

## July 2015 Bar Examination Sample Answers

### DISCLAIMER

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### QUESTION 1 - Sample Answer # 1

The issue here is whether Joe's agreement qualifies as him paying for a referral or splitting fees with a non-lawyer under the Georgia Rules of Professional Conduct. Joe's referral agreement with the Shelter is not allowed under the Georgia Rules of Professional Conduct (GRPC). Lawyers may not pay for referrals nor may they share earnings from representation with non-lawyers. There are two exceptions to the rule against referrals, (1) referral services are allowed and (2) reciprocal referral agreements are allowed. This referral agreement falls into neither of the two exceptions; therefore, Joe is in violation of the GRPC. The shelter's status as a non-profit organization has no bearing on the ethical nature of Joe's agreement. No matter what he calls it, he is sharing a portion of the proceeds from his legal work with the shelter. Lawyers may share fees with other lawyers if the overall fee to the client is reasonable, the other attorney is reasonably compensated for his services, and the client is aware of the agreement and consents.

Joe's fee arrangement with Mary is in violation of the GRPC. Contingency fees, those which are contingent on the outcome of the representation, are not allowed in domestic relations cases or criminal cases. Divorce is a domestic relationship case. Joe's promise to not bind Mary to pay for the services unless Joe won her the settlement he promised is likely a contingent fee. Joe could argue that it was not because it didn't meet the requirement associated with contingency fees but unless the statute of frauds in contracts, a fees failure to adhere to the requirements of contingency fees set out in the GRPC does not remove it from being a contingency fee. Joe could argue that it was just an incentive to retain clients that he not charge them if he didn't adequately perform but he will likely be found to have violated the rules. Additionally, Joe violated the rules when he spent the money. Attorneys are required to keep two accounts, an operating account where they keep the money they have earned and use for the operation of their business, and a trust account where they keep money of their clients. Joe should have put the money from Mary in the Trust account and only moved it to his operating account as he earned it. Because Joe had not actually done any work on the case yet (this is assumed from the facts), there is no way he could have earned the entirety of the payment already. If Joe did still have the money, he should put the entire \$600 in his trust account and leave it there until the dispute over what is owed to Joe and what should be returned to Mary is resolved. After resolution, Joe's may place undisputed funds owed to him in his operating account and

may reimburse Mary with the appropriate funds. Additionally, attorney's are required to keep detailed accountings of the money in their accounts so as to show when and for what it was earned and used.

Joe's discussion with Larry violated the GRPC. Under the GRPC, an attorney may not speak with a party he knows is represented without the presence of that parties counsel or permission to speak with them from their counsel. This applies to a party that the attorney knows or should know has retained counsel. Here, Joe does not appear to have knowledge as to whether Larry has retained counsel but his communication is still in violation of GRPC. Counsel may not give legal advice of any kind to another party. Additionally, if they speak to them at all, they must make it clear that they are not disinterested in the matter. Here, Joe is attempting to give Larry legal counsel when he suggests that Larry not contest the divorce. The only thing Joe should be saying to Larry, if anything at all, is that he should seek counsel of his own. It is also a violation of the GRPC for Larry to represent both Larry and Mary because it would be an unconsentable conflict of interest.

Joe owes Larry a duty of confidentiality. The duty of confidentiality under the GRPC is far more broad than that of the attorney-client privilege. Under the GRPC's duty of confidentiality, an attorney may not reveal information of a former or current client regardless of the source. Under the attorney client-privilege, only confidential communications between attorney and client are privileged. The duty does not require a formal attorney-client relationship be established. The duty to potential clients begins when the client seeks consultation of the attorney. Here, Joe had begun investigating the case. Just because the formality of relationship had not commenced does not excuse him of his professional duties. Consultations prior to formal retention as counsel are covered if the client is actually seeking representation. The policy behind this is to encourage candor. It is important that a client know if the attorney is right for him but also that the attorney know if he is right for the client. If anything, Joe should have gotten consent from Larry as Larry is the only one who may waive the duty he is owed. Additionally, just because Joe had not formally been retained, the public defenders office may have and would be treated as a firm would be. As such, Joe would likely have had access to the confidential information even if not individually formally retained as counsel.

Joe has a conflict of interest arising from his previous, formal or informal, representation of Larry. A non-consentable conflict of interest arises when an attorney previously worked with a client on a matter that he gained confidential information or could have reasonably gained confidential information that will be useful in his representation of a current client against that former client. In a divorce action, Larry's past crimes will likely play a part in the case put on by Mary. Especially if Mary were to request a jury trial which is allowed in Georgia. The time since Joe's representation of Larry does not change the analysis. This is supported by policy on two sides. On one side, Larry is entitled to confidentiality of information candidly shared with his counsel during a formal representation. Further, Mary is entitled to complete representation of legal counsel which she cannot do if her counsel is unable to fully advocate for her because he must cut off a portion of his knowledge.

## QUESTION 1 - Sample Answer # 2

### 1. Referral arrangement between Joe and the Shelter under the Georgia Rules of Professional Conduct

Under the Georgia Rules of Professional Conduct ("Rules"), an attorney may not pay a referral fee to a person or entity that refers clients to the attorney. However, a reasonable fee may be paid to lawyer referral services that operate under the approval of the Georgia bar. There is no exception to the prohibition on paying referral fees for payments to other non-profits that refer clients. Here, Joe is making a "donation" to the shelter for each client that the shelter refers to him, which would most likely qualify as a referral fee. The shelter does not qualify as an organization that is approved by the Georgia Bar for referring clients to lawyers, and therefore the fee that Joe is paying the shelter would violate the Rules.

### 2. Joe's fee arrangement with Mary and disbursement of the fee under the Rules

The Rules prohibit lawyers from Contingency fee arrangements when the subject matter is domestic (e.g. divorce) and the attorney's fee is contingent on obtaining a certain outcome, such as obtaining a divorce or receiving a certain settlement. However, an attorney may receive a retainer fee up-front and deduct his reasonable attorney's fees from that retainer as he performs the work. In receiving a retainer fee up-front, however, an attorney must keep those funds separate (in a trust account) from other client accounts and the firm's own operating funds. The attorney may not remove funds from the client's trust account if there is a dispute over the amount owed to the attorney.

Here, Joe appears to violate the rule against Contingency fee arrangements in domestic matters by promising to return Mary's fee if she did not obtain a divorce or receive a good settlement. The fact that he received the fee up-front rather than at the end of the case should not change the fact that the fee is contingent on obtaining certain outcomes, thereby making it a Contingency fee arrangement in violation of the rule. Joe also violates the rule against keeping the funds separate from other client and firm accounts, thereby commingling funds in violation of the Rules.

Joe's disbursement of the fees to himself also likely violate the rules since (apparently from the facts) he did not do any work on the case to merit taking his fees out of the retainer. Also, Joe took money out of the account when there was a dispute over the amount owed, which violated the Rules.

### 3. Joe's discussion with Larry under the Rules

Under the Rules, attorneys are prohibited from speaking directly to a represented party without the consent of the party's attorney. Attorneys also may not give legal advice to unrepresented parties, and from implying that their interests are aligned. Lawyers may only advise the unrepresented party to secure counsel. Here, Larry is likely an unrepresented party considering the fact that Mary (and presumably Larry) "could not afford a lawyer to get a divorce." Therefore, Joe likely violated the Rules by giving Larry legal advice and by

implying that his interests were aligned with Larry when in fact Joe was representing Mary, the adversarial party, in their divorce action.

#### 4. Joe's duty of confidentiality to Larry regarding his drug arrest under the Rules

Under the Rules, lawyers owe a duty of confidentiality to their clients (and prospective clients) to not reveal information learned about the matter during the course of the representation (unless the information has become generally known). Lawyers especially owe a duty not to use the information learned about the client to the client's disadvantage in other matters with other clients.

Here, Joe disclosed Larry's arrest, which was information Joe learned about while "investigating" Larry's arrest although before a "formal" attorney-client relationship had been formed. If Larry had disclosed the information about the arrest to Joe in a prospective client meeting, then the duty of confidentiality would apply unless the information had since become generally known. It is unclear whether the information about the arrest was generally known. Clearly Mary did not know about it so it seems unlikely. However, Joe investigated the arrest, which implies that may have been facts available to the public about the matter. The fact that the arrest was dismissed means that the matter was certainly not as public as it would have been if the prosecutor had proceeded to indict.

#### 5. Conflict of interest Joe has relating to Larry as a possible former client and Mary as current client

Under the Rules, the attorney-client relationship begins when the client reasonably believes it has. Lawyers may not take on new clients when the new client's matter is the same or substantially related to the former client's matter. A matter is substantially related when there is a likelihood that the attorney learned confidences in the previous engagement that could be used against the former client in the new matter.

Once again, it is not clear whether an attorney-client relationship was formed with Larry, but at least he was a prospective client who is owed the same duties as owed to former clients in terms of conflicts of interest. Mary's divorce case is substantially related to the former matter that Joe consulted Larry on because there were confidences learned that could be used against Larry in a materially adverse way in the divorce case. Therefore, Joe likely had a disqualifying conflict of interest by taking on Mary's case and should have declined representation.

## QUESTION 1 - Sample Answer # 3

### Referral Arrangement

The Rules of Professional Conduct prohibit lawyers from accepting referrals in exchange for payment. While there is an exception for approved lawyer referral services that is not present in this case. In this instance, Joe has set up an Arrangement whereby in exchange for referrals he will make a \$100 "donation" to the shelter. While the shelter is a non-profit public services organization that does not effect the fact that Joe is paying money in exchange for referrals. As such, Joe has violated the rules of professional conduct because he has entered into a prohibited referral agreement.

### Fee Arrangement

The most important factor in any fee Arrangement is that it be reasonable. Whether an Arrangement is reasonable depends on the knowledge and experience of the attorney, the level of skill required, the amount of time required, whether it will interfere with taking on other work, and what the custom is within the community for providing such services. In this instance it appears that a \$600 fee is reasonable as a one time lump sum fee. One would imagine that the work going into obtaining a divorce would take at least a few hours such that broken down by hour the fee is not particularly large. As a result, the \$600 dollar fee is likely reasonable.

In addition, Joe has entered into a Contingency fee arrangement with Mary. While Contingency fee arrangements are typically acceptable under the rules as long as they are reasonable and the client has been informed of how it will be calculated, whether costs will be included, and other options available if appropriate Contingency fee arrangements are not permitted in divorce or alimony cases. By making his fee contingent on winning Joe has made the fee a Contingency fee. The rules prohibit Contingency fees in these cases because there is the belief that such a stake by the lawyer will increase already divisive situations and discourage settlement. By entering into a Contingency fee with Mary you have violated the professional rules concerning Contingency fee arrangements.

In addition, Joe's placing of the fee in his operating account was a violation of the rules concerning maintaining and protecting client property. The rules require lawyer's to keep there personal funds separate from the funds of clients. In this case, Joe placed the Contingency fee, which was in essence a retainer, in his operating account. This is a commingling because Joe had not yet earned his fee and as such, the funds where still client property. Joe should have place the funds in a separate trust in addition, by spending the funds he misappropriated his client's funds because he had not earned the fee yet. Both acts were violations.

