates back to the date of filing (Sept. 1) and is considered timely.

3. The pre-trial order, if entered (GA courts aren't required to have pretrial conferences unless requested), supersedes the pleadings and is considered the final arbiter of what issues and evidence may come in at trial. The pretrial order may be modified, but it is a very high standard – only to avoid manifest injustice or if you introduce evidence that's at variance with it and the other side doesn't object. Here there was an objection, and manifest injustice is unlikely (since defense wasn't in the defendants' submissions- their fault).

4. As directed verdict takes the case away from the jury (decides the case before the jury ever gets a chance to deliberate). The standard for a directed verdict is that "no reasonable people could disagree" on the result. IF the statute of limitations on a claim has run, then the claim is barred, and a directed verdict would be proper. The answer to this, then, depends on the answers to #1 and #2. If the court decided that a backlog in the sheriff's office was excusable delay (so service would relate back to filing), no directed verdict. If the court did NOT decide to modify the pretrial order, no directed verdict. The directed verdict was proper only if there was no relation back and the court agreed to modify the pretrial order- if there still could still be an issue of fact (facts don't tell us enough to know).

5. As a general rule, venue lies for an individual (non-corporate) Georgia resident defendant in his county of residence. Smith is a resident of DeKalb County; Jones is a resident of Gwinnett. However, this case was filed in DeKalb county under the multiple defendants joint liability exception (MDJLE). Under the MDJLE, if all defendants are Georgia residents and they're jointly liable, then venue is proper in any county in which any defendant resides. Here Smith and Jones are both GA residents and they are joint tortfeasors. Therefore, venue was correct when the case was filed in either DeKalb or Gwinnett.

However, along with the MDJLE comes the vanishing venue problem. "Vanishing venue" means that a case was filed in a particular venue because of an exception (like the MDJLE) and then all of the defendants who would make that venue proper disappear from the case. Venue can vanish before trial, during trial (dismissal of charges), or upon verdict. Here, venue was proper when the

case was filed, but then the court found a directed verdict for Smith. Suddenly there's no longer any defendant in the case who would make the venue proper.

From 1999-2005, there was no vanishing venue in Georgia. As of the 2005 GA Tort Reform, there is vanishing venue again. This case went to trial in 2006, so there's vanishing venue and Jones' motion to transfer is proper. If there were multiple defendants remaining in the case and multiple venues were proper, the plaintiff would get to choose between the remaining venues. Here, however, only Jones remains so only Gwinnett County is available.

MPT 1 - Sample Answer 1.
(disclaimer)

MEMORANDUM

To: Elaine Dreyer

From: Applicant

Date: July 25, 2006

Re: Larson Real Estate File

DISCLOSURE OBLIGATIONS

Under Franklin Real Property Law Section 350(b)-(c), sellers of residential real property are required to furnish disclosure statements providing "known material facts relating to the property and its environs" prior to entering into a contract for sale. Materiality of a fact is based on an objective standard, whether the fact "would affect the decision making of the reasonable home buyer." Hernandez, or one that would "relate to the quality of the property which might decrease its value." Wallen. It does not include facts that, while of interest, would only be considered minor by a reasonable purchaser. Hernandez.

A more recent Court of Appeals decision has interpreted the recent statute as simply disclosing known facts, but not creating an affirmative obligation on a seller to inspect their property for latent material conditions. Wallen. Furthermore, disclosure of zoning restrictions, without further explicating their impact on property values, is sufficient to discharge a seller's duties. Id.

ALLEGED DEFECTS

The Meridians' counsel reported a number of alleged defects in the property. Each will be addressed in turn.

