INDIANA ESSAY
QUESTION I
FEBRUARY 2004

Mary, an artist, owns a farm in rural Indiana. She decides to start a ceramic business in the barn. She asks her wealthy friend Bob to invest $50,000.00 in the business and offers Bob 75% of the profits of the business for the first five years and 50% for each year thereafter. Bob agrees and gives Mary the $50,000.00, but tells Mary that he wants no day-to-day involvement in the business and wants no liability in connection with its operation. Mary agrees that she will be solely responsible for the day-to-day operation of the business and that Bob will have no liability. Bob and Mary do not reduce their agreement to writing or file any paperwork with the Secretary of State. Mary calls the business "Clay Creations."

To generate more income, Mary enters into an oral agreement with Farmer. The agreement reached is that Farmer will plant crops on the farmland and that she and Farmer will split the proceeds from the sale of the crops equally. Farmer is to provide all equipment, supplies (such as seed, fertilizer, and fuel), and labor. Farmer makes all decisions what to plant, when to plant, when and where to sell, etc. Mary and Farmer's relationship continues year after year.

Three years later, the ceramic business is thriving. That year, Mary decides she should be compensated for all of her hard work and creativity and, without talking to Bob, Mary writes herself a check for $40,000.00 before she splits the profits with Bob.

The next year, a customer of Clay Creations slips and falls on some ceramic glaze that Mary dropped on the floor and forgot to clean up. The customer breaks her wrist in the fall. The customer sues Mary, Bob and Clay Creations.

That same year, the bottom drops out of the soybean market, which happens to be the crop Farmer planted that year. After harvesting and selling the soybeans, and dividing up the sale proceeds, Farmer does not have enough money left to pay for the seed and fertilizer he purchased on credit from Supplier. Supplier sues Farmer and Mary contending that they are both liable for the unpaid bill. In the complaint, Supplier alleges that Farmer represented himself to be in business with Mary. Supplier himself never had any conversations or business dealings with Mary.

1. Analyze the business relationship between Mary and Bob. Also analyze whether, based on that business relationship, Bob may be liable to the injured customer who has sued Mary, Bob and Clay Creations.
2. Describe and analyze any claims Bob may have against Mary.
3. Analyze the business relationship between Farmer and Mary and whether, based on that business relationship, Mary may be liable to Supplier.

Explain your answers.

INDIANA ESSAY
QUESTION II
February 2004

Charles Contractor comes into your office for advice about a major public construction contract that he recently bid on. Though his company was the low bidder, Charles did not receive the contract. Instead, the County Board of Public Works awarded the contract to Wanda Wilson's company, because it is a woman-owned business enterprise.

Charles tells you that he doesn't believe that giving a preference to a company like Wanda's is fair. Charles was born to a poor family and has struggled most of his life. He was finally able to "pull himself up by his own bootstraps" and built a moderately successful construction business. Like many such businesses, though, it has recently fallen on hard times. Wanda, he claims, has not suffered similar disadvantages.

You tell Charles that you will talk to the County Board of Public Works and find out what, if anything, can be done. You meet with the Board President, and he tells you that the Board really wanted to award the contract to Charles, both because Charles was the low bidder and because the Board is familiar with Charles' "rags to riches" story. But the President tells you that the Board's hands are tied because a state statute requires that it award a certain percentage of its contracts each year (by dollar value) to woman-owned businesses, and the contract in question is so large that it must be awarded to a woman-owned business for the Board to comply with the statute.

You research the statute and find out that it applies only to counties with populations of between 200,000 and 300,000 people. Only Charles' county falls within that range. While there are similar statutes governing other Indiana counties, they all have lower percentages of contracts that have to be awarded to woman-owned business enterprises, and the Board could comply with those statutes (if they applied) and still award Charles the contract.

Prepare a memorandum describing in detail the challenges you can bring under Indiana law to help Charles obtain the contract, including your evaluation of the likelihood of success on each. Assume that the procedural mechanism you will use is a suit for declaratory and injunctive relief, and that you need not exhaust any additional administrative remedies.

INDIANA ESSAY
QUESTION III
February 2004

John Smith, an Indiana resident, owned a business specializing in caring for rare and expensive potted plants. He operated this successful business from a building located on the two acre family homestead he and his first wife, who is deceased, purchased twenty-eight years ago. The homestead is in his name alone. John had never taken any steps since his second marriage, to Kate, to change the title to the property.

John's two children by his deceased wife graduated from college and have since moved to the Northeast. John ran the business on his own, except for occasional weekend assistance from Kate and her seventeen-year-old son from her previous marriage.

John's customers regularly delivered their prized plants to John in order for him to administer his specialized treatment. He normally had a customer's plants for two weeks or less. On January 27, 2003, Calvin Customer dropped off for treatment thirteen valuable plants from the island of Madagascar and has not returned to pick them up.

On April 1, 2003, John suddenly became ill, and Kate rushed him to the hospital. Within three days, he died. The day before his death, with Kate and two nurses at his side, he told his wife: "Please let my two children and your son know that I love them. I love you, too. I never went to my lawyer's office to make a will, but of course you know that I leave you the family homestead and everything that's in it. Also, everything I've accumulated in my business belongs to you."

After John's death, his children are stunned to learn that their father left them nothing. At Kate's request, the two nurses who stood at John's bedside recount John's dying words and confirm them in writing.

Kate begins to operate the business and keeps all the proceeds for herself. She refuses to return the Madagascar plants to Calvin Customer and advertises them for sale instead.