### Discussion with Larry

Joe's discussion with Larry is a possible violation of the professional rules but we need more facts. A lawyer must not talk with a person involved with the subject matter of

litigation if he knows or should know the person is represented by counsel. In this instance we have no facts that indicate Larry is represented by counsel. In addition since he knew Larry previously as a result of his work as a public defender he likely knew that Larry was indigent and likely would not be able to afford an attorney so it appears that Larry had no reason to believe that Larry was represented by counsel.

However, even though a lawyer may speak with an unrepresented individual the lawyer should not make it appear as though he has no interest in the outcome of the litigation and should never offer any advice to the unrepresented individual other than to obtain assistance of counsel. Here, it appears Joe told Mary that he would tell Larry not to contest because he would get a better deal. If such statement was actually made to Larry Joe would have violated the rules because in doing so he would have been advising Larry to settle to improve his position which is legal advice. In addition, because of their previous relationship, it is likely that Larry would see Joe as if not being on his side at least being impartial. Joe was taking advantage of his previous relationship with Larry through the public defenders office. In doing so, Joe appears to have been trying to make it appear that he had no stake in the outcome.

### Confidentiality

Lawyer's owe a duty of confidentiality to their client's. Lawyer's may not disclose any information, especially information that is embarrassing or damaging, gained during the representation of a client. In addition, a lawyer may not use information gained in the representation of a client against a client that is materially adverse to that client. Joe has violated both of these rules. While Joe states that Larry and himself never entered into a formal client-attorney relationship, the duty of confidentiality can attach before the attorney client relationship attaches. The duty also extends to pre-engagement conversations and information that was learned in investigating whether the lawyer can and should take on the case. In this case, while an attorney-client relationship may not have existed, the duty still attached because Joe was investigating the case in a pre-engagement investigation for the purpose of likely representing Larry in the future. Had the case not been dismissed on other grounds, Joe would have likely been the lawyer. As such, discussion the arrest and dismissal with Mary was a violation of the rules. In addition, while it does not appear that the litigation ever got far enough, if Joe did try to use that info that would have been a violation as well unless the matter had become public knowledge. Since his wife did not even know, that seems unlikely.

### Conflict

A lawyer must not take on a client where there is a substantial risk that the lawyer's duty to another client, former client, third party, or his own interests will materially and adversely affected unless: The lawyer reasonably believes a conflict will not occur, the rules do not prohibit it, the parties are not directly adverse, and there is waiver after informed consent in writing. In this case, his duty of confidentiality to Larry and his duty to Mary to represent her to the best of his ability are in conflict because he has information that would help Mary's case but in revealing the information he would violate his duty of confidentiality to

Larry. Since there was never a waiver in writing, Joe violated the rules in taking the case.

## QUESTION 2 - Sample Answer # 1

1. The trial judge may properly exclude the witness from testifying. The court's discovery order required the Plaintiffs to identify, within a certain time frame, any experts to be used at trial and to provide a summary of each expert's findings and opinions. When a court enters a discovery order and a party fails to comply, then the judge has the discretion to exclude that evidence, impose sanctions, and in cases of bad faith, dismiss the case entirely. The Plaintiffs did not serve the Defendants with the discovery documents until weeks after the Deadline set forth in the Discovery Order. Plaintiffs did not provide any information about the expert's findings and opinions until two days before the jury trial began. The other party must have these documents at least 10 days before trial. Otherwise, the other party does not have enough time to prepare their case against the other side and would thus be prejudiced. Therefore, the judge may properly grant the Defendant's motion and prevent the Plaintiff's expert from testifying. The Defendants properly moved to have the expert witness excluded. Unless the Plaintiffs can show an excusable reason for why they were so delayed in releasing the identity of the expert witness, their opinion and the basis and facts supporting that opinion, then the judge can properly exclude that expert witness. The Plaintiff repeatedly had failed to comply with court's discovery orders, so it is likely that the judge will grant the motion to exclude the expert as a witness.

2. A battery is an intentional act to harm or cause offensive contact or knowledge that an action is reasonably certain to result in harm or offensive contact. Offensive means that the act would be offensive to a reasonable person in like circumstances. This is a fact question and up to the finder of fact, which is the jury. Here, the Defendant Wife stated that the Plaintiff Husband was standing in front of her and screaming and some of his spit landed on her face. From the facts, it does not seem that Plaintiff Husband intentionally spit in Defendant's Wife's face, but that they were having a heated conversation and some spit landed on her face while he was talking. A jury could reasonably find that the Plaintiff Husband did not intentionally cause offensive contact. A jury could find that this type of contact is common when people are having a heated argument. A directed verdict is only appropriate where there is no way that a jury could come out a different way. Here, the jury could come to the conclusion that the spitting was not a battery since it did not result in an offensive touch. If the trial court directs a verdict of liability on the battery counterclaim, it will be an error.

3. The Defendant Wife's and neighborhood homeowner's association's President's testimony at the deposition will be admissible at trial. Evidence is admissible at trial if it is relevant. Evidence is relevant if it is more likely to make a fact that is material to the case more or less probable. A party's statements are always admissible. The statements are relevant because if the Defendant's Wife changes her story, she will lose credibility with the jury. In addition, depositions are taken under oath, and thus are admissible. The President's testimony is also admissible in court. Similar to the wife, if he testifies differently while in court, his statements at the deposition can be admitted for impeachment purposes and for substantive purposes.



## QUESTION 2 - Sample Answer # 2

The issue is whether a trial judge may grant a defendant's motion to exclude an expert witness of the plaintiff from testifying where the plaintiff did not disclose the identity of the expert witness until after the deadline imposed by a discovery order and where plaintiffs did not supply defendants with any information about the expert's findings and opinions until two days before trial began. In Georgia, expert witnesses must be identified during discovery and the expert's opinion and findings must be presented to the opposing party during discovery so that the opposing party can have the opportunity to analyze the expert's results and find its own expert to evaluate the expert's findings. Here, plaintiffs did not provide the name of the expert until weeks after the deadline set forth in the discovery order. Further, the experts opinions and findings were not given to the defendants until two days before the jury trial began. As such, barring any circumstances that justify exceeding the discovery order, plaintiff's expert should not be allowed to testify because the defendant has not been given adequate time to analyze the experts findings and data and formulate a response to it. The court will probably therefore grant defendant's motion to exclude the expert's testimony.

The issue is whether a trial could would err by directing a verdict in favor of a party for a battery action where the court directed verdict is based on the testimony only of the party seeking the judgment. A verdict may only be directed to a jury when there are no material issues of fact and based on the facts, the law will allow only one judgment result. Here, Defendant wife has testified that Plaintiff husband was yelling in her face and during the process some spit landed on her face. To prove battery, Defendant wife would have to show the intentional touching of another without consent. Here, even if the spit did indeed land on Defendant wife's face, there is still an issue of whether the act was intentional. Intent in this context does not necessarily mean purposefully, but more than mere negligence is required to show intent. If Plaintiff husband were aware that his yelling would produce projectile spit capable of striking Defendant wife's face, then his act would be intentional. If a reasonable person would have known there was a substantial likelihood that by yelling in someone's face, spit may leave the mouth of the person yelling and strike the face of the other party, then the jury may find intent. Based solely on the testimony of Defendant wife, however, intent is not shown simply by the fact that spit did indeed land on her face. In addition, the president of the neighborhood homeowners' association testified that the husband was only "expressing his point of view" and was pointing his finger at Defendant wife. The president's testimony shows he was able to see the Plaintiff husband and he does not mention any spit. The question of intent is a matter of fact for the jury to decide, and a directed verdict would therefore be improper.

The issue is whether a party or a witness's testimony during a deposition can be used at trial if either changes their testimony at trial. Generally, any statement made outside of court and offered to the court for its truth would be considered hearsay. A prior sworn inconsistent statement, however, is not considered hearsay even if made outside of court and offered in court for its truth. If the president of the homeowner's association changes his testimony while in court, his prior sworn inconsistent statement may be used to impeach his testimony. In addition, his prior sworn inconsistent statement can be used also to assert the truth of his prior sworn statement even if not for impeachment purposes. The Defendant wife's out of court testimony may be used substantively in court by Plaintiffs as

a statement by a opponent party. Used as such, it would not be considered hearsay because statements by party opponents are not hearsay. In addition, the Defendant wife's prior testimony can be used to impeach her by the Plaintiff if her testimony were to change to make in a way that harms the Plaintiff.

## QUESTION 2 - Sample Answer # 3

**1. Defendants' Motion to Exclude Expert.** The court may prevent the expert from testifying. Unlike in Federal Court, in Georgia there is no requirement that the parties make disclosures about the evidence they will use in support of their claim. However, that is subject to modification based on the discretion of the judge. Such a modification occurred here, when the judge entered the Discovery Order, which served to bind the parties with respect to the remainder of discovery. Failure to adhere to the Discovery Order could result in discovery sanctions that are left to the discretion of the judge, including preventing the Plaintiffs' expert from testifying.

In discovery matters, parties are given a reasonable time to comply with the discovery requests of the adverse parties and of the court. The issue here would be whether the Plaintiffs' delay in identification of their expert witness and additional delay in providing the Defendants with a summary of his opinions would be so unreasonable as to warrant preventing their expert from testifying. Courts generally favor letting parties work their discovery issues out with minimal interference, and the Plaintiffs ultimately complied with the Order, and do not appear to have any other experts prepared to testify should this one be excluded. However, the Plaintiffs blatantly violated the Order by missing their deadline to identify their expert, and further failed to present the summary required in the order until just before trial. The violation of the Order would be enough to warrant a discretionary exclusion by the court, particularly given that the Plaintiffs waiting until close to the eve of trial to disclose the information to the Defendants. Because of the danger that the Defendants could not adequately prepare, the Defendants' motion could be granted.

**2. Directed Verdict on Claim of Battery.** The court would err if it directs a verdict of liability on the battery counterclaim and charges the jury that the spitting constituted a battery. A directed verdict may only be granted if, based on the evidence presented to the court, the judge finds that no reasonable jury could find for the nonmoving party. Here, that means that the Defendants' evidence would have to convince the judge that no reasonable jury could find the Plaintiff not guilty of battery. Based on the evidence presented, the Defendants have not met that high standard.

To determine whether the motion should be granted, the court would first have to determine whether the elements of battery have been satisfied. To show a prima facie case of battery, the Defendants would have to show an unconsented or unwanted touch, intent, and causation. Based on the facts, it is possible to establish a prima facie case--the Plaintiff's spit landed on the Defendant's face, which constituted an unwanted contact, it could be argued that intent was satisfied because the Plaintiff should have known to a reasonable certainty that his screaming would result in the unwanted contact, and causation is met because the landing of the spit on the face is the cause in fact of the Defendant's battery claim and she was a foreseeable victim.