Drug Rehabilitation Home: It is unclear whether Larson was required to disclose the rehab group home. It depends on whether it would be considered a material fact to an objective buyer. This is unclear based on the case law. Although the home was between 2-3 blocks from the Larson property, even Ms. Larson herself noted that she would have concerns. Other neighbors expressed

differing responses, according to the article in the Banford Courier. Some expressed concerns over safety, although the home itself does not accept individuals with any history of violence. It is unclear whether these subjective concerns would rise to the level of material fact – i.e., affect a reasonable buyer's decision to purchase the house, or affect the property value. Prior to the opening of the rehab home, it is frankly impossible to determine the impact. Furthermore, even under the new disclosure laws, buyers maintain "responsibility to exercise due diligence in inspecting property before purchasing it," which includes facts that are commonly known. Wallen. Although the Meridiens were not from Franklin, a cousin lived in the same town, and could have disclosed the controversy to them prior to executing the contract, given the wide publicity that the home has garnered. Larson probably is not liable for failing to disclose the upcoming group home.

Zoning in the Historic District: Ms. Larson fully disclosed the fact that her home was zoned in the historic district in her disclosure statement, which was the extent of her requirement by law. The Court of Appeals spoke directly to this question in Wallen when it held that although this fact is material, "the responsibility for discovering the ramifications of the classification lies with the buyer because the relevant information is freely available and a matter of public record." Under the zoning laws, this classification only means that the Meridiens would have to obtain prior approval from the Neighborhood Preservation Committee and applicable permits to add a family room; it does not prevent them from doing so. Larson will not be liable at all on this complaint.

Water Stains Evidencing Roof Damage: Larson was obliged to disclose the roof damage, and her failure to do so is the most problematic omission from her disclosure statement. She was aware of the problem, and knew that it would cost significantly to repair. It likely amounts to the level of damage that would affect a prospective buyer's decision to purchase, or at least the price that a buyer would be willing to pay. Painting the ceiling so that the stains are less noticeable may even fall into the category of intentional misrepresentation or fraudulent concealment of a defect. Fowles. To prove a case of fraudulent misrepresentation, the purchasers must demonstrate misrepresentation, justifiable reliance, and injury. Reliance on the disclosure statement that there are no defects in the roof may be enough to make out a case for misrepresentation, which would allow much broader remedies for the Meridiens (see infra).

Fire Damage: Because Larson had no knowledge of the fire damage, she was under no obligation to disclose it under the new disclosure laws, which require only disclosure of "known material facts." S 350(b); see also Wallen. Sellers are under no obligation to inspect property for latent material conditions or defects. The Meridiens cannot recover for this.

Worn Vinyl Floor: It is questionable whether the state of the kitchen floor rises to the level of a material fact that would have to be disclosed. This appears to be the type of issue that a reasonable buyer would find interesting, but would likely rather not affect her decision to purchase. Hernandez. Common wear and tear is not considered a "defect/malfunction," which is what the disclosure statement requires sellers to disclose. Section "350 does not render a seller liable for nondisclosure of facts that a buyer could have discovered with reasonable effort. A buyer has a responsibility to exercise due diligence in inspecting property before purchasing it." The state of the flooring could easily have been discovered through a cursory inspection by the buyer's cousin. Larson faces no liability here.

RELIEF

If a seller simply fails to disclose a material fact, she will be liable for actual damages suffered as a result of that fact, along with fees and costs. Here, Larson would be liable to pay for the roof repairs, fees and costs, but the Meridiens would not be able to rescind the contract.

If, however, a seller has intentionally misrepresented or fraudulently concealed a material defect, she will be liable under all common law contract claims, up to and including rescission and even punitive damages, since the concealment has severe financial implications. The fact that Larson did not understand the import of "material" will help her case, but may not be conclusive, since she knowingly painted over the water damage. It is likely that Larson may face these penalties.

MPT 1 - Sample Answer 2.

(disclaimer)

MEMORANDUM

To: Elaine Dreyer

From: Applicant

Date: July 25, 2006

Re: Larson Real Estate File

What disclosure obligation does a seller of residential real estate have under Franklin statutory and common law?