Analyze who will take John's assets, and give the reasons for your conclusions. Analyze whether Calvin Customer has a right to the bushes from Madagascar and why or why not.

INDIANA ESSAY
QUESTION IV
February 2004

Aaron Brown is an adult living in Indiana. Aaron had a knee replacement in an Indiana hospital by an Indiana surgeon in June 2002. Two weeks after the surgery, Aaron and his surgeon noticed that the appliance in the knee did not work properly. Aaron could not return to his employment as an attorney in a lucrative practice, and he suffered severe pain on a daily basis. He could not perform any activities except sleeping in a recliner and watching television.

After six months passed without improvement, Aaron's surgeon recommended removing the appliance. When the surgeon removed the artificial knee, he found that the appliance had a crack in it from top to bottom. The surgeon removed the cracked appliance and placed a new appliance in the knee. The second appliance worked well, and Aaron returned to work and regained full, normal function in his knee, one full year after the first surgery. Aaron lost one full year's income, totaling $150,000.

Aaron retains you, an Indiana lawyer, to recover damages for the lost income and the pain and suffering he experienced. You file a lawsuit against the Indiana manufacturer in an Indiana state court. After you file the suit, you talk to Aaron's surgeon, who still has the cracked appliance. The surgeon tells you that he will mail the appliance to the manufacturer (the defendant in your suit) for testing, and he does so. The manufacturer's president writes a letter to the surgeon, a copy of which you receive from the manufacturer's attorney, acknowledging that the president had personally received and examined the appliance and would have it tested for defects immediately.

In your first discovery request, you ask what the results were of any testing done on the cracked appliance. You also request an opportunity for the expert you have retained to examine the appliance.

(A) Assume seventy-five days have passed, and you have received no response from the manufacturer's attorney. Describe the steps you must take to obtain responses.

(B) Assume that following your efforts to obtain responses as outlined in your response to (A), you receive the following response under oath from the manufacturer's president: "The appliance in question was in my possession but cannot now be located. I believe I inadvertently discarded it when I was preparing to send it to an outside expert for testing. If I locate it, I will inform counsel for Plaintiff immediately." Describe your options under the Indiana Trial Rules to respond to this disclosure and analyze which option you would recommend to your client, and the reasons why.

In your response, assume the surgeon met his duty to exercise reasonable care. Do not discuss any medical malpractice issues.

INDIANA ESSAY
QUESTION V
February 2004

In 1996, Mother, age seventeen, gave birth to a child. Father was seventeen years of age as well. Paternity was established. In the paternity case, Mother received sole custody and Father received parenting time and was ordered to pay support. Maternal Grandparents were then appointed guardians of Child so that health insurance could be provided for Child. Between 1996 and 2002, Mother lived in a number of homes and had several live-in boyfriends; during this period, child sometimes lived with mother and sometimes with grandparents. Mother maintained steady employment from 1998 until January 2004, when she quit. Mother wanted to terminate the guardianship for several years. Finally, in September of 2003, Grandparents entered into an agreement with Mother terminating the guardianship, and the court approved the termination.

In February of 2004, Maternal Grandparents file an ex parte Petition For Immediate Temporary Guardianship as well as a Petition For Permanent Guardianship. Father filed a Consent to Grandparents' actions. In the Temporary Guardianship petition, Grandparents assert an emergency exists because Mother has met a man through the Internet and is planning to move to Florida with him in the next thirty days. Maternal Grandparents assert it is an emergency because Child will be uprooted from his first grade class. They also seek an order appointing them as the permanent guardians because Mother had promised them she would lead a stable life when the former guardianship was terminated in 2003.

Question: What is the appropriate action for the trial court to take on the ex parte Petition For Immediate Temporary Guardianship? Why?

At the hearing on the permanent guardianship, Mother admits that she met her new boyfriend/fiancé on the Internet in May of 2003. They are planning to marry, but they don't know when. She visited him in the summer of 2003, and he came to Indiana to visit her from Thanksgiving through the end of December of 2003. He is a self-employed roofer who has a roofing job lined up upon his return to Florida. Mother quit her job. She is taking the early withdrawal penalty and withdrawing $5,000.00 from her retirement plan to help cover expenses until she can obtain employment in Florida. Mother and her boyfriend/fiancé have rented an apartment with the rent paid through the end of February in Florida. They testify that they need to hurry and move to Florida so boyfriend/fiancé can work and pay the March rent.

Question: Should the trial court grant Maternal Grandparents permanent guardianship? Why or why not?

INDIANA ESSAY
QUESTION VI
February 2004

Bob and Ray opened a tire store in May 2002. At the time they opened their store they formed an Indiana limited liability company for the store's operation to be known as "Tire Max, LLC" ("Tire Max"). Prior to commencing operations, Tire Max purchased several hundred tires from Prime Tire Corporation ("PTC"). Tire Max granted a security interest in its tire inventory to PTC to secure payment of the inventory acquisition loan. PTC filed a financing statement with the county recorder in the office in the Indiana county where Tire Max was located.

Three months after purchasing the tires, Bob and Ray obtained a line of credit from Third National Bank. Third National Bank obtained a security interest from Tire Max in all of Tire Max's equipment and personal property. Third National Bank perfected its security interest by filing a financing statement with the county recorder in the Indiana county where Tire Max was located and with the Indiana Secretary of State.