However, just because a prima facie case can be made out does not mean that a directed verdict should be granted. While the facts concerning the occurrence of the confrontation do not appear to be in dispute, the difference in testimony between the Defendant and the president of the neighborhood homeowners' association raise questions as to the nature of the confrontation. Specifically, the president's testimony that there were additional

parties present during the confrontation and the fact that it was not just the Plaintiff against the Defendant could raise issues on which a reasonable jury could foreseeably disagree. Although none has yet been presented, evidence could exist that would show the Plaintiff was justified in his behavior or should otherwise be exculpated, or the jury could determine that the requisite intent was not present. Granting a directed verdict without giving the Plaintiff a full and fair opportunity to present evidence to dispute the claim, and without giving the jury an opportunity to deliberate on the evidence before the court, would be an error--instead, this claim should be left to the determination of the jury. Because it is possible for a reasonable jury to disagree about the facts surrounding the confrontation, a directed verdict would be improper.

**3. Defendant and NHA President Changing Testimony.** If the Defendant or the NHA President change their testimony at trial, their deposition testimony will be admissible at trial, either as non-hearsay or as hearsay falling within a specific hearsay exception.

For the testimony of the Defendant, her prior inconsistent statement will be admissible as non-hearsay. A hearsay statement is a statement made out of court that goes to the truth of the matter in dispute. Ordinarily, hearsay statements will be excluded, however there are some statements that are considered non-hearsay and are therefore always admissible. The Defendant's testimony would fall into two non-hearsay categories: prior inconsistent statement made under oath, and the admission of a party opponent. It would be a prior inconsistent statement made under oath because it would differ from her trial testimony and would have been made at a deposition, where she would have been under oath and therefore subject to perjur. If her trial testimony is inconsistent with her prior testimony, it could be admitted as non-hearsay in this category. In the rare case her trial testimony is not inconsistent, but has just changed, her prior statements will still be admissible as the statement of a party opponent. The Rules of Evidence in Georgia recognize that a statement of a party opponent will always be relevant and should always be admissible, even if prejudicial, since it was made by a party to the case.

The testimony of the NHA President would also be admissible, but could only be used to impeach the NHA President as a witness and could not be used as substantive evidence. A witness can be impeached by reference to a prior inconsistent statement made under oath, as long as a proper foundation is laid. Therefore, as long as the NHA President is permitted to explain the inconsistency in his testimony, the prior deposition testimony will be admissible against him in order to impeach his credibility as a witness for the Defendant.

### QUESTION 3 - Sample Answer # 1

1) The firm could use a consent judgment or dismiss using a Rule 21 dismissal to eliminate the case against Sally. The issue is what procedures must be accomplished to remove Sally from the case and eliminate the claims against her. A consent judgment is typically used when a parties settle a case. The consent judgment essentially states that the claims against that particular defendant were settled or dismissed, thus allowing her to be dismissed from the case and the claims against her are dismissed with prejudice. The consent judgment would not be a dismissal for the two-dismissal rule because the court enters a judgment; the plaintiff does not dismiss. Plus, absent collusion on the part of the plaintiff and that defendant, case law in Georgia suggests that a valid consent judgment would preserve venue in that county if venue was based upon that defendant. Thus, venue would not vanish. Alternatively, a firm may dismiss a party from the case by using Rule 21. The court's permission is necessary because the plaintiff is dismissing only one party from the case, not the entire claim against all defendants. If the plaintiff wishes to dismiss only one defendant when several are in the case for the same cause of action, Rule 21 is invoked. However, this dismissal would be without prejudice if it was the first dismissal on that claim.

Here, the best solution is to use a consent judgment to dismiss the claims against Sally. The consent judgment would allow the Smith's to recover from the settlement agreement while dismissing Sally from the actions. The claims against Sally would be dismissed with prejudice, meaning that all claims would be barred that arise out of the same transaction or occurrence. Sally would likely request this before agreeing to settle. Additionally, because venue was based upon Sally under the joint tortfeasor rule of the Georgia Constitution, the consent judgment would preserve venue over the remaining defendants in Chatham County.

Alternatively, the firm could ask the court for permission under Rule 21 to dismiss Sally from the case. Leave of court is needed because Sally, and not the other defendants, are dismissed, invoking the leave of court requirement. However, unless the court stated otherwise in this dismissal, the dismissal would be without prejudice, meaning the claim against Sally could be brought again. Also, because the two-dismissal rule focuses on claims and not parties, the dismissal of Sally under Rule 21 would prevent a later dismissal of the rest of the case because the claim against the subsequent defendant is the same (according to Georgia case law).

2a) The elimination of Sally without a consent order would make venue vanish. The issue is whether venue vanished. Vanishing venue is back in Georgia post-2005 and holds that if a defendant upon whom venue is based is dismissed from the case (absent a consent order), venue vanishes. The case must be transferred to a jurisdiction in which venue is proper to the remaining defendants. If more than one venue is proper, the plaintiff picks the transferee county.

Venue will vanish as to Common Carrier and Driver. Because venue is based on residency of county in Georgia, the case must be transferred to either Bryan or Effingham County. Venue was proper in Chatham because of Sally, not the plaintiffs. Either venue is fine

because the defendants are joint tortfeasors. Thus, the Smith's would get to pick the new venue from those two counties.

**2b)** A motion to transfer venue would suffice. The issue is what procedural methods the defendants should use to transfer venue. Upon venue vanishing, either defendant may make a motion to transfer the case to a proper venue. Transfer, and not dismissal, is favored in Georgia. Alternatively, a forum non conveniens or inconvenient forum motion could be made, but a simple motion to transfer venue would suffice. Note that the 12(b) motion for improper venue is not relevant (the motion is barred because it was not made in the pleading) because this is vanishing venue, not improper venue existing from the beginning.

Therefore, Carrier or Driver should make a motion to transfer venue once venue vanishes. Because venue is proper in both Effingham and Bryan County, the Smiths will choose the new venue. The court will transfer, and not dismiss, the action to the new venue. This would require the trial in the new venue to begin anew.

**3)** The senior partner can dismiss the case after the trial has commenced. The issue is whether the case may be dismissed before the first witness is sworn. A plaintiff may dismiss a case at any time before the first witness is sworn or by consent of all parties. This dismissal is voluntary, but plaintiff only gets one. The dismissal may only occur until the judge enters an order ending the case pre-trial (i.e. summary judgment) or the plaintiff definitively knows of this outcome. The plaintiff simply files a motion of dismissal, and the case is dismissed. If a counterclaim is present and cannot stand alone, dismissal is improper.

Here, the first witness has not been sworn, so dismissal is proper. The jury was already sworn, but the focus is upon the swearing in of the first witness. The plaintiff did not know of any pending actions by the judge evidencing an intent to dismiss, so the partner may dismiss. However, if he dismissed the claim against Sally, as discussed above, this may be his second dismissal, dismissing the case with prejudice.

**4)** The Smiths will simply use a renewal action to re-file the case. The issue is how do the Smiths re-file their case. Assuming the first dismissal does not invoke the two-dismissal rule, the plaintiff would simply re-file the case and pay costs. The plaintiff may renew his action within the statute of limitations or within 6 months of dismissal if the period has run. The plaintiff re-files the complaint asserting that this is a renewal action and perfects service again like it's a new lawsuit.

Here, the Smiths will be allowed to use the renewal rule assuming that this was the first dismissal of the claim. They would have to file within 6 months of the dismissal because the statute of limitations has already run. The Smiths must pay court costs for the new complaint and re-serve the defendants. The case will have to be brought in a proper venue as well, because after the dismissal of Sally, venue is not proper in Chatham County. However, the renewal may be made in a different county (or even federal court).



## **QUESTION 3 - Sample Answer # 2**

### **Question 1**

The issue presented is what procedure could be used to eliminate claims against Sally Jones ("Jones").

Georgia differs slightly from the Federal Rules of Civil Procedure (FRCP) on dismissal. In Georgia (GA), a party may voluntarily dismiss all claims against an opposing party without a court order at any time before the first witness is sworn in. A party may dismiss an opposing party by filing a notice of dismissal with the court. If dismissal occurs after trial has commenced, the dismissing party must get an order from the court allowing dismissal of the party.

In this case, our firm could dismiss Jones. According to the facts, Jones was dismissed a few weeks before trial started. If we dismiss before trial starts, we can file a notice of dismissal with the court without getting a court order to do so. If the dismissal decision was made but the trial has started without dismissal occurring, a court order is needed to dismiss Jones.

Therefore, assuming dismissal occurs before the 1st witness is sworn in, we can file a notice of dismissal and voluntarily dismiss Jones without a court order.

### **Question 2(a)**

The issue presented is what impact Jones' dismissal has on venue of the Smiths' claim and to Joneses' cross claim.

Generally, if all defendants are Georgia residents, a plaintiff can file suit in an county where a defendant is a resident. When all defendants who reside in the county where suit is filed are eliminated, the issue of vanishing venue occurs. This means venue is no longer proper in the current county, and the remaining defendants may challenge the suit's venue. If a defendant settles all claims and is dismissed from the case, all that party's claims and cross-claims are dismissed. If a party is dismissed, the plaintiff should file an amended complaint. Under the relation back doctrine, an amendment arising from the same transaction or occurrence as the original claim will relate back to the original pleading's filing date and avoid a statute of limitations problem. Here, Jones was the only defendant residing in Chatham County ("Chatham"), where the lawsuit was filed. The Smiths live in Chatham, but they are plaintiffs. Because Jones was dismissed, her cross-claim was dismissed. Private Carrier Company (PCC) and Truck Driver (Driver) are still defendants in the case. PCC and Driver can validly challenge the venue. If PCC and Driver decide to not challenge venue, the case can continue in Chatham. Plaintiffs should likely amend the complaint to dismiss Jones. The amended complaint will relate back to the original complaint's filing date. This means the amendment is effective even though the SOL has run.

Therefore, because Jones was the only resident defendant in Chatham and Jones was eliminated, venue in Chatham is now improper. PCC and Driver can properly seek to change the venue. If they decide not to change venue, the case can continue in Chatham.



## **Question 2(b)**

The issue is what venue motion and procedure would occur after dismissal of Jones.

When vanishing venue occurs, all resident defendants in the county where the suit is filed are eliminated. If no resident defendants remain, each remaining defendant can file a motion stating venue is improper and requesting transfer of venue to its county of residence. If more than one defendant remains, the plaintiffs can decide the county where the case should be transferred. This procedure is the same regardless of whether the dismissal of the resident defendant occurs before or during trial. When all possible venues are in Georgia, the case is transferred rather than dismissed and re-filed in the different venue.

Driver and PCC could file a motion arguing that venue is improper. Each defendant would request the case be transferred to his county of residence. The Smiths have discretion in whether to transfer the case to Effingham or Bryan County.

Therefore, PCC and Driver will move to transfer the case to a different venue. Smiths can decide which available county to which to transfer the case.

## **Question 3**

The issue presented is whether the case can be dismissed after trial commences.