Prior to March 31, 2005, Franklin adhered to a caveat emptor or buyer beware doctrine in residential real estate sales. (Hernandez v. Comfrey, hereinafter "Hernandez") Under common law, seller had no affirmative obligation to volunteer information about defective conditions in the property being offered for sale. Id. A seller could not, however, intentionally misrepresent or fraudulently conceal material facts regarding a property's condition or its environs.

Presently, sellers of residential real estate are required to affirmatively disclose, through a disclosure statement, known material facts relating to the property and its environs prior to entering into a contract of sale. 350. The new legislation did not alter a seller's common law duty to not intentionally misrepresent or fraudulently conceal material facts. 350(e). Sellers do not have to go so far as inspecting their properties for latent material conditions or defects to disclose. (Wallen v. Daniels, hereinafter "Wallen")

As to each of the problems and defects cited by the Meridiens' attorney, what, if anything, was Larson required to disclose under Franklin law, and did she comply?

1. A drug rehabilitation group home scheduled to open in two months, located less than three blocks from the property.

In Harris v. Roth, cited in Wallen, the seller was required to disclose an abandoned toxic waste dump that was contaminating groundwater a half mile from the property. This case is distinguishable because the Terrapin Heights group home does not in and of itself pose a danger to the property or its occupants. There has been no history of problems associated with this group

home and Health Homes, the owner, has a good track record (See article in The Banford Courier). While it may have been preferable to the buyers to know, it is doubtful that this group home was required to be disclosed.

2. The neighborhood recently has been designated as a historic district, severely restricting the Meridiens' plans to add a family room on the back of the house.

In Wallen, the Franklin Court of Appeal stated that disclosing the property as "Residential (fault area)" was sufficient to put the buyers on notice that building codes could impact home improvement plans in the fault area. Similarly, in Larson's "Residential Real Property Disclosure Statement" the zoning class is "Residential-Historic." This is likewise sufficient to put the buyers on notice that building codes could impact home improvement plans. Larson complied with the requirement.

3. Water stains on the ceiling in one bedroom upstairs, evidencing damage to the roof. Extent of damage unknown, but estimated cost of replacement is over $30,000.

Larson indicated that she knew of the leaking roof and had a roofer inspect it. The estimate was too high for Larson, so she painted the ceiling in the bedroom to make it less noticeable. Sellers are under a duty not to fraudulently conceal material facts. Materiality is judged on an objective standard, looking to whether the fact would affect the decision making in a reasonable buyer. Hernandez. A leaking roof would affect a reasonable buyer, at least to the extent of the size of his offer. It is highly doubtful that this would be a minor defect. Larson did not disclose this problem to the buyer and probably fraudulently concealed it.

Larson may argue that there was no fraudulent concealment because the buyers did not justifiably rely on the concealment. The buyers are responsible for inspecting, whether personally or through an agent, the premises. Since there was no inspection, there could be no justifiable reliance. However, the buyers will argue that this should have been on the disclosure statement and without it, it is intentional misrepresentation.

4. Fire damage to the upstairs affecting the structural integrity of the house. Preliminary damage estimate is $12,000.

As previously stated, sellers are under no duty to inspect their property for latent defects. Wallen. The fire damage was not obvious since the previous owner had covered the damage behind plaster walls. Larson would not be under a duty to inspect for the damage, and she had no reason to previously know of the problem. This, she was not required to disclose the defect.

5. Severely worn vinyl floor in the kitchen. Replacement cost of $3,000.

The worn vinyl is probably a de minimis defect (1% of purchase price), even though it would be of interest to the buyer. Many buyers replace floors upon buying a home, despite what condition they are in.

What type of relief, if any, can the Meridiens obtain against Ms. Larson under Franklin law?