Six months after going into business, Bob and Ray ran into severe financial difficulties and were unable to meet their current financial obligations. Tire Max defaulted on its obligations to Third National Bank and PTC, and both entities filed suit to foreclose their security interests. At the time the suits were initiated, the only assets Tire Max had were its tire inventory.

Discuss and analyze all issues pertaining to the security interests of Tire Max and PTC and their respective abilities to obtain the tire inventory.

Indiana Essay Question I
Sample Answer
(verbatim transcription of answer written by an examinee)
February 2004

(1)

A partnership (Pship) is an agreement between two or more persons to carry on a business for profit. A Pship does not have to be in writing. Unless, the Pship is otherwise, Partners share in the profits and liabilities of a Pship equally. Receipt of profits, not for rent or wages, is prima facie evidence that the person receiving such is a Partner. Regardless of what Bob told Mary concerning liability, all partners of a general pship are liable personally for pship debts. In fact, Partners are held responsible unless they are a limited partner. Bob and Mary still to have started a pship, which is easy to do since there are really no formalities. Bob should have filed a certificate of limited partnership with the state if he wanted limited liability. Since Bob doesn't have limited liability, he and Mary may be liable to the injured customer along with Clay Creations. IF a Judgement is entered for the customer, the money would first come from Clay Creations (Pship) then if NOT enough from Mary and Bob.

(2) Regarding the customer, if a judgement is entered and Clay Creations is bankrupted after paying, then Bob and Mary will have to come up with the rest. Bob can try to sue Mary for indemnification a contact theory since she agreed to be solely liable. Also since the customer's injury was caused by Mary's negligence.

Bob can also sue Mary because she breached her fidiciary duty of loyalty. When there is a Pship, none of the partners can unilaterally decide to pay him/herself because doing so is self-dealing. However, Mary can defend by saying that she handled the "day to day" operations per Bob's request and that it was within her discretion to compensate herself. This will likely fail because NO agreement was made concerning Mary being paid and Partners are usually only paid for extrordinary services.

(3) Mary and Farmer are probably NOT PARTNERS. Proceeds and Profits are two different things. Proceeds are the amount they are getting from their crop selling agreement NOT Taking costs into consideration. Profits on the other Hand are the amount left after expenses. A Partner must share in the benefits (profits proceeds $) and the burdens (cost) of the pship. IT appears that Farmer is an independent contractor since he provided all the equipment, supplies, and labor and he & Mary just SPLIT the proceeds since it was her land. This is very analagous to share cropper agreements IN the agricultural days of our county. I

If a court finds that Mary and Farmer are partners, then Mary May be liable to supplier because partners are agents for the partnership and each other. However, if the court finds that Mary and Farmer are NOT partners, then Mary will only Be liable if there was apparent/ostensible authority and supplier relied to his detriment. Since Mary Never had any conversations or business dealings with supplier and never held Farmer out to be her agent then she probably won't be liable to him. However, Supplier can argue that Being on Mary's farm and farming it gave the improper appearance to the public that they were partners and that he relied on Farmer's representation, then Mary should be estopped from Denying his claim because she benefited from the seed and the fertilizer. Mary will probably still win because his argument unintentionally points out that if it was a real Pship, Supplier would have been paid because the debts would have been distributed before Farmer and Mary get their shares, but since NO partnership then Mary got her "proceeds" and Farmer got his "proceeds" which were enough to cover Supplier Bill.

Indiana Essay Question II
Sample Answer
(verbatim transcription of answer written by an examinee)
February 2004

TO: Charles Contractor
FROM: Applicant
DATE: 2/24/04
RE: Suit to seek award of contract

(I) Suing for a Declaration Judgment & Injunctive Relief

It appears that there are several successful challenges which we may bring to obtain the contract that was denied by the County Board of Public Works.

In order to obtain the most immediate relief and to obtain the greatest chance of having the contract awarded to Charles' construction company, we will bring a suit in equity, seeking two remedies: (1) a declaratory judgment and (2) injunctive relief. A declaratory judgment is a statement by the court regarding the legality of a law, or the interpretation of a legal instrument such as a contract. A declaratory judgment can be issued where there is an issue of contention between two or more adverse parties, where the parties are seeking a ruling of interpretation, rather than an award of damages. A declaratory judgment is the best remedy to seek in our suit because the trial court can move an action for a declaratory judgment ahead on the calendar, and it will provide quick, efficient relief, if we are successful.

We will also seek an injunction to keep the board from awarding the contract to Wanda, or to keep the contract award from moving forward. To obtain this relief, we will need to show that there is an important issue of law involved, that it is a matter of public importance at stake, that our ultimate relief if we sue for damages will be inadequate, that the opposing party has been given notice of our suit for an injunction and has had an opportunity to be heard, and that we will likely prevail on the merits. Since there are issues of gender discrimination involved, and the best remedy is the awarding of the contract, we will have a good chance to obtain an injunction, since there are several constitutional challenges we can make under the Indiana Constitution.

(II) Challenges under the Indiana Constitution

A. Special Legislation

Since there are no further administrative remedies which we need to exhaust, we will challenge the award of the contract in trial court (superior or circuit court), where we will also argue that the law awarding a set percentage of contracts to woman-owned businesses violates the provision in the Indiana Constitution which bars special legislation. Special legislation is generally prohibited, and is legislation that does not apply uniformly throughout the state. Here, the facts indicate that the law in question only applies to counties with a certain population, though there are similar laws applying to counties with a lesser population. The test for special legislation is whether the subject matter of the law is amenable to general application, and if it is being applied specifically. Here, the legislation is not uniform throughout the state. Nevertheless, courts have basically allowed legislation that applies to counties on the basis of population, under the rationale that eventually it could apply to all counties. Courts tend to be diferential where legislation is challenged as special, and this we should make other constitutional challenges as well.