Generally, the SOL for personal injury cases is 2 years. A party can voluntarily dismiss a case without prejudice. If the case is dismissed after the SOL ends, voluntary dismissal can only be exercised once. To dismiss, the party must file a motion of voluntary dismissal and expressly state that dismissal is without prejudice. If a case is dismissed twice, the second dismissal is deemed an adjudication on the merits of the case.

Here, we can voluntarily dismiss the case even though trial commenced. The case was filed one week before the SOL ended. When trial started, it was a few weeks beyond the SOL period. Because the SOL has run, we may only exercise this right once. If dismissed without prejudice, the case can be re-filed. However, because trial has commenced, we may be required to get leave of court to dismiss the case.

Therefore, senior partner can dismiss the lawsuit after trial commences, but he may be required to get leave of court in the form of a court order.

## **Question 4**

The issue presented is what procedure is required to re-file the dismissed lawsuit.

GA has a renewal privilege that allows a voluntarily dismissed suit to be validly re-filed. When a case is voluntarily dismissed, it must be re-filed within 6 months. If the SOL ends before the case is re-filed, the renewal can only occur once. Before re-filing, a plaintiff must pay all costs and fees associated with the first case. A plaintiff must attach a copy of the original complaint to the new lawsuit at filing. Renewal means the entire case must be repeated, such as conducting discovery and performing depositions.

Here, we can re-file the lawsuit after voluntarily dismissing the first case. We have to re-file within 6 months. We would not add Jones in the new case because we settled with Jones.

We must file in Effingham or Bryan County. Since the SOL ended, we only have one more chance to file suit. A 2nd dismissal will be an adjudication on the merits.

Therefore, the renewal privilege allows us to re-file after voluntary dismissal as long as we pay all costs associated with the 1st case, re-file within 6 months of 1st case's dismissal, leave Jones out of the case, and file the lawsuit in Effingham or Bryan County.

### **QUESTION 3 - Sample Answer # 3**

**(1)** Georgia has eliminated joint and several liability. Instead, apportionment of liability is used among those liable in the action. When a party settles a claim independently, and another party is held fully liable at jury trial, the party held liable at the jury trial may seek contribution from the party that settled. However, apportionment may be made prior to this during the mediation between all of the parties. In order to prevent a contribution action by TD or PCC against Sally, we may apportion liability of Sally at the settlement proceeding.

**(2)(a)** The elimination of Sally Jones from the suit creates a vanishing venue problem. In Georgia, venue is proper (i) in any county where the defendant resides, (ii) if all defendant's are Georgia residents, in any county where any defendant resides, and (iii) where a significant part of the transaction occurrence giving rise to the action occur. An individual resides in any county in which the individual is domiciled. Thus, Sally is domiciled in Chatham County. For a corporation or business entity, residence is in the county of the companies registered office. In addition, in tort cases, a corporation may be deemed to reside in the county where the tort occurred if the corporation also has an office in that county and does business in that county. In our case, the facts indicate that the cause of action arose in Effingham County. The facts also state that the Private Carrier Company has its registered office in Effingham County. Finally, Truck Driver ("TD") resides in Bryan County.

With the above, since all the defendants are Georgia residents, venue is initially proper in either Bryan, Effingham, or Chatham Counties. The original selection of Chatham County as venue was proper since Sally resides in Chatham County. However, once Sally is eliminated from the case after the settlement, venue becomes improper in the Smith's case as to PCC and TD. Additionally, the venue for Sally's cross-claim against PCC and TD becomes improper.

**(2)(b)** In Georgia, once a defendant is dismissed, and venue was proper due to the dismissed defendant's presence in the case, the case may be transferred to proper venue. This is true whether the defendant is dismissed from the case through settlement or by finding of a not guilty verdict. Here, venue was proper in Chatham County due to Sally's presence in the case. The case now becomes Dick and Jane Smith vs. PCC and TD. Venue would now be properly held in Effingham County (place of the occurrence giving rise to action and registered office of PCC) or Bryan County (residence of TD). Upon a motion to transfer by either TD or PCC, plaintiff's have the choice of venue. Thus, the Smith's may choose to have the case transferred to either Bryan or Effingham County.

Additionally, upon dismissal of Sally from the case, Sally's cross-claim becomes severed from the case. However, the cross-claim is dismissed without prejudice and Sally may now bring the claim separately against TD and PCC. Just as the Smith's, Sally may also bring the case in either Effingham or Bryan County.

**(3)** Yes, my senior partner may file a motion to dismiss after the trial has commenced as long as the first witness has not yet been sworn. A case may be dismissed without leave of court once without prejudice if the motion to dismiss is made prior to the swearing of the first witness or, if one is held, the pretrial conference. If the motion to dismiss is made after

the swearing of the first witness, the dismissal is with prejudice unless leave of court is obtained. If a counterclaim is pending in the action, a motion to dismiss will not be permitted. In Georgia, if a motion to dismiss without prejudice is made, the plaintiff may re-file the claim within the statute of limitations period or within six months, whichever is later. Here, the motion to dismiss was made before the first witness was sworn. Further, there is no pending counterclaim in the action. Thus, we can file a motion to dismiss without the leave of court. Further, since the statute of limitations period has already run, we would need to re-file the case within six months of the motion to dismiss.

**(4)** To reinstitute an action against PCC and TD, we must file within the statute of limitations period or within six months of the motion to dismiss. As stated above, the statute of limitations ran a week after filing the original complaint. Thus, we must re-file our claim within six months from the motion to dismiss. To reinstitute the action, we must follow the guidelines as stated within the Georgia Rules for Civil Procedure as if we were filing the case for the first time. We must file a complaint with that states the cause of action, claim for relief, subject matter jurisdiction, and a summary of proper venue. As stated above, without Sally in the case, venue is now proper in Bryan or Effingham County. Once the complaint is filed, process may be served by an agent authorized by the court (must be over 18) or by a sheriff. Process should be made by the process server within five days of receiving the complaint. If service is not made within five days, service is not improper, but the plaintiff must exercise reasonable diligence to serve process in a reasonable time. Service may be made in any of the ways authorized by the Federal Rules of Civil Procedure: personal service, abode service, or service made on an agent. Service may also be made by mail if the defendant consents to mail service. If the defendant does not consent to mail service, the defendant is liable for any costs of service.

## QUESTION 4 - Sample Answer # 1

To: Partner

From: Examinee

Re: Able Events's contract enforceability issues

Date: July 28, 2015

### 1. Able Events ("AE") and Chair Depot ("CD") do have an enforceable contract.

A contract in Georgia as elsewhere requires an offer, acceptance, and consideration. Additionally, because the contract at issue was for the sale of goods-usually defined as things movable at the time the contract is entered into-Article 2 of the UCC, which has been adopted in Georgia, applies. Under the UCC, a contract for goods over \$500 in value is subject to the statute of frauds, and may only be proved by a writing that includes all material terms (notably including in sale of goods contracts a quantity term) and signed by the party to be charged.

At issue in this case is when was an offer accepted in exchange for consideration and thus forming a valid and enforceable contract. An offer creates a power of acceptance in the offeree that once exercised binds each party to the contract. The offeror is master of the offer and may limit the method of acceptance. Although the language of the oral conversation between Amy and the Chair Depot representative appears to be otherwise sufficient to create a contract, because the contract is for the sale of goods worth more than \$500, the statute of frauds applies, and the contract will only be enforceable if it meets the requirements discussed above. Importantly, the fax sent to AE meets all the necessary statute of frauds requirements and specifies that acceptance may only be by signing the fax and returning it by close of business on May 2, 2014. This created a power of acceptance in Amy on behalf of AE, which she exercised by signing and returning the form via fax on May 2 before "close of business." (It doesn't seem likely to be an issue, but parol evidence would be admissible despite the caption "Final Contract" to define the term "close of business," and I presume trade usage would be sufficient to prove that 11:00am is before such. Parol evidence is always admissible to prove the meaning of an ambiguous term.) Ordinarily, an offer may be revoked so long as revocation is received by the offeree before she accepts, but because the UCC merchant firm offer rule applies (see #2 below), the offer may not be revoked until the period for which the offer was promised to remain open has run out. Additionally the mirror image rule does not apply because this is a UCC rather than common law contract, and furthermore, the battle of forms is irrelevant because Amy accepted any terms added in the fax itself by signing and returning the form without changing them. The fax satisfies the statute of frauds because it is in writing, all material terms, particularly quantity, are included, and CD-the party to be charged-signed the writing.

**2.** Chair Depot's attempted revocation was invalid because of the UCC merchant firm offer rule.

Under the common law an option contract cannot be withdrawn during the period promised to be left open, but only if the option was supported independently by consideration. Under the UCC, however, the merchant firm offer rule does not require consideration to apply. Where a merchant promises to keep an offer open for a period of time, the merchant may not revoke the offer during the time promised, and acceptance even of an offer the merchant offeror attempted to revoke will bind the parties. A merchant is a party who is in the business of selling goods. (Some merchant rules apply only if the merchant is in the business of selling the particular kind of goods at issue in the contract. I don't think that is required in the case of the merchant firm offer rule, but in either event Chair Depot is in the business of selling the type of goods at issue-tables and chairs-so the merchant firm offer rule would definitely apply.) At issue would be whether the language used in CD's fax actually amounted to an intention to create an irrevocable offer. This is questionable because the language may be read somewhat ambiguously in this respect, but because CD was the drafting party in this case (the master of the offer), I expect the court would resolve such ambiguities against Chair Depot and likely find that the fax did create an irrevocable firm offer. As such it is irrelevant that Amy was aware of the attempted revocation before she accepted the firm offer.

**3.** CD breached its contract with Able Events when it failed to deliver 200 folding chairs and 20 tables to Able Events by May 2014, and Able Events is entitled to the benefit of its bargain, i.e., damages measured by its expectation interest.

The obligations of CD-assuming the contract is valid-are clear: it needed to deliver 200 folding chairs and 20 tables by May 9, 2014. When it failed to do so, CD breached the agreement. Under Georgia law, as elsewhere, contract remedies are most often measured by the expectation damages. It's not entirely clear whether Brian Brown knew that he was inducing Chair Depot to breach its agreement with Amy (or at least an undisclosed client), but if he was, then perhaps Amy could seek an action against Brian for tortious interference with a business relation. If Amy has damages beyond her foreseeable expectation damages, she might be able to recover them from Brian, but I don't think she could recover the tables/chairs through replevin, nor could she require specific performance from CD, but I doubt she'd want to since she already found a substitute.

**4.** Generally, the nonbreaching party may select the measure of damages it prefers. Usually expectation damages-the amount that would give the nonbreaching party the benefit it would have received had the nonbreaching party performed according to the contract-will maximize recovery, but sometimes a nonbreaching parties reliance damages-the amount that would return the nonbreaching party to its pre-contract (ex ante) position-will be more. (Although only foreseeable reliance damages may be recovered.)

a. AE is entitled to seek damages. Where one party breaches the nonbreaching party may seek expectation or reliance damages in addition to incidental damages.

b. The appropriate measure is AE's expectation interest, which is \$4,000. AE contracted to receive 200 chairs and 20 tables for \$4,000 and had to pay \$8,000, so \$4,000 is the difference between what AE would have received had CD performed according to the contract and what AE actually received as a result of CD's failure to perform.