Failure to provide necessary disclosures prior to the contract of sale does not void the contract nor does it create any defect to title; sellers are liable for any actual damages suffered as a result of the nondisclosure. 350(d) Actual damages are the cost to repair the property so that it conforms to its condition as represented by the seller at the time of sale with respect to those

defects of which the seller had actual knowledge; if repair is not possible, damages are measured by the difference between the property as represented and an independent appraisal. Wallen. Although unlikely, if the Court determines that the zoning, the group home, the fire damage, or the worn vinyl floor were required disclosures, the Court could impose actual damages. However, the group home may present a problem for the buyers because damages would be speculative. The other items would present a definitive dollar number for the courts to impose actual damages.

Buyers may pursue both law and equity remedies in the event of a seller's intentional misrepresentation and/or fraudulent concealment. 350. Because Larson fraudulently concealed the roof damage, she is liable for the cost of repair. The buyers may be able to pursue punitive damages if they are able to prove that Larson fraudulently concealed the damage.

MPT 1 - Sample Answer 3.

(disclaimer)

MEMORANDUM

TO: Elaine Dreyer

FROM: Applicant

DATE: July 25, 2006

RE: Larson Real Estate File—Disclosure Obligations & Analysis of Claims/Relief

Disclosure obligations of seller of residential real estate under Franklin statutory and common law:

Statutory Obligations: Frank. R.P. 350(c). Under this statute, the seller of residential real estate must disclose known material defects affecting the property and environs at the time of the contract for sale. The law applies to all residential sales involving 1 to 4 units and includes sales FSBO, as is the case here. The disclosure must be delivered by the seller to the buyer before entering the contract.

The key element the requirement of disclosure for material defects. Under Franklin law (Hernandez) a defect is material if "purported fact would affect the decision making of the reasonable home buyer," based on an objective standard. Minor/de minimis defects don't amount to material defects. In Wallen (Ct. App. 2006) the court further elaborated on materiality, saying that a material fact is "one relating to the quality of the property which might decrease its value."

Therefore, under 350(c) a seller of residential real estate, including Larson, must disclose all facts known at the time of disclosure that would affect a reasonable buyer's decision about whether to purchase the property, including all facts that would materially affect the value of the property. Failure to make the disclosure results in liability for actual damages and attorney fees/court costs.

Finally, as recently interpreted in Wallen, 350(c) has not abrogated buyer's obligation to make a

reasonable inspection using the due diligence and the seller is under no obligation to discover latent defects, even if they are material.

Common Law Obligations:

350(c) does not affect common law liability for intentional misrepresentation or fraudulent concealment. To establish intentional misrepresentation under Franklin common law plaintiff must establish: 1) a misrepresentation of material fact; 2) justifiable reliance; & 3) injury. The elements for fraudulent concealment are the same, except for the first element, which requires plaintiff to establish intentional concealment of a material fact.

The same standard for materiality discussed above, applies here. Also, the seller must have actual knowledge of the fact. Additionally, only representations of fact are significant, while statements of opinion or mere sales puffery (e.g., “this is a great house”) are not actionable.

Damages for these common law claims include actual costs of repair and if the failure to disclose involves substantial financial problems or significant problems with the property there can be punitive damages as well.

Analysis of Defects

Defects re the Neighborhood

The Group Home

Larson failed to disclose the fact that a rehab group home was planned to go into the neighborhood. It is possible that this would be considered material as a reasonable buyer might decide not to purchase because the proximity to drug addicts and potential for crime. Also, it is possible that the reasonable buyer might include one who has children, and that buyer might reasonably be concerned about this issue.

This isn’t a clear win for plaintiffs, however, because disclosure is only required for facts about conditions that are actually known at the time contracting. Here, the group home wasn’t yet in place and wouldn’t be operating until September. So, while Larson probably had actual knowledge of the home, given all of the controversy, she didn’t know at the time that the home would actually create any of the problems claimed, and there is evidence that the home will have limited impact on the neighborhood. Finally, because of the publicity, it is likely that court would conclude that a buyer exercising due diligence and making reasonable inspection would’ve discovered this problem.