B. Due Course of Law

The due course of law provision in the Indiana Constitution is similar to that in the federal constitution, guaranteeing due process before one is deprived of property. For administrative actions, the due process principles are codified in the AOPA, which applies to state agencies. Here, we could argue that denying the contract on the basis of is a violation of the due course of law provision, as a property right, the award of the contract, would have gone to Charles' construction company but for gender reasons.

C. Equal Privileges and Immunities

Art I, section 23 of the Indiana Constitution provides for equal privileges and immunities, somewhat analogous to the Federal Constitution's concept of equal protection, but with a different analysis.

When interpreting the Indiana Constitution, courts look to the text, history, framers' intent, and precedent under the constitution. The fact that the constitution was changed in 1984 to include gender-neutral language will assist us in challenging this gender-based law on the awarding of contracts.

The equal privileges and immunities clause asks (1) if the disparate treatment on the basis of gender is rationally related to the inherent characteristics of the class, and (2) if those within each class are treated equally. Here, we can challenge the law because it does not treat all male-owned contractors equally but varies based on their geographic locale. *FN

D. Germaneness

We could also challenge the law as lacking germaneness since it deals with more than one issue. However, courts are very deferential in reviewing laws under the germaneness requirement of the Indiana constitution, and thus this is not our best challenge.

In sum, if we can demonstrate likely success on the merits on any of these issues, we may be able to obtain an injunction, since there are issues of public concern involved.

FN* We can also argue that the disparate treatment of contractors on the basis of gender is not rationally related to the goals of the law. While review under the equal privileges and immunities clause is deferential, we could argue that based on the adoption of gender-neutral language in the constitution that equal treatment on the basis of gender is a "core constitutional value", which is similar to Price's holding on free expression, the legislature may not materially burden. Thus, while review under the equal privileges and immunities clause is generally not under a strict or exacting standard, we could potentially get the court to review this law more stringently under earlier case law.

Indiana Essay Question III
Sample Answer
(verbatim transcription of answer written by an examinee)
February 2004

John's Assets

The probate court would allocate ½ of the personal property to Kate with ¼ in real property. The two children from his prior marriage will receive ½ personal and ¾ real property from John's estate.

At issue is whether John's oral statements at death constitute a valid will.

Under Indiana probate law, nuncupative wills (oral wills) are valid if death is imminent and person dies from that imminence. Oral wills are limited to personal property with value of 1K unless in military then 10K. Two disinterested witnesses are required with the oral statements placed into writing within 30 days. Finally, for an oral will to be valid it must be sent to probate within 6 months and may not revoke a written will. If a person does not have a will or an invalid will then the person's estate will be governed by the laws of intestacy. A subsequent wife will receive ½ personal property and ¼ real property if there are children from a prior marriage. The children from prior marriage will receive the remainder.

Here, John attempted to make a nuncupative will. However, it would be invalid under Indiana law. He tried to transfer both real and personal property to Kate. The personal property is assumed to be over 1K and would not constitute a valid nuncupative will. Kate and John's children would claim under intestacy law because John did not have a valid written will.

Kate would receive ½ personal property within John's probate estate and a value of ¼ in real property. The children from John's prior marriage would split the remainder of John's estate equally. Kate's seventeen year-old son would receive nothing from John's estate under intestacy law. He was not a biological son of John's nor was he adopted by John.

Calvin Customer's Bushes

A court would find that Calvin Customer should obtain his bushes from Kate.

At issue is whether Calvin has a right to the bushes he left in John's care.

Under Indiana law, abandoned property is property where the owner shows actual intent to give up both title and possession to the property.

Here, Calvin left his expensive and rare bushes with John's business for care and upkeep. He left them there in January 27, 2003 and has now come to claim his property. The facts do not state that he has any intent to give up both title and possession to the bushes. No mention is made regarding a contract for time the bushes were to be kept but John is in the business of caring for expensive plants, Calvin did not abandon the bushes.

A court would order Kate to return Calvin's expensive bushes because he showed no actual intent to give up both title and possession to his property.

Indiana Essay Question IV
Sample Answer
(verbatim transcription of answer written by an examinee)
February 2004

In general, the scope of permissible discovery includes those matters relevant to a party's claim or defense or reasonably calculated to lead to the discovery of admissible evidence.

The items at issue here, the test results, if any, and the knee appliance are critical to establishing the manufacturer's liability for manufacturing and marketing a defective product.

A. Steps to obtain responses

Assuming the "first discovery request" was a request for production of documents and tangible things, Defendant's response would have been due within 30 days of service of the request (plus an additional three days if the request was served by mail).

After 75 days, Defendant's responses are long overdue. However, the first action required under the Indiana Trial Rules, is a conference among counsel, during which counsel engage in a good faith effort to resolve any issues before resorting to court intervention.

Assuming opposing counsel does not agree to comply with the discovery request voluntarily, I would prepare and file a motion to compel the production of the test results and the appliance. This motion must include reference to the specific discovery requests at issue, an explanation of the need for the matters requested, (i.e., within scope of permissible discovery) that Defendant has failed and (as of the conference with opposing counsel) refused to comply, and requesting that the court order compliance. As a practical matter, it would be effective to attach, as exhibits to the motion to compel, highlighted copies of the discovery requests at issue and the letter from Defendant's president promising to have the appliance tested immediately. Also, a proposed order compelling responses to the discovery requests should be attached to the motion and brief.