## QUESTION 4 - Sample Answer # 2

To: Partner

From: Examinee

Re: Representation of Able Events

Date: July 28, 2015

As requested, here is a memorandum addressing issues as it relates to the representation of Able Events.

**1. Issue:** The first issue is whether there was an enforceable contract between Able Events and Chair Depot.

**Rule:** In Georgia, a contract is formed when there is an offer, acceptance, and consideration. An offer is an outward manifestation of intent to enter into a contract and a signal that acceptance will close the deal. Acceptance occurs when the party agrees to the exact terms of the offer. Consideration is typically characterized by a bargained-for exchange, however Georgia courts follow the minority approach using the benefit/detriment test. A Georgia court will find consideration where one party obtains a benefit while the other party incurs a detriment. A detriment occurs when the party either refrains from something he has a legal right to do or does something he has a legal right not to do. Assuming there is an offer, acceptance, and consideration, a contract will be enforceable subject to the statute of frauds. The statute of frauds requires certain contracts to be in writing in order to be enforceable. Where a contract is for the sale of goods over \$500, the contract must be in writing. The writing must be signed by the party to be charged and contain the quantity term. The UCC has provisions to fill in gaps where other terms are not included.

**Analysis:** In a telephone conversation on May 1, 2014, Chair Depot offered to sell to Amy Able 200 chairs at \$10 per chair and 20 tables at \$100 per table. Although not explicitly stated from the facts, it seems apparent that Amy accepted the offer. There is sufficient consideration given the bilateral contract promise to pay in exchange for the promise to deliver goods. Because this agreement is a contract for goods in the amount of \$4,000, the contract needed to be in writing to satisfy the statute of frauds. This writing requirement was satisfied when Chair Depot faxed the form contract captioned "Final Contract." While Chair Depot may try to argue that the writing was not signed by Amy Able, this argument will fail because the writing need only be signed by the party to be charged - in this case, Chair Depot. Chair Depot signed the contract. Chair Depot might also try to argue that because of the language, "if not returned by this time, this offer is no longer valid," the contract was only an offer waiting for acceptance. However, because the offer and acceptance took place over the phone, there was already a binding contract. The Final Contract form simply memorialized the agreement in writing in satisfaction of the statute of frauds.



**Conclusion:** The contract between Able Events and Chair Depot is enforceable and binding.

**2. Issue:** The issue is whether the attempt by Chair Depot to revoke the offer was effective.

**Rule:** An offer can be revoked at any time before acceptance. In order to revoke the offer, the offeror must notify the offeree of the revocation in the same manner as the offer was communicated or the offeror must act in a way that is inconsistent with the offer and the offeree must learn of the inconsistent act through a reliable source. However, under the UCC, where a merchant extends an offer in a signed writing and explicitly states the offer will remain open for a period of time, the offer will become irrevocable for the stated period of time (not to exceed three months).

**Analysis:** As aforementioned, it is possible that Able Events accepted over the phone creating a binding contract in which any attempt to revoke the offer would have amounted to a breach. Even if Able Events did not accept over the phone, Chair Depot's offer was an irrevocable option contract because Chair Depot is a merchant, the offer was in writing and signed, and the offer stated the time under which the offer would remain open. Thus, Chair Depot could not revoke the offer until after close of business on May 2, 2014. Because Able Events accepted the offer before close of business on May 2, 2014, a valid contract was formed notwithstanding Chair Depot's attempt to revoke.

**Conclusion:** Chair Depot's attempt to revoke the offer was ineffective.

**3. Issue:** The issue is whether the contract between Able Events and Chair Depot has been breached and what remedies are available.

**Rule:** A contract is breached when a party fails to perform under his obligations of the contract. Under Georgia law, remedies for a breach of contract action include expectation damages, restitution, lost profits, and specific performance. In the case of a nonbreaching buyer who subsequently covers, expectation damages are the most appropriate.

**Analysis:** Based on the analysis above, Chair Depot had a valid and enforceable contract with Able Events and breached the contract by failing to deliver the chairs and tables by May 9, 2014. In fact, Chair Depot never delivered the chairs or tables, thus completely breaching all obligations owed. As a result, Able Events had to pay double to cover the loss. Able Events can sue Chair Depot for expectation damages.

**Conclusion:** Chair Depot breached the contract and will be liable for expectation damages.

**4. Rule:** When a seller breaches a contract for the sale of goods, the buyer may recover expectation damages. If a buyer covers, the expectation damages are calculated by the difference between the contract price and the cost to cover, plus any incidental and consequential damages minus any cost saved by the breach. Punitive damages are generally not available.

**4a. Conclusion re Entitlement to Damages:** Able Events is entitled to seek expectation damages.

**4b. Conclusion re Measure of Damages:** Damages will be measured by the difference between the contract price (\$4,000) and the cost to cover (\$8,000). Therefore, Able Events is entitled to seek \$4,000 plus any incidental and consequential damages. Based on the facts, Able Events did not save any money by the breach.

### **QUESTION 4 - Sample Answer # 3**

To: Partner  
From: Applicant  
Re: Chair Contract  
Date: July 28, 2015

#### **Contract Validity**

An enforceable contract existed between Amy and Chair Depot. Georgia law requires offer, acceptance, and consideration for a contract to arise. An offer must contain all essential terms, including identity of the parties, each party's performance, quantity (for goods contracts), and price, though the latter is not required for contracts involving the sale of goods. The offeror is master of the offer and may specify the terms of acceptance. In order to be valid, acceptance must be communicated in the manner prescribed by the offeror, if any, and must generally mirror the terms of the offer, though goods contracts are governed by the UCC, which does not require identical terms. Consideration may be based on a strong moral obligation ("good consideration") or may be "valuable." Valuable consideration is any detriment to the promisor or benefit to the promisee.

In this case, Chair Depot made an offer to deliver 200 chairs and 20 tables to Able Events on a certain date for a certain price. Thus, the parties, performance, quantity, and price were all identified in the offer. Acceptance was to be made by signing and returning the form by close of business the following day. Amy did exactly this and, therefore, validly accepted the offer in the manner prescribed by Chair Depot. Each party provided consideration since Chair Depot promised to provide chairs and tables and Amy promised, in return, to pay \$10 per chair and \$100 per table. Because of this, all the requirements for a valid contract were fulfilled and the agreement between the parties was legally enforceable.

#### **Revocation**

Chair Depot's attempted revocation of its offer was not effective. Ordinarily, the offeror may revoke its offer at any time prior to acceptance. This is not so, however, when the offeree has an option to accept within a certain time. At common law, an option was a promise by the offeror to hold an offer open supported by independent consideration. Georgia, however, requires only that the offeror set forth the option in a signed writing. By stating that "if not returned by [close of business May 2, 2014] this offer is no longer valid," Chair Depot implied that it was holding the offer open until that time. This statement was contained in the offer itself, which was both written and signed. Therefore, Amy had a valid option to accept the offer before the provided time and Chair Depot could not revoke it before then.

## **Breach and Remedies**

Chair Depot breached its contract with Amy by failing to perform. A contract may be breached either by anticipatory repudiation or by failure to perform. Anticipatory repudiation occurs when one party communicates to the other that it does not intend to carry out the contract. In this case, the non-breaching party may choose to either file suit immediately, or wait for actual breach and sue then. Anticipatory repudiation, however, can only occur after a contract is already formed and is, for this reason, not applicable here. Chair Depot sent Amy a fax purporting to revoke its offer and communicating its intention not to perform, but did so before Amy accepted the offer and, thus, before a contract arose. Under the UCC, Amy could have demanded assurances of performance at any time and the failure to provide such assurances would have been a repudiation on Chair Depot's part, but she did not do so. Therefore, Chair Depot breached only when it failed to provide the chairs at the agreed-upon time.

Amy's remedy for this breach would be monetary damages. Specific performance is sometimes available for sale of goods contracts, but only when the goods are unique or of special significance to the plaintiff, which is not so here. A plaintiff may also sue for rescission or reformation of the contract, but Amy has no reason to do so since what she wants is compensation for Chair Depot's failure to perform, rather than invalidation or modification of the contract terms. Thus, damages are her only applicable remedy.

## **Damages**

Amy is entitled to damages in the amount of \$4000. Monetary damages are appropriate whenever breach of a contract causes harm to the plaintiff. Here, Amy has suffered harm because she was forced, as a direct result of Chair Depot's breach, to purchase chairs and tables at a higher price than she had contracted for. The ordinary measure of damages in contract cases is expectation, which seeks to put the plaintiff in the same position she would be in had the contract been performed. In a sale of goods contract, a buyer's expectation damages are equal to the cost of cover (i.e. replacement goods) minus the contract price, plus any consequential damages stemming directly from the breach, such as lost profits. It does not appear in this case that Amy has any consequential damages. Thus, her expectation damages would be the cost of cover, \$8000, minus the contract price, \$4000, which equals \$4000.

## MPT 1 - Sample Answer # 1

Anders, Davis & Waters  
Attorneys at Law  
6241 Lowell Street  
Franklin City, FR 33205

July 29, 2015

Bryan Carr  
6226 Lake Drive  
Franklin City, FR 33244

Dear Bryan,

I am writing to follow up on our phone call from July 24. I was happy to hear from you, but I am sorry it was under the shadow of some difficult circumstances. I hope this letter will answer your questions regarding whether your bank can hold you responsible for the charges to your credit card that your dad made without your permission. I have addressed each purchase your dad made with your credit card.

**1. Are you responsible for the total auto repair cost of \$1850 even though you originally allowed your dad to charge the repair understanding only \$1500 would be charged.**

Yes, you are responsible for the full cost of the auto repair because you specifically told you dad he could charge the repairs. The extra \$350 in repairs were reasonable and within the scope of the permission you had specifically given.

Under the Federal Truth in Lending Act, you are only responsible to pay a maximum of \$50 for any charges that are incurred from the unauthorized use of your card. 15 U.S.C. § 1643(a)(1). The Act defines "unauthorized use" as "the use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit." *Id.* § 1602(o). Essentially, if someone uses your credit card without your permission, you will only be responsible for up to \$50 of their un-permitted charges. However, if someone spends more than they were initially permitted to spend, you may still be responsible for the charges if the person had "implied" or "apparent" authority to make the charge. "Implied authority" generally means that the person you gave permission to make charges is allowed to make charges that are reasonably within the bounds of your actual grant of authority or are necessary to do what it is you asked them to do with the card. *BAK Aviation Systems*, at 14. Ultimately, if someone has actual permission to use the card and uses it in a manner reasonably in bounds of that permission, you will be responsible for the entire charge under the Truth in Lending Act.