Historic Zoning Restrictions

Larson satisfied here disclosure requirements by noting that the home was zoned “Residential-Historic” on the disclosure form. Under Wallen, the seller’s disclosure of a similar zoning restriction (fault zone) on the same disclosure form used here and in the same sparse manner as Larson did here, was sufficient to satisfy the disclosure requirements of the law. It is up to the buyers to research the ramifications of the zoning law.

Defects re the House

Water Stains/Roof Leak

Larson failed to disclose roof leak and concealed the stains with paint, thereby breaching disclosure duties under 350(c) and making herself liable under fraudulent concealment theory.

It is clear that the roof leak would be considered material to an objectively reasonable buyer, because the initial estimate for repairs is as high as $30,000. Also, Larson actually knew about this problem, having had it inspected, and was aware that the costs of repair could be high (she had a high estimate). This failure to disclose a known material fact is a violation of her 350 © disclosure duties.

By painting over the stain she concealed a material fact of which she was aware and there is clearly injury, but it is unclear that the buyers relied on that "representation" because they never made an inspection of the house pre-contract. Under Hernandez, the buyer must act with due diligence. Even so the plaintiff's could have a good case here because, even if they had made an inspection they may not have noticed the problem because of concealment.

Fire Damage

Larson had no duty to disclose because she had no actual knowledge of the problem prior to the contract.

Floor

This appears to immaterial. If the damage is de minimis or minor, then it is not material and does not have to be disclosed. Also, this would clearly be seen in a diligent inspection.

Potential Relief

Given her failure to disclose the roof leak Larson is liable for the actual costs of repair. She should get an estimate to determine this amount. Based on fraudulent concealment she may also be liable for punitive damages if the problem is deemed to be substantial/significant. Finally, she will be liable for attorney fees and court costs. Damages will likely be deducted from the contract price.

MPT 2 - Sample Answer 1.

(disclaimer)

ARGUMENT

Franklin Rules of Professional Conduct (FRPC) 1.7 does not apply because Essex is no longer a client of Peter Alexander.

Essex cites FRPC 1.7 as grounds to disqualify Brown Scott & Meyer (BSM) from the current case against Essex due to the fact that a BSM Associate, Peter Alexander, once represented Essex on certain matters. FRPC governs conflicts of interest created when an attorney represents one client whose interests are adverse to another client. This rule would be arguably imputed to the entire firm of BSM under FRPC 1.10. The court should deny any argument based on FRPC 1.7, however,

because the attorney-client relationship between Essex and Alexander terminated when Alexander left his old firm of Tansy & Pipe (T&P).

The case of Global Fin. Fund v. Omega Invest. Inc. addresses the issue of when an attorney-client relationship terminates. Although it is said that such a relationship does not terminate easily, there are circumstances where it does. First, an express statement of either the attorney or the client can terminate the relationship. Second, acts inconsistent with the relationship can terminate it. Finally, the relationship may terminate over time.

In the current case, Mr. Alexander was an associate of T&P who did a few small jobs for Essex. However, when he left T&P it was clear that the attorney-client relationship between Mr. Alexander and Essex was over. First, T&P sent notice to Essex that Alexander was leaving the firm. It is clear that Essex got this notice because the President of Essex admitted knowledge of such to Mr. Alexander at a concert afterwards. Moreover, Essex was told that a new attorney would begin servicing its account, and this presumably occurred. Finally, a year and a half has gone by since Alexander has had any contact with Essex. For these reasons, it is clear that both parties considered the relationship terminated and consequently, FRPC 1.7 does not apply.

There is no conflict under FRCP 1.9 because Alexander did not represent Essex in a matter that was substantially similar to the case at hand.

The counterpart to FRCP 1.7 is FRCP 1.9, which deals with conflicts of interest regarding former clients (imputed to BSM by Rule 1.10). The need for disqualification is established by the proof of the elements. See Holden v. Shop-Mart Stores. Similar to the facts in Holden, this Court need only consider the final issue of whether the current matter is substantially related to the former matter. BSM concedes that Alexander had a valid attorney-client relationship with Essex, that the interests of Ms. Parker and Essex are adverse, and that Essex did not consent to BSM's representation.