If Defendant fails to comply with the court's order compelling discovery, I would continue to seek compliance by asking that the court assert additional pressure. The most likely results would be contempt, awarding of attorneys fees, awarding an adverse inference, i.e., that the trier of fact may infer from Defendant's failure to produce the results or appliance, that these items would have produced negative results for Defendant (e.g., that the appliance was indeed defective as alleged), or, if the court considers Defendant's conduct sufficiently egregious, it may order "death penalty" sanctions, i.e., enter default judgment against Defendant.

B. Response to disclosure

Under the Indiana Trial Rules, the scope of permissible discovery extends only to matters within a party's (or non-party's) possession, custody or control. By offering this sworn statement, Defendant has attempted to remove the appliance from the realm of proper discovery. However, because the statement is sworn and because we lack the power to read Defendant's mind or enter its facilities to search for the appliance, we will largely be bound by Defendant's word. Of course, we should request additional discovery relating to the matters set forth in the statement, including how it was discarded, when, where, under what circumstances, who else had access to it, and who else know about it.

Moreover, the purported inability to produce the appliance certainly does not relieve Defendant of the obligation to produce the test results, if any exist.

Because Defendant has effectively prevented us from accessing vital evidence in our claim against Defendant, we should consider several options: (1) we could request that the court hold a show cause hearing, where Defendant should have to demonstrate why it should not be held in contempt; (2) we can request and adverse inference (see above); (3) amend the Complaint to assert a spoliation claim; or (4) move the Court for entry of default judgment.

Contempt is unlikely because Defendant will undoubtedly argue it did not act intentionally in disregarding the court's order but negligently. An adverse inference would be helpful. This is probably the most likely course. The Court will be hesitant to enter a default judgment unless we establish that Defendant's "accidental" loss of the appliance was actually willful concealment. Finally, the spoliation claim would be of little use because it would probably not address the magnitude of harm caused by the loss of the appliance.

Indiana Essay Question V
Sample Answer
(verbatim transcription of answer written by an examinee)
February 2004

Question One:

In considering the ex parte Petition for Immediate Temporary Guardianship, the court will consider a variety of factors.

First, a procedural rule should be addressed regarding the ex parte hearing. In order for a hearing to be ex parte, a party must certify: (i) what efforts were made to contact the party being excluded; (ii) irreparable injury if it is not heard immediately; and (iii) a party bringing an ex parte order must present both sides of the case because the other side isn't there to present the evidence in their favor.

The likelihood of an ex parte order here is very slim. First, the child still lives with her mother and she has sole legal custody. Second, mother is moving (or desires to move) to Florida with him in 30 days. This gives the mother plenty of time to be heard. Thus, ex parte is not really warranted here, especially absent a showing of efforts made to contact mother, irreparable injury, and a showing of both sides of the case by the grandparents.

As far as the Petition itself, the court will look heavily upon the best interest of the child factors. Those factors will also be considered in the permanent guardianship analysis.

It is unlikely that the court will grant the Temporary Guardianship Motion, since Grandparents were guardians of the child but were only the guardians for 6 years so that support would be paid. For temporary immediate guardianship, there hasn't been a strong enough showing by the Grandparents that this is an emergency situation so severe as to hear this ex parte and rule immediately. They are more likely to succeed on the permanent guardianship claime.

Question Two: With respect to Maternal Grandparents' request for permanent guardianship, the court will place great importance in the best-interests of the child analysis. Under this analysis the following factors are considered: (i) the age and sex of the child; (ii) the wishes of the parents; (iii) the wishes of the child, with greater weight placed on this factor if the child is 14 or older; (iv) the child's interrelationship with family, such as siblings; (v) the child's adjustment to home, school and community; (vi) the health of the parties; and (vii) whether the child had been cared for by a de facto custodian.

Balancing these factors, the courts also pay special attention to a child's interest of staying with his parents. Anyone challenging guardianship or even visitation must presume that the child's best interests with respect to his or her grandparents are being taken care of by the custodian parents. In other words, it is the presumption that the parent acts in the best interests of the child, making it hard for a "de facto custodian" to overcome this presumption. Further, Indiana law has also included as a factor in the analysis of whether a de facto custodian should

Indiana Essay Question VI
Sample Answer
(verbatim transcription of answer written by an examinee)
February 2004

A security interest in its broadest sense is a concept whereby one party (creditor) loans or extends credit to another party (debtor) and the creditor obtains an interest in the property (collateral) of the debtor. Security interests are governed by Article 9 of the Uniform Commercial Code which has been adopted by the state of Indiana.

The first requirement for the validity of a security interest is that there be "attachment," the security interest must attach to the collateral. A security interest is said to be attached when (1) a creditor gives value and takes an interest in the debtor's collateral and (2) the debtor has rights in the collateral.

Next, after a security interest attaches it must be perfected. Perfection merely provides notice "to the world" of the agreement between the debtor and creditor.

These concepts can now be applied to the transactions between Tire Max, PTC, and Third National Bank.

The security interest between Tire Max and PTC is unperfected, and consequently PTC would have no rights in Tire Max's inventory. The issue surrounding this transaction pertains to perfection of the security interest.