With the van repair charge, you gave your dad specific permission to charge the repair to your credit card. Although he had received an initial estimate for repairs of \$1500 and you had based your permission on that amount, the additional \$350 needed to make the repair

was reasonable given your initial grant of permission - when repairs begin, additional problems are often discovered and need to be fixed. Given that you initially told your dad to pay for the entire van repair with your card, the additional costs are within your dad's implied authority to use the card; therefore, you are responsible for the entire amount.

## **2. Are you responsible for the gas, grocery, and book store purchases that your dad made without your specific permission**

Likely yes, you are responsible for the gas, grocery, and book store purchases even though you did not give you dad permission to make those additional purchases. The general authority you provided you dad with in the letter you gave him and the fact that you did not get the card and letter back until later means your dad likely had the apparent authority to make the purchases.

An individual can make purchases on a credit card provided by the credit card holder without the credit card holder's actual permission and, in certain situations, the credit card holder will still be responsible for the charges; this is known as apparent authority. *BAK Aviation*; Rest (3d) Agency § 3.03. The credit card holder will be responsible for charges when the words or actions of the credit card holder cause a store or other third party to reasonably believe that the individual making the purchase has the permission to make the purchase. *Id.* For example, when an airliner gave its chief pilot a credit card and instructed him to purchase fuel for a charter plan only for specific types of flights, a court held the airliner responsible for un-permitted fuel charges even though it had expressly told the pilot to use the card only for certain situations. *BAK*. The court said that pilots were often entrusted with credit cards and the fuel sellers could not have made a distinction between allowed purchase and purchases not allowed.

Additionally, credit card holders have a responsibility to review credit card charges on their accounts and notify a bank promptly of any errors. *Transmutual Insurance*. If a card holder is careless in reviewing his statement, he may be unable to use the Truth in Lending statutes protection.

Here, the grocery, gas, and bookstore charges were all made by your dad without your permission. However, to the gas station, bookstore, and grocery store, it appeared that your dad had the authority to make those charges to your card. The letter you provided him did not contain any limitations to the cards use so these store were reasonable in relying on the letter to accept the card from your dad. The fact that you did not get the card and letter back immediately adds credence to these stores' belief that your dad had the right to use the card. Given that he likely had apparent authority to use your card in the eyes of the stores he was making these purchases with, you will be responsible for the April and May charges for gas, books, and groceries. Additionally, the fact that you did not notice these charges as unauthorized during your initial review of the bills would also weigh against you when seeking to avoid these charges.

## **3. Are you responsible for the hardware store purchase your dad made after he returned your card and permission letter**

Possibly no. The fact that your dad did not have your permission, did not have your credit card or the letter you provided, and the hardware store's carelessness likely means you will not be responsible for the hardware store charge.

As mentioned in my response to question two, it is possible for a person to have apparent authority to use a credit card. However, a person's apparent authority will only protect a seller or bank when they accept the credit card in "good faith and without ordinary negligence." *Transmutual*. For example, a bank that issued a credit card to an employee of a company without checking with the company's general manager, who alone had authority to request issuance of a new card, was considered negligent. *Id.* This carelessness by the bank prevented them from relying on the employee's apparent authority to request the card. *Id.*

Here, the hardware store was likely negligent when its clerk carelessly accepted the credit card name, number, and expiration date from your dad without any questions. The lack of the physical credit card or any indication that he had permission to use the card number should prevent them claiming your dad had the apparent authority to use your card. Even so, it is probably a close call on whether you can prevent bank from collecting under the Truth in Lending act given your previous payment and authorization of your dad's use of the card. However, the size of the purchase rest in your favor.

It might be best for you to see if the items can still be returned to the hardware store for a full refund to avoid any additional issues. In the meantime, I am happy to call the bank directly to see if they will void the charges for the hardware store.

I hope this letter answers your questions. If you have any additional questions, please give me a call.

Sincerest Regards,  
Miles Anders

## **MPT 1 - Sample Answer # 2**

July 28, 2015

Dear Bryan:

You have asked me to investigate whether you can be held responsible for payment on the unauthorized purchases made by your father on your Acme State Bank credit card. The Truth in Lending Act limits liability to cardholders for charges made by third parties without actual, implied, or apparent authority 15 U.S.C. §§ 1602(o), 1643. These charges are deemed to be unauthorized, and the cardholder is liable for only up to \$50 of the amount charged on the card if the conditions are met. After investigation into these instances of misuse of your credit card, I have concluded as follows:

### **Are you responsible for paying the charges made by your father to the auto repair shop.**

Yes. Your father was using the card with your actual, or at least implied, authority, and therefore the use for the car repair is authorized, and does not fall under the protection of the Truth in Lending Act

The Truth in Lending Act does not apply if the use of the card by third parties was made with actual, implied, or apparent authority. §1602(o). This authority is determined by agency principals. Under the Restatement (Third) of Agency §2.01, actual authority exists when the agent, here your father, reasonably believes based on the principal's, here your, representations to him that it is desired that he act. Here, it is arguable that your father had your actual authority to charge the purchase because you explicitly told him to use the card to charge the repairs, and gave him your card and the note for the purposes of doing so.

However, if there was not actual authority for this purchase, because the cost was more than expected, there was at least implied authority granted to your father to charge the total cost to your credit card. The Court in *BAK Aviation v. World Airways* (Franklin Ct. App. 2007) stated that implied authority means "actual authority either (1) to do what is necessary, usual, and proper" to accomplish the agent's (your father's) responsibilities, or (2) to act in a way in which the agent (your father) believes the principal (yourself) wants him to act, based upon a reasonable interpretation of the representations made in light of the objectives of the action. Here though the charges to the auto repair shop were \$350 more than what was expected, it is reasonable to believe that your father interpreted your agreement to pay for the repair as implied authority to charge whatever the repair cost. Thus, because there is authority for your father to use your card in this instance, you will not be able to recover for any charges to the auto repair shop.

### **Are you responsible for paying the charges incurred by your father at the bookstore, the grocery store, and the gas station.**

Yes. Though your father did not act under actual or implied authority to make these purchases, he did act under your apparent authority. The use is therefore not unauthorized, and the Truth in Lending Act protection will not extend to these purchases; you will be responsible for making these payments.



According to the Restatement (Third) of Agency §3.03, apparent authority is created when a person represents that another has his authority to act, with legal consequences for the person who makes such representation, and when a third party reasonably believes that the actor is authorized, and the belief is traceable to the representation. Here, this means that, because you gave your father your credit card, with an accompanying note giving him unqualified authorization to use the card, vendors will reasonably believe him to be authorized to use the card, and you will be responsible for the purchases.

Even where there is no actual authority for additional, unauthorized charges on a voluntarily transferred credit card, most courts will not apply the Truth in Lending Act's liability limitations to the card holder, because the voluntary relinquishment for one purpose gave the actor apparent authority, in the vendor's eyes, for the other purchases. *BAK v. World Airways*. If there is notice to vendors that the authorization is limited, apparent authority may not be established. *BAK v. World Airways*. However, here your father had the note, and there were no words of limitations on his authority to use the card. However, if the principal fails to disapprove of the agent's (your father's) acts, he leads the public to believe that the agent possesses the authority to do that act, and the principal, you, are bound. *Farmers Bank v. Wood* (Franklin Ct. App. 1998). Because of this, the bookstore, grocery store, and gas station were not on notice that the charges at their particular establishments were not authorized. A cardholder has a duty to examine his credit card statement promptly, and to use reasonable care to discover unauthorized charges made. *Transmutual Insurance Co. v. Green Oil Co.* (Franklin Ct. App. 2009). Because you did not contest the payments, and paid your credit cards without noticing and contesting the charges at the time, the bank had no notice that the charges were not authorized, and you will be responsible for these payments.

**Are you responsible for paying the charges made by your father to the hardware store.**

Probably no. There was no actual or implied authority to use your credit card for this purchase, nor was there a good reason to believe there was apparent authority. Further, the charges here were contested before they were paid, so the reasoning of *Transmutual* and *Farmers* does not apply.

The hardware store had no reason to believe that your father had actual, implied, or apparent authority to use the card, as described above. He did not have the card in hand when he made the purchase. He merely had a piece of paper with the card numbers written on it. For apparent authority to be created, there must be a reasonable belief of authority. You can only be bound to pay those who have "incurred liability in good faith and without ordinary negligence." *Transmutual v. Green Oil*. It is likely negligent on the part of the clerk to run a credit card with the account information merely presented to him on a piece of paper. Because of this negligence on the part of the hardware store, there is no real argument that apparent authority existed. Further, because you have not paid the bills, unlike the case with *Transmutual*, you have not been negligent in regards to reporting this charge. Therefore, the 15 U.S.C. §1602(o) test for unauthorized use of a credit card is met, and the Truth in Lending Act's limitation on liability should protect you with regards to this purchase. You should only be liable for \$50 of the \$1200 spent on the power tools.

In summary, I believe that you will be able to claim protection under the Truth in Lending Act for the purchase of the power tools. You will be liable for the minimum amount of \$50. However, you will not receive protection for the purchases made by your father at the bookstore, grocery store, or gas station, as he authority, or at least apparent authority, to make those purchases. If you have any further questions, I'd be happy to explain further.

Best Regards,

Miles Anders

### **MPT 1 - Sample Answer # 3**

Dear Mr. Carr,

You have asked us to review your liability for charges your father made on your credit card during the months of March, April, May, and June of this year. The Federal Truth in Lending Act limits liability of cardholders for unauthorized use of credit cards to \$50 if certain conditions are satisfied. According to Franklin law, we have determined that your liability for these charges is likely as follows:

#### **WAS HENRY'S USE OF THE CARD UNAUTHORIZED?**

Henry's use of Bryan's credit card for the March van repairs is probably not unauthorized, which means Bryan is liable for the \$1850 repair charge. Likewise, the use of the credit card in April and May was probably not unauthorized either, and Bryan is liable for the food and gas charge, as well as the charge at the bookstore. However, the use of the credit card number to buy power tools was probably unauthorized, and Bryan is therefore not liable for those charges.

"Unauthorized use" of a credit card is defined in Franklin law as "use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit." 15 U.S.C. § 1602.

There was arguably a benefit to Bryan from Henry's use of the credit card, even though the items and services bought were primarily for Henry's own benefit. Bryan gave Henry the card specifically because he wished to help his father out in a difficult time, and it is likely that Bryan gained some form of benefit through helping out his father. There is not a strong argument that there was no benefit to Bryan, so we turn next to whether or not Henry had authority to use Bryan's card.

Whether or not a person is an authorized or unauthorized user depends on agency law, which explains when a person other than the cardholder would have authority to enter into transactions. Actual authority is when the principal, or cardholder (Bryan), directly communicates his consent to particular transactions to the agent, or user (Henry). Implied authority is when the user has actual authority to act in a manner in which the user believes the cardholder wishes him to act, based on the user's reasonable interpretation of the cardholder's objectives.

Henry probably had either actual or implied authority to make the purchase of van repairs. Bryan gave his father the credit card in order to purchase these services specifically. Although Henry had actual authority to purchase an "estimated" \$1500 worth of repairs, that number was only an estimate. Henry had implied authority to spend a little more than the estimate in order to complete the repairs, as long as the amount was reasonable. The actual charge of \$1850 did not differ significantly enough from the estimate that Henry would believe that the charge was outside of the range for which he could use the card.