Essex argues that BSM should be disqualified because Alexander advised Essex on a variety of matters, including employment agency licensure issues, which is the topic of one of the claims in the current case. Moreover, Alexander represented Essex on matters concerning the music industry including the negotiation of two contracts, which they argue are substantially similar to those in the present litigation.

Despite Essex's arguments, the matters that Alexander represented Essex in and the current matter are not substantially similar. Holden suggests four factors that the representation of Essex involved simple transactional work. He had no involvement in anything to do with litigation work and had no opportunity to learn anything that could be used against Essex in this case.

Disqualification is not appropriate in this case.

Even if the Court were to somehow find that FRCP 1.7 or 1.9 apply, disqualification is not automatic. Global Finance addresses the problems that disqualification can often cause. Disqualification can cause the innocent client to suffer delay, inconvenience and expense. Such would be the case here. Ms. Parker has already spent $10,000 on this case and we are currently in the middle of discovery. Moreover, a new attorney would have a hard time catching up with where we are in this case, which would only cause greater delays and expense. Of course, this Court will also lose precious time it has invested thus far in the proceedings. Finally, Ms. Parker, who has been a client of BSM for ten years, would lose her autonomy in selecting her attorney.

It is the belief of this firm that the Eagin Group's motion to disqualify is little more than a

strategic move to get this court off of the facts and should therefore be denied.

MPT 2 - Sample Answer 2.
(disclaimer)

Response to Motion to Disqualify Legal Counsel

I. Attorney Alexander is not disqualified from representing the plaintiff because Defendant Essex is neither a current client nor a former client with adverse interests:

Franklin Rules of Professional Conduct will not prohibit attorney Peter D. Alexander ("Alexander") from representing plaintiff Sylvia Parker ("Parker") and thus the firm of Brown Scott & Mayer ("Brown") shall not be disqualified pursuant to Rule 1.10. An attorney's disqualification imputes to all attorneys that he is associated with regardless of whether ethical walls are in place to avoid conflicts. See Holden. Thus, the court must examine the disqualification for Alexander since there is no dispute that Essex cannot be a client of Brown without Alexander.

II. Defendant is not a current client of Alexander and/or the firm of Brown and thus Rule 1.7(a) is inapplicable:

Defendant is not a current client of Alexander and/or Brown as the representation was terminated in February of 2005 – four months before Alexander began to work for Brown. Franklin Rules of Professional Conduct 1.7 (a) regulates an attorney's ability to undertake representation adverse to a present client. See Global.

Because the attorney-client relationship cannot be terminated easily, the Franklin courts have established three ways to terminate the relationship, all three of which occurred in regard to Essex. First, the relationship was terminated by the express statement of Alexander's old firm, Tansy & Pipe, by letter after Alexander's employment ended. Second, Alexander and Essex both acted inconsistently with the continuation of the relationship when Alexander informed the Gasso, Essex's president, that he could not discuss any legal matters when they randomly saw each other at a concert. Finally, the relationship was terminated by lapse of time as Alexander's very minimal work for Essex was complete in February of 2005. Thus, there should be no dispute that Essex has not been a client of Alexander since February.

III. The subject matter of the current litigation and Alexander's prior representation of Essex is not substantially related:

Although Essex is considered to be a former client of Alexander, and therefore Brown, the Franklin Rules of Professional Conduct Rule 1.9 will not require disqualification because the subject matter of the current litigation and that of Alexander's prior representation are not substantially related.

Under Rule 1.9, the need for disqualification is met once the plaintiff has established four elements – only one of which is disputed here. First, there must have been a valid attorney-client relationship between Alexander and Essex. Second, the interests of Essex and Parker must be materially adverse. Third, Essex must not have consented to the representation of Parker. These

three elements are not disputed- leaving only the element of substantial similarity to be examined.