The transaction between Tire Max and PTC created a purchase money security interest or (PMSI). A PMSI is created when credit is extended for the sole purposes of acquiring property and a security interest is then granted in the property acquired. A PMSI transaction will give rise to an automatic perfection period of 20 days but the perfection will expire if the security interest is not perfected by some other means. Generally security interests may be perfected by filing a financing statement with the Secretary of State's office where the debtor resides.

Here, the facts reveal that PTC filed a financing statement with the county recorder in the Indiana court where Tire Max was located. This manner of filing is insufficient. Any other party that extends credit to Tire Max and takes a security interest in Tire Max's inventory would have priority.

As between PTC & Tire Max alone, the security agreement between them is still valid and enforceable. This, despite PTC's misfiling it still has priority in Tire Max's inventory over Tire Max itself. Consequently, Tire Max's default on its obligation to PTC would justify PTC's foreclosure on the inventory.

A secondary issue in this matter concerns the security interest of Third National Bank. The facts reveal that Third Nation Bank took a security interest in Tire Max's "equipment and personal property" and properly perfected that interest by filing with the Indiana Secretary of State. While this filing would cover any equipment owned or possessed by Tire Max, it would not likely cover the inventory.

Article 9 of the UCC as adopted by the state of Indiana places emphasis on certain categories of collateral. These categories include goods, inventory, equipment, general intangibles, accounts, chattel paper, etc. These different types of collateral have different methods of perfection, and while filing a financing statement may perfect one category of collateral, it will not suffice for others.

Here Third National took a security interest in "equipment and personal property", as provided in the financing statement filed with the Secretary of State. Because "inventory" is not "equipment" for purposes of UCC, the filing will be insufficient. Further, the filing of a

financial statement for "personal property" would not act to perfect an interest in "inventory" as "personal property" is far too vague a description and not recognized as a category of collateral by the UCC.

Therefore, neither Third National nor PTC would be perfected as to an interest in Tire Max's inventory. However, the security agreement between Tire Max and PTC regardless of the non-perfection would likely allow for PTC to repossess the inventory.

MPT Question I
Sample Answer
(verbatim transcription of answer written by an examinee)
February 2004

IN THE CIRCUIT COURT OF WILLAMSON COUNTY,
STATE OF FRANKLIN.

STATE	)	
	)	
V.	)	CASE NO._____
	)	
MILLER	)	

BRIEF IN SUPPORT OF ADMISSION OF PRIOR ACTS
UNDER FRANKLIN RULES OF EVIDENCE

STATEMENT OF FACTS

Defendant, Tom Miller, is charged with two counts of aggravated assault against Jan Adams, stemming from actions taken by Defendant on November 5, 2003 and October 29, 2003. As a result of his entered plea of not guilty, the case at hand is set for jury trial.

The problem at hand is that Defendant had committed other acts of domestic violence and abuse towards Ms. Adams and her daughter Sara during the time he lived with them from June 2001 to September 2002. He has also been convicted of an assault against Ms. Adams on September 21, 2002.

Because all of Defendant's prior acts of misconduct have involved acts against Ms. Adams and her daughter, the prosecution seeks to admit this evidence during the jury trial.

In accordance with Franklin Rule of Evidence (herinafter, "FRE") 418E, the prosecution gave the defendant and his counsel timely notice of its intention to use these three prior acts of violence in his upcoming jury trial. The defense, however, objects to its admission, stating the following: (i) none of the prior incidents constitutes domestic violence under Franklin Penal Code §501, and so FRE 418 does not apply; (ii) each prior incident constitutes inadmissible character evidence under FRE 404A; and (iii) Even if the evidence is admissible under FRE 404B or 418, the court should exercise its discussion under FRE 403 to exclude the evidence.

The prosecution and defense have subsequently been ordered by the Honorable Gebippe to prepare concurrent briefs so that he may rule on the admissibility of these factors.

ARGUMENT

I. § 501 of the Franklin Penal Code provides that a man who lives with another woman for substantial length of time and abuses her during this living arrangement, has committed domestic violence.

§ 501 FPC.

Further, the penal code provides that the following factors may be considered in determing whether this "cohabitation" requirement exists are (A) sexual relations between the parties while sharing the same living quarters; (B) sharing of income or expenses; (C) joint use or ownership of property; (D) the parties' holding themselves out as husband and wife: (E) the continuity of the relationship; and (F) the length of the relationship.

In accordance with the Deposition of Ms. Adams, taken by detective Tina Ruiz (see attached exhibit "A"), A, B and C above are true, as Ms. Adams herself stated that she and defendant had a close, personal and intimate relationship, that they lived together, and that they shared expenses for almost a year. Though the facts do not indicate that they held themselves out as husband and wife, their relationship continued without interruption for approximately 15 months.

For these reasons, it is undoubtedly the case that Defendant meets the "cohabitation" test of § 501 of the Franklin penal code.

In addition, § 501 (a) of the Franklin Penal Code provides that "abuse" necessary for domestic violence means intentionally or recklessly causing or attempting to cause a person bodily injury or placing a person in reasonable apprehension of imminent bodily harm.

On February 12, 2003, Defendant, in a rage against Ms. Adams to "drop his charges", intentionally pushed her against the wall and stuck his finger in her eye, causing her bodily injury. After he left, he subsequently threw a rock through the window, which scared her.

Though this act occurred after he had moved out of the house, this is still considered domestic violence because of the permanency of the relationship and continuity of the relationship, because even though they had broken up, Defendant had retained a key to Ms. Adams' apartment and subsequently bothered her.