Henry probably did not have either actual or implied authority for the purchases in April, May, or June. Courts in Franklin have previously determined that the use of a credit card outside of the scope of what the cardholder expressly permitted them to use it for created neither actual nor implied authority. *BAK Aviation Systems, Inc. v. World Airways, Inc.* In

that case, the cardholder expressly told an employee he could use the card for one type of purchase, gas for non-charter flights, and the employee used it for a different purpose, gas for charter flights. The court determined that there was no actual or implied authority because the purchases were not what was allowed by the cardholder. Although Bryan wrote and signed a letter granting Henry express permission to use the card, Henry had actual, specific instructions from Bryan as to what he was permitted to use the card for -- van repairs only. Because the gas, groceries, books, and tools were outside of the range of things Henry actually had permission to use the card for, there was no actual or implied authority.

Even if there is no actual or implied authority, there may still be an agency relationship (and therefore an authorized use of the credit card) if there was apparent authority. Unlike actual and implied authority, apparent authority exists when a third party (a seller) reasonably interprets words or actions by the cardholder to determine that the user was acting with the cardholder's consent. BAK Aviation. Franklin courts have determined that there was apparent authority for an employee to use a credit card given by the employer for uses even outside the scope of actual and implied authority, because the third party seller had no reason to know that the employee was allowed to use the card for non-charter, but not charter, flights. The important factor here is what a seller would know about the user is allowed to buy with the card, not what the user thought. When the cardholder voluntarily gives his card to the user, courts will not limit a cardholder's liability under the Truth in Lending Act, because there is apparent authority. Henry had Bryan's credit card when he purchased the gas, food, and books in April and May. Henry probably had apparent authority here; there was no reason for a seller to know that Henry had permission to use the card for van repairs but not other items such as food and gas. Further, Henry possessed the letter signed by Bryan voluntarily granting Henry permission to use the card, and there were no such limitations stated on the letter. Even if a seller would have inquired into Henry's authority to use the card, the letter would have provided no indication that Henry's authority was limited.

However, Henry's use of the credit card number, without the accompanying card, was probably unauthorized. When Henry made that charge, he was no longer in possession of either the card itself or the letter granting him permission to use it. Henry either knew or should have known at this point that he was not allowed to use the card. Further, he probably did not have apparent authority, because unlike the use of the card for food and gas, the hardware store knew that Henry was not in possession of the card, which should have notified the store that he did not have authority to use the card.

### **IF USE WAS UNAUTHORIZED, WHAT IS THE LIABILITY?**

Even if Henry's use of the card in April and May was unauthorized, the Truth in Lending Act would probably not apply, and Bryan would be liable for the charges anyway. However, the charges for power tools in June probably qualify as unauthorized purchases under the Truth in Lending Act, and Bryan's liability for that purchase would be limited to \$50.

Section 1643 of the Truth in Lending Act limits a cardholder's liability for unauthorized purchases using a credit card to \$50 if certain conditions are met, including a requirement that the unauthorized use must have occurred before the card issuer has been notified that such a use has occurred. Franklin courts have considered negligence on all parties

involved in a transaction when determining whether this section will apply to limit liability for unauthorized credit card charges. *Transmutual Insurance Co. v. Green Oil Co.* In *Transmutual*, an employee of a company opened a credit card without authorization and used the card for three years. The company paid the monthly statements for this period of time, and then disputed the charges when they realized that the card had been opened fraudulently. Although the credit card company was negligent in allowing the employee to open the card, the court said that the company was still liable because they were negligent in not discovering the improper use and in paying the monthly statements for a long period of time.

A court may similarly determine that Bryan was negligent in not discovering the fraudulent charges on the credit card, or that Bryan paying the statements for two months gave him notice of unauthorized purchases, and therefore § 1643 would not limit his liability. However, there is a strong argument that there is a difference in negligently paying monthly bills for three years, as the company in *Transmutual* did, and paying two months' worth of bills for charges that were not unusual in any way. Bryan and Henry shopped at the same places, and upon a glance at the credit card statement, Bryan could reasonably have thought that he made the charges himself, and he therefore did not have clear notice of unauthorized charges. Further, Bryan notified the credit card company as soon as he realized that there were unauthorized charges on his card. Also, the hardware store was probably negligent in accepting a credit card number in lieu of an actual credit card, as the fact that Henry did not have the card in his possession should have put them on notice that something was not right about the transaction. Bryan's liability for the hardware store charges will probably be limited to \$50 under the Truth in Lending Act, because he did not have adequate notice, his negligence in not discovering the charges was minor, and the hardware store itself was negligent in allowing Henry to make the purchase in the first place.

Sincerely,

Miles Anders

## **MPT 2 - Sample Answer # 1**

To: Mr. Al Gurvin

From: Applicant

RE: Review of Your Copyright Infringement Claim

Date: July 28, 2015

Dear Mr. Gurvin:

I have been asked to review your case and issue an opinion on whether or not you should accept the settlement offer from Pro Ball Inc. I recommend that you do take the settlement offer.

### **1. Enforceable Copyright**

In order for you to have a claim for copyright infringement against Pro Ball, it must first be determined that your logo is protectable under copyright. Under 17 USC Section 102, copyrights protect original works of authorship. The distinction between copyrightable and non-copyrightable subject matter was raised in the case of Oakland Arrows Soccer Club v. Cordova. (Cordova). There the court found that a logo for the Oakland Arrows soccer club was not protectable under copyright. The court found that the logo lacked originality and creativity because the logo was a familiar symbol or design with a mere variation in coloring. In coming to this conclusion, the court cited Feist Publications, Inc v. Rural telephone Co. from the United States Supreme Court. There the court held that original means that the work was independently created by the author and that it possesses at least a minimal degree of creativity. The court in Cordova also cited 37 CFR Section 202.1 which covers non-copyrightable materials. Subsection (a) states that familiar symbols or designs are not subject to copyright.

In reviewing your case, it appears that in light of the holding in Cordova, your logo may not be subject to copyright. The logo that you have presented comprises of a hand holding a set of four aces which could be identified as a familiar symbol or design. Monica Dean, the commercial artist and designer for ForwardDesigns stated in an affidavit that there are many versions of this image and that there are several art collections on the internet that are not protected by copyright. If this is true, then any slight variation you make to these public images will not be enough to afford you copyright protection.

### **2. Copyright Infringement**

If it is determined that you have an enforceable copyrighted work, then you must also show copyright infringement. There is a two part test that has been used in the circuit that covers the District of Franklin that was cited in the case Savia v. Malcolm (Malcolm). In order to show infringement under this test, the plaintiff must show: 1) the works are substantially similar; and 2) the alleged infringer had access to the copyrighted work.

From reviewing the fax that you sent to Daniel Luce on September 25, 2014 and the press release, it appears the two images are substantially similar. The outline of the hand is different between the logos, but the logos are otherwise identical. Proving that Pro Ball had access to your logo will also need to be proved. The standard of proof for showing access is quite high. In *Malcolm*, it was determined that the defendant did not have access to the earlier song because it was only available to the public for a short period of time at a single theater and was never later released to the public. In an earlier case on the topic, *Fred Fisher v. Dilingham*, the court found that the defendant was presumed to have access to a song because it was popular at the time. Copying does not have to be intentional (See. *Bright Tunes Music Corp v. Harringtons Music*), the plaintiff just must show the defendant had access to the work.

Here, it will be difficult for you to prove that Pro Ball had access to your logo. The logo was sent to the CEO of the Franklin Sports Authority, not Pro Ball. According to the affidavit of the CEO, the two entities have no affiliation with each other. The CEO also stated that his office is on a different floor than Pro Ball and that he believes he discarded the fax in the trash. Monica Dean, the designer of the team logo swore that she had no contact with Franklin Sports Authority except for when she occasionally met one of her friends. She had never met the CEO that received your logo. These facts, if true, indicate that ForwardDesigns did not have access to your logo. If they are accepted as true by the court, then there has not been any copyright infringement because it will be determined that the Pro Ball logo was created independently.

### **3. Expected Damages**

If you were to litigate the maximum that you would likely recover is \$10,000. As was described to you in the interview with our firm on June 29, 2015, a work does not have to be registered in order to be copyrighted. However, there are benefits to registering a work. First, a work must be registered before a claim can be brought against a potential infringer. It is possible to register the work after the infringement is identified. Second, if a work is not registered at the time the alleged infringement occurred, then the copyright holder is limited to actual damages and the infringer's profits (See 17 USC 412, 504(b)).

According to the press release, there have been no sales to date. Therefore, Pro Ball has not made any profits. You are therefore limited to your actual damages. The test for determining actual damages when there is no track record of sales was illustrated by the court in *Herman v. Nova*. There, the court held that when a person does not have a track record of sales, then evidence can be submitted to show what the person would ordinarily make for the particular type of work. Here, an experienced designer from ForwardDesigns was paid \$10,000 to create the logo. Therefore, the most you will likely make is \$10,000.

### **4. Conclusion**

In conclusion, I would recommend that you take Pro Ball's settlement offer because it will be difficult for you to prove that your logo is copyrightable and that there was copyright infringement. Also the damages that you may recover are not much greater than the settlement offer by Pro Ball and the cost of litigation could exceed the difference.

Thank you for allowing me to review this matter for you. I will await further instructions.

With Best Regards,

Applicant



## **MPT 2 - Sample Answer # 2**

### **Franklin Arts Law Services**

*Pro Bono Legal Services for the Franklin Arts Community*

224 Beckett Avenue

Franklin City, Franklin 33221

To: Al Gurvin

From: Examinee

Re: Your Copyright Claim Against Franklin Aces

Date: July 28, 2015

Dear Mr. Gurvin,

Eileen Lee, who you spoke to in June about your copyright claim, asked me to send you this letter with our opinions as to your claim. I must stress that, as a pro bono legal service, we can evaluate your claim and offer advice as to settlement offers but we will not be able to represent you should you decide to litigate this claim. We will try to help you secure counsel should you decide to go that route, but our representation of you will end at that point. The following is my assessment of your claim and my recommendation on what you should do with the settlement offer from Franklin Aces. I have tried to be as clear as possible but, as some of the laws in this area are quite technical, if you do not understand anything in this letter feel free to call me at any time. I have also included the names of cases and laws which I used to reach my conclusion should you wish to read those yourself.

Before beginning my assessment, I would like to inform you that we have received a settlement offer from Franklin Aces. They have offered to give you one single season ticket for all of the Franklin Aces home games in a prime location for the team's first season. The retail price of that ticket is \$5,000. Should you decide to accept this offer, you will have to sign a document saying that you will not be able to sue Franklin Aces later for infringement on your design. That choice will ultimately be up to you.

### **1. The Likelihood of Success Should You Decide to Litigate**

Should you decide to reject the settlement offer and proceed to trial there are several things that you will have to show to the court. First you will have to show that the picture you drew is copyrightable. You will then have to show that Franklin Aces infringed your rights. Last, you will have to show what damages are appropriate. I will discuss each of these for you.