The subject matter of the current litigation and Alexander's past representation is not substantially related because there are no unique factual and legal issues presented in both cases that are so similar that there is a genuine threat that confidential information may have been revealed to Alexander in his previous dealing with Essex that can be used against Essex in the current litigation. To determine if the cases are substantially similar, the court must consider the four factors established by the court in Holden.

First, the two cases do not raise similar factual or legal issues. Alexander's only substantial representation of Essex involved negotiating a concert contract and a recording contract. He never drafted any management contracts. The two contracts which Alexander spent only 10 to 15 hours on each did not involve any claim similar to Parker's claims for stacking management fees and misrepresentation. The only possible argument for their similarity is that they involve contracts for performance in the music industry. However, the mere fact that pleadings are similar does not make the two cases substantially related. See Holden.

Second, the nature of the evidence and the identity of the witnesses are not similar. Parker was not a party to either of the contracts that Alexander drafted for Essex. Neither Alexander nor Brown were not involved in Parker's negotiations with Essex or in negotiating agreements for her performance.

Third, the nature of the attorney-client relationship did not give Alexander access to confidential information. Alexander was only hired to do limited small matters for Essex when Essex had a conflict with another firm. It was small-project oriented hourly employment, usually only requiring a letter or a telephone call to resolve the matter. In fact, Alexander only visited Essex's office once and even that was for a personal matter. Moreover, the fact that Essex does not have an employment agency license is a matter of public record and obviously is not a confidential matter.

Finally, Alexander did not gain knowledge of unique, unexpected, unusual or novel litigation strategies when he represented Essex. Not only did Alexander have limited contact with Essex, but the contracts that he did draft were rudimentary and typical contracts. Such general commonplace and routine matters do not rise to the level of substantial relatedness. See Holden.

IV. Even if the court should find that Essex is a client, disqualification is not the appropriate remedy:

If the court should find that Essex is, in fact, a former client of Alexander the court should still decline to enforce disqualification for its harsh results. Disqualification is not automatic and the court must look at several other factors before granting disqualification, including interests of judicial economy, lawyer mobility, client autonomy in selecting a lawyer, while acknowledging the frequent strategic use of and hardship resulting from disqualification motions. See Global.

Disqualification would impose a tremendous hardship on Parker as she will suffer delay, inconvenience, and expense, and will be deprived of her choice of counsel. She has already invested $10,000 in pursuing this case with Brown and the parties are in the middle of discovery. Thus, it would be very expensive and time consuming to find Parker new counsel who is available to give the case the attention that it deserves.

MPT 2 - Sample Answer 3.
(disclaimer)

MEMORANDUM

To: Gail Brown

From: Applicant

Date: July 25, 2006

Re: Parker v. Essex Productions motion in response to motion to disqualify

Facts: Brown Scott & Mayer represents Sylvia Parker in a dispute against Essex Productions, Inc. to recover excessive management and promotional fees that it charged to Ms. Parker after a recent tour she did in which Essex handled the promoting, the venue, collecting fees, and the like. Essex has filed a motion to disqualify Brown Scott & Mayer ("Brown") for certain conflicts it claims based on a few discrete contracts the a Brown associate wrote for Essex. Essex motion is clearly unfounded and Brown has violated no Rules of Conduct.

Legal Argument:

Brown Scott & Mayer should not be disqualified from representing Sylvia Parker in her suit against Essex Productions, Inc., despite the previous employment of one of its associates, Peter Alexander. Although Rule 1.10 would impute Alexander's disqualification to the firm because Franklin Rule 1.9 does not accept as a defense that attorneys at a firm can be screened as a means to avoid conflict, Alexander would not be individually disqualified either.