Further, on September 21, 2002 Defendant pushed Ms. Adams' young daughter Sara into a wall. On July 4, 2001, defendant pushed Ms. Adams for the first time.

All of these actions constitute abuse during cohabitation, thus warranting them domestic violence claims.

II. Past crimes occurring on specific occasions may be admissible to prove motive, opportunity, intent, preparation, common plan, identity, or absence of mistake or accident

FRE 404A provides that offering evidence of a person's character poses a threat that the trier of fact will be distracted from the central issues of the case and decide the case based on the operative facts. State v. Grubb

FRE 404B, however, allows the prior acts to be admissible for reasons such as motive, intent, plan, or absence of mistake or accident, which are all evident in Defendant's actions towards Ms. Adams. He made it his motive to abuse her, with intent, and even carried out a plan to enter her home after she evicted him. All of these qualities and actions came under 404B and should be admissible.

III. Past instances of domestic abuse which have been proven and were similar and no more egregious than the charged offenses pose little likelihood of a confused, misled, or unduly prejudiced jury.

State v. Beck

The court may exclude evidence under 403, while weighing specific factors: (i) an examination of the nature, relevance and possible remoteness of each offense; (ii) the degree of certainty of its commission; (iii) the burden on the Defendant of defending against the uncharged offense; (iv) the likelihood of confusing the jury; and (v) its likely prejudicial impact on the jurors.

Like in Beck, the prior incidents of domestic abuse introduced in our case were of the same nature and displayed a pattern of abuse, all within 2 ½ years prior to the crime that Defendant is now charged. The past instances, to which he was convicted or does not dispute, were very similar and no more egregious than the charges at hand.

Therefore, there is little basis for a confused jury.

Res

MPT Question II
Sample Answer
(verbatim transcription of answer written by an examinee)
February 2004

MEMORANDUM

To: Thomas Isley
From: Applicant
Re: Rivera v. Baldisari Amusement Parks, Inc.

You have asked me to prepare a memorandum answering two questions regarding certain items of evidence in the above-referenced matter: (1) what steps should be taken to ensure the evidence is available in court; and (2) what must we do to establish the authenticity of each item of evidence. I will address each piece of evidence, and each question, in turn.

I. Frank Electronics, Inc.'s Personnel File on Cara Rivera

A. Necessary steps to get item to court.

We will need to file a subpoena under Franklin Code of Civil Procedure (FCCP) §§ 1985, 1986. Under § 1985(a) & (b) we will need to get a subpoena duces tecum and prepare and affidavit to be served on Nancy Sanders, Frank's Director of Human Resources and the custodian of Cara Rivera's personnel file. As attorney of record in this matter, under § 1985(c), you may sign and issue the subpoena duces tecum and it need not be sealed. Also, since we are dealing with employment records with Ms. Rivera's personnel file we will need to conder FCCP § 1986. Under § 1986(a) not less than 15 days before production of the file is ordered, we must get to Frank a copy of Ms. Rivera's written authorization to release the records. As she is our client, this should not be an issue. We then must serve to Nancy Sanders in attestation of compliance with § 1986(a). As we have Ms. Rivera's consent we do not need to concern ourselves with the notice requirement of §1986(c).

Within 15 days of our subpoena, pursuant to FCCP § 1990, Frank must send by mail or otherwise a copy of Ms. Rivera's file along with an affidavit of Ms. Sanders attesting to (1) her authority to certify the file, (2) the copy is a true copy, and (3) that the file is Ms. Rivera's personnel file.

B. Authenticating the file.

Under FCCP § 1991 we should speak to Ms. Sanders about including in her § 1990(a) affidavit that: (1) the file was kept in the ordinary course of Frank's business; (2) it was Frank's regular practice to keep such files; (3) how the personnel file is prepared and that (4) the original file would be admissible if Ms. Sanders was present to testify to the matters stated in the affidavit. Therefore, under § 1991, we will be able to use the affidavit as evidence of matter stated in it and this is sufficient to meet the requirements of self-authentication under Franklin Rule of Evidence (FRE) 902(II). Ms. Rivera's personnel file is a domestic record of a regularly conducted activity, the keeping of a personnel file by a business.

II. WWW's Personnel File on Brady Spitz

A. Necessary steps to get to court.

Getting Spitz's personnel file will be more procedurally difficult than obtaining Ms. Rivera's for the obvious reason that WWW is adverse to us. Still, under rules of discovery we are entitled to it. Since we are seeking employment records we cannot utilize § 1984 per subsection (a). We must use § 1986 and not less than 15 days before production we must obtain a written authorization from Spitz or serve on Spitz a copy of the subpoena in § 1985, the supporting affidavit of § 1985, and the notice required by § 1986(c). Under § 1986(c) we must send Spitz notice in bold type that: (1) we are seeking employment records, (2) they are protected by a right of privacy and (3) if he objects he shall file papers with the court before production, and (4) if we do not agree to limit or cancel the subpoena he should consult an attorney about his right of privacy and/or a possible motion to quash. We do not, however, have either a current address for Mr. Spitz or the name of the WWW custodian on whom we must serve the subpoena. Still, the statute merely requires us to serve Spitz at his last known address which is at the Bay View Residence Hotel. While our researcher tells us no one knows of Spitz's forwarding address, sending the notice affidavit, copy of the subpoena, should be OK under the statute. We also need to have the researcher determine who the custodian is. Once we have that information, the custodian must produce the documents.

B. Authentication Spitz's file.

Unlike for Ms. Rivera's personnel file, § 1990 is not available to help authenticate Spitz's personnel file as WWW is a party to this action. Since WWW is a party, they will be in court and we may just want to have the as yet unknown custodian of WWW's personnel file to testify as a sponsoring witness. We simply need to provide written notice under § 1984 (a) which will allow for a sufficient finding that the file in question is what we claim it is under FRE 901(a).

III. State Safety Inspection Report.

A. Necessary Steps to Get Into Court.

Under § 1985, we should file a subpoena duces tecum with Marta Jones, as the head of the Department of Public Safety's bureau of records. As Baldisari does not have a copy this is the only way we can get a copy. While our researcher provided us with a copy, I think it also wise to get one from the Department itself. Under § 1985(c) we can also issue the subpoena ourselves. We should tell the Department exactly what we want in the subpoena pursuant to § 1985(b) and that is records of it report, inspection, as well as any other citations relating to safety violations at WWW. While you want the January 29, 2003 report, I think the other items are relevant to our case.

Under § 1990, the Department should comply within 15 days along with an affidavit attesting to the requirements of § 1990 (a)(1)-(3) as well as (b)(c).

B. Authenticating the report

Under FRE 902 we will not have to provide extrinsic evidence a condition precedent to admissibily under 902(4). As the report is a official record which the Department of Public Safety has a duty to maintain it simply must be certified by Marty Nixon, who as the head of the Bureau would be authorized to so certify, that it is accurate. It appears that she could do this wither under seal or without but this would save her, and us, the expense of her testifying.

IV. Baldisari Maintace Records.

A. Necessary steps to Get into Court

Again, we will utilize § 1984 to serve on Baldisari as a party to this lawsuit a subpoena duces tecum for its maintence records. We should serve an affidavit as well stating we want its business records as well as the correspondence showing Baldisari declined to purchase the automatic seat guards. Again we do not have information on a custodian of Baldasari on whom to serve the subpoena. The custodian will then be required to bring the documents to the trial as pursuant to § 1994(b).

B. How to Authenticate.

Again, I do not see a basis for self-authentication, but since the custodian of Baldisari's records will likely be present as the agent to a party to the action, we should call him/her as a sponsoring witness. Under Rule 901, we should then be able to establish that the maintence file is what we claim it is.

V. Ms. Rivera's Hospital & Medical Records

A. Necessary steps.

We will need to issue a subpoena to Franklin General Hospital for Ms. Rivera's medical records. There will likely be some privacy concerns but as Ms. Rivera is our client she will likely sign a authorization. We need to determine the custodian of these records to determine the appropriate party to serve the subpoena on. Under § 1985(c), as an attorney of record we may simply issue this subpoena along with the affidavit required by § 1985 (b) which lists exactly the documents and records we seeks.

B. Authenticate

Under § 1990(a) we will have the custodian of records of Franklin General Hospital produce the records along with the affidavit pursuant to § 1990(a)(1)-(3) and also follow the procedures of § 1990(b) and (c). Then, under § 1991, include the requirements of (1)-(4) so the medical records may be self-authenticating under FRE 902 (II). Medical records are likely considered a subset of business records especially since the FRE does not appear to have a separate category for medical records to be self-authenticated. If need be, we could have the custodian of Franklin on hand to testify to the authenticity of the records.

Please let me know if you have any additional questions or concerns.

S/l
Applicant

Indiana Essay Question I
Sample Answer
(verbatim transcription of answer written by an examinee)
February 2004

(1)

A partnership (Pship) is an agreement between two or more persons to carry on a business for profit. A Pship does not have to be in writing. Unless, the Pship is otherwise, Partners share in the profits and liabilities of a Pship equally. Receipt of profits, not for rent or wages, is prima facie evidence that the person receiving such is a Partner. Regardless of what Bob told Mary concerning liability, all partners of a general pship are liable personally for pship debts. In fact, Partners are held responsible unless they are a limited partner. Bob and Mary still to have started a pship, which is easy to do since there are really no formalities. Bob should have filed a certificate of limited partnership with the state if he wanted limited liability. Since Bob doesn't have limited liability, he and Mary may be liable to the injured customer along with Clay Creations. IF a Judgement is entered for the customer, the money would first come from Clay Creations (Pship) then if NOT enough from Mary and Bob.

(2) Regarding the customer, if a judgement is entered and Clay Creations is bankrupted after paying, then Bob and Mary will have to come up with the rest. Bob can try to sue Mary for indemnification a contact theory since she agreed to be solely liable. Also since the customer's injury was caused by Mary's negligence.

Bob can also sue Mary because she breached her fidiciary duty of loyalty. When there is a Pship, none of the partners can unilaterally decide to pay him/herself because doing so is self-dealing. However, Mary can defend by saying that she handled the "day to day" operations per Bob's request and that it was within her discretion to compensate herself. This will likely fail because NO agreement was made concerning Mary being paid and Partners are usually only paid for extrordinary services.

(3) Mary and Farmer are probably NOT PARTNERS. Proceeds and Profits are two different things. Proceeds are the amount they are getting from their crop selling agreement NOT Taking costs into consideration. Profits on the other Hand are the amount left after expenses. A Partner must share in the benefits (profits proceeds $) and the burdens (cost) of the pship. IT appears that Farmer is an independent contractor since he provided all the equipment, supplies, and labor and he & Mary just SPLIT the proceeds since it was her land. This is very analagous to share cropper agreements IN the agricultural days of our county. I

If a court finds that Mary and Farmer are partners, then Mary May