### **a. Is the Design Copyrightable?**

Whether or not your design is copyrightable is important because you will not be able to sue Franklin Aces for copyright infringement unless you are able to register your design with the United States Copyright Office. The United States Copyright Office will not register your design unless they determine that it is copyrightable. For something to be copyrightable it must be an "original work of authorship." *Oakland Arrows Soccer Club, Inc. v. Cordova* ("*Cordova*"). It is up to the Copyright Office and, later on appeal, a judge to decide whether your design will fall under that definition. While we can never be sure, we can look at past cases to see what individual judges thought was important in determining if something was copyrightable. For instance, one judge said that to be copyrighted a work of art must "possess some minimal degree of creativity..." *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.* ("*Feist*"). That judge went on to say that the level of creativity needed to satisfy that test is extremely low and even a slight amount will work. *Feist*. What will not satisfy this test is a design that is simply a "familiar symbol or design." §202.1. By way of example, in the *Cordova* case, an artist designed a logo for a soccer club and tried to have it copyrighted. The logo was a triangle with different colors inside it. The Copyright Office and the court said that this was not copyrightable because it was a triangle is a familiar symbol and arranging different colors in it doesn't make it unique enough to be copyrightable.

Here, your design could also fall under the "familiar symbol or design" section of the copyright law as did the design in *Cordova*. You could argue that your depiction of the hand holding the cards, the arrangement of the cards, the fact that only aces were used, and the colors makes it sufficiently unique but a court is not likely to agree. Because playing cards are universally recognized all around the world, as is the particular manner of holding the cards in your design, your design is likely not copyrightable. The arrangement of the cards, the depiction of the hand, and the use of only aces is not likely to rise to the level needed to support a copyright.

### **b. Did Franklin Aces Infringe on Your Copyright?**

If the Copyright Office does decide that your design is copyrightable and allows you to register it with their office, you would then be able to bring suit against Franklin Aces for infringement. To succeed you would have to show two things: 1) your design and the design Franklin Aces used are "substantially similar," and 2) Franklin Aces had access to your design. *Savia v. Malcolm* ("*Savia*").

Your design and the Franklin Aces logo are nearly identical so there isn't likely to be a problem with the first element of this test. However, that will not be enough. You will have to show that Franklin Aces had access to your design. Even if they didn't consciously copy your design, if they had access to it a court could find that they infringed your work. Courts will look to see if there is "plausible evidence" that the alleged infringer had access to the copyrighted work or if the access is based on "mere speculation." *Savia*. Here, a court could find either way. The CEO of Franklin Aces Daniel Luce admits to getting the fax with your design and that fax was logged in his fax machine. However, his office is three floors below the office of the designer there and the designer will testify that she never saw the design nor has she ever talked to Daniel Luce. He will testify that he never talked with

anyone connected to the design team and that he threw your design in the trash immediately after receiving it. The only contact with anyone working on that floor that the designer has had is with one person who does not work in Daniel Luce's office. While a court may find more than "plausible evidence" of access based on the fax being received by the CEO and possibly picked out of the trash by someone involved with the design, it is equally as likely (or even more so) that a court will find that this is not enough evidence to show access.

### **c. What Damages Could you Win?**

If you were able to get a copyright registered and show infringement, the court would then look to see what damages you are owed. We can reasonably predict what damages you could be awarded based on past case law and we can then use that to decide how attractive the settlement offer would be.

Unfortunately, your damages would be limited in this case because you did not register your copyright before the infringement took place. *Herman v. Nova Inc* ("*Herman*"). Your damages will be limited to your actual damages and Franklin Ace's profits from the use of the design. You will not be able to recover attorney's fees and costs from Franklin Aces which is important to consider. When determining actual damages, courts typically look to the artist's track record of payments. As you are a mature artist I will assume that you do not have such a track record. Absent a track record, the court will look to what other people employed in designing logos such as this are paid for their services. Here, the designer responsible for Franklin Ace's logo was paid \$10,000. Determining Franklin Ace's profits from the logo would be exceedingly difficult and further, their press release indicates that it won't be used at all until later in the year. Unless other amounts are turned up through discovery before the trial, your damages are likely to be around \$10,000.

## **2. My Recommendations**

I recommend that you accept the settlement offer. This case would be very difficult to win and winning is not likely. Further, should you win, you will likely only receive around \$10,000. You will also have to undergo the expense of registering your design with the copyright office which likely has some fees associated with it and you will have to hire an attorney to bring the case for you. You will likely have to pay these costs whether or not you win your case. I know that your hope was to get around \$20,000 for the case but that is extremely unlikely under these circumstances.

Given that you are a football fan and a fan of the Franklin Aces and given that in your original fax to the team you indicated that all you wanted for your design was tickets to games, I feel that the offer from Franklin Aces is generous and is likely to be more valuable to you than anything you may receive in filing a claim against Franklin Aces.

Thank you for contacting us with your question. I hope this letter has been informative. While I tried to give you an idea of the strengths and weaknesses of your claim and my opinion as to what you should do, it is still just my opinion. The ultimate decision on what to do is up to you. Again, should you decide to go forward and reject the settlement, we will help you acquire an attorney but that will end our relationship.

Sincerely,  
Examinee

## MPT 2 - Sample Answer # 3

July 28, 2015

Dear Mr. Gurvin,

Please allow this letter to be Franklin Arts Law Services assessment as to whether you should accept the offer made by ProBall Inc., ("ProBall") the owner of the Franklin Aces football team.

The likelihood of success, as well as the amount of damages recoverable, if any, are both greatly influenced by whether you register your logo with the United States Copyright Office--and if so, whether the logo is copyrightable.

The likelihood of success in litigation depends on whether there is enough originality of authorship in your design to merit copyright protection, and if so, whether ProBall has infringed on your copyright.

### **A. Whether there is enough originality of authorship in your logo to merit copyright protection.**

Registration of a copyright is a prerequisite to bringing suit for copyright infringement. Thus, you will need to submit an application for copyright registration to the Copyright Office in Washington D.C. to bring suit against ProBall. The Copyright office will then determine whether your logo qualifies for copyright protection.

Pursuant to 17 U.S.C. S102, the standard for copyright is that it protects original works of authorship. Original means that "the work was independently created by the author (as opposed to copied from other works), and it possesses at least some minimal degree of creativity." *Oakland Arrows Soccer Club, Inc. v. Cordova* (U.S. DC 1998) *citing Feist Pub.* (U.S. 1991). "The requisite level of creativity is extremely low." *Id.* Section 202.1 provides examples of works that are NOT subject to copyright protection. A logo in the shape of a triangle colored red, white, and blue has been denied copyright protection because it was considered a "familiar symbol" with "mere variation of coloring" pursuant to Section 202.1(a). *Oakland Arrows*.

A hand, without any other features and is a familiar symbol. Cards are also familiar symbols and these facts might present serious challenges to being successful in litigation. While you may have many arguments as to the artistic value of the work and the connections to the team which it conjures up--"copyright law does not reward effort--it rewards original expression of authorship." Additionally, as sworn to by Monica Dean, she saw many versions of your logo on clip art collections on the Internet, none of which were protected by copyright.

Although the threshold for originality is low, there is a strong likelihood that the copyright office may deny your application. Please be advised, that if the application is denied, you would then need to file an internal appeal within the Copyright Office. If that is also denied, your last resort is to bring a mandamus action seeking to compel the Register of Copyrights. As you know, this course of action would be very expensive.

## **B. It is unlikely that a Court will find that ProBall and Forward Designs Infringed on Your Logo**

In the event that your logo is successfully registered with the Copyright office, you will then need to prove that ProBall and Forward Designs ("FD") infringed on your copyright. According to the affidavits provided, this will be a difficult hurdle to overcome. There is no direct evidence of copyright infringement. Therefore a court would need to determine whether there is circumstantial evidence of infringement by applying a two-pronged test:

- (1) Are the works "substantially similar"?
- (2) Did ProBall/FD have access to the copyrighted work?

*Savia v. Malcom.*

Here, there is no question that the works are substantially similar. Thus, the inquiry will focus on whether ProBall/FD had access to the copyrighted work. If there is no access, there is no copying.

According to the affidavits, Daniel Luce, the recipient of your faxed logo believes that he discarded the logo in the trash. He also affirmed that he had no contact with anyone working for FD. Affiant, Monica Dean also confirmed that she has likewise never met Luce, and furthermore has never had any contact with employees of Franklin Sports Authority (except from a pre-existing friendship with another woman). Both affiants confirmed that they are located on different floors--so physical access, or simply stumbling upon the logo would have been impossible. Ms. Dean swore that she did not recall seeing any sketch of any idea for the logo created by anyone prior to creating her design. Thus, the opportunity for ProBall/FD to gain access to your logo is not only remote, it is nearly impossible and there is no plausible evidence based upon testimony to date, that ProBall/FD had access to your work. Thus, your claim for copyright infringement will likely fail.

## **2. Your Recovery of Damages Will Include Actual Damages and The Infringer's Profits--If Any**

If ProBall/FD is liable to you for copyright infringement, the court will assess your damages. The calculation of damages will depend on whether the infringer (ProBall) takes action after appropriating your logo. *See Herman v. Nova, Inc.* For example, such action would include whether ProBall begins selling merchandise with the logo on it. Since you do not register your logo with the United States Copyright Office before the act of infringement occurred, your damages are limited to your (1) actual damages and (2) the infringer's (ProBall) profits. 17 U.S.C. SS412, 504(b). If ProBall moves forward with merchandising manufacturers (as it plans to per its May 28, 2015 press release), you would be entitled to profits resulting from the infringement. ProBall's profits have the potential to be very large. However, if they design another logo and proceed with another (not substantially similar) logo, then you will not be entitled to any profits from the use of the other logo.

As for your actual damages, because you are an amateur artist, it appears you have no track record of payments for prior work to be used as evidence in determining a proper amount of damages. The evidence in this case shows that ProBall was going to pay FD

\$10,000 for designing the team's logo. Accordingly, it is likely that a court would likewise pay you \$10,000 in actual damages.

### **CONCLUSION**

Because it is unlikely that you will succeed on the merits of establishing a protectable copyright, and an infringement of that copyright, I would strongly suggest that you take the offer from ProBall. As you are most likely aware, the costs associated with litigating a copyright matter can be very expensive. It is possible that you would have to assert an appeal with the Copyright office and if ProBall does not have any actual losses, your damages may be limited to actual damages of approximately \$10,000. Thus, the cost of litigation with attorneys fees would be prohibitive to any recovery you may have.

Additionally, it bears mentioning that in your fax to Daniel Luce, you stated that you wouldn't want anything from the team if they used your logo--except maybe some tickets to games in the new stadium. In light of the factors discussed above, I would strongly encourage you to take the offer from ProBall.

Should you have any questions or further wish to discuss the above, please do not hesitate to contact me.

Very Truly Yours,

Applicant