I. Rule 1.7, which applies to current clients, is not implicated by Brown's litigation against

A. Essex is not a current client of either Brown or Alexander, thus Brown has not violated Rule 1.7. Alexander's relationship with Essex had already terminated prior to the current litigation with Ms. Parker. Modes of termination are express statement of attorney or client, acts inconsistent with the continuing relationship, or lapse over time. Here, although Alexander did not expressly communicate the terminated relationship, his firm clearly did when it mailed Essex a letter stating that Alexander had left and a different associate would be representing them. Additionally, the President of Essex personally stated that he was aware Alexander no longer worked for Tansy & Pipe. Even without express termination, Alexander's leaving Tansy & Pipe and moving to another law firm in addition to his statement to Essex President Gasso that he could not discuss the case are acts inconsistent with a continuing relationship. Lastly, the relationship would have lapsed over time because Alexander's last project for Essex was in February 2005 and this dispute did not arise until July 2006.

B. The fairness factors of Rule 1.7, which is not mandatory, weigh in favor of Brown continuing to represent Ms. Parker. Additionally, Rule 1.7 is not a mandatory rule, but is discretionary and must take into consideration the added costs imposed on the current client, including delay, costs, and inconvenience. Here, Ms. Parker has already invested $10,000 into the case with Brown and would suffer unnecessary delay because this case is already in the middle of discovery. The

purpose of 1.7 is to safeguard loyalty, which is not a problem implicated here where Essex is a large corporation that rarely did business with Tansy & Pipe and because Alexander's interactions with Essex were discrete projects on rudimentary, impersonal matters. Loyalty weighs in favor of Brown remaining with Parker, who was a client of ten years. The court has even found no disqualification when a current relationship had not terminated between law firm and former client.

Brown is not disqualified under Rule 1.9, which applies to former clients, because Essex has not proven a prima facie case of substantial similarity.

A prima facie case for conflict with a former client under Rule 1.9 requires 1) a previous valid attorney client relationship with the former client, 2) the interests of the current and former client are materially adverse, 3) the former client has not consented, and 4) the current and former matters must be the same or substantially related. Here, the first three elements are met because Alexander and Essex had an attorney client relationship, Ms. Parker's interests are materially adverse to Essex now, and Essex has not consented. However, the last element is not met because Ms. Parker's current suit against Essex to recover for excessive fees she was charged are not the same or substantially similar to the contracts that Alexander wrote for Essex in the previous job. The court must disqualify a firm under Rule 1.9 unless the judge finds it appropriate to weigh other fairness factors such as the interests of judicial economy, client autonomy, or other hardship.

Four factors for determining substantial similarity are: 1) if the cases raise similar factual/legal issues; 2) if nature of evidence or witnesses are the same; 3) if the attorney gained confidential, undiscoverable information, and 4) the attorney gained information about unique or novel litigation strategies. Essentially, cases are "substantially similar" when the factual or legal issues are so "unique" that there is a real threat the confidential information could be disclosed to the new client.

Here, the cases do not raise the same legal issues because Alexander drafted routine form language contracts for Essex, whereas the current litigation is a dispute over recovery for excessive fees on a music singer's touring contract. Second, the evidence and witnesses would not be the same because the contracts Alexander wrote were with different parties and had nothing to do with Parkers claims that Essex was not licensed. Alexander didn't even know that Essex and Parker had worked together until this current litigation. Third, because Alexander worked only on a couple of discrete projects for Essex, which were standard form contracts, he rarely had any personal contact with Essex (they communicated by fax and email mostly) and had no opportunity to obtain confidential information from them. He only billed them a total of 25 hours worth of work, which is hardly enough time to obtain secret information. Lastly, the lack of intimate representation could not have led to disclosure to Alexander of Essex's novel litigation strategies. Courts have not disqualified law firms in situations in which a partner of the law firm actually had complete access to a former client's stores, business documents, and litigation strategy, and an associate at that firm was still not disqualified.

Conclusion: Brown is not disqualified under either Rule 1.7 or 1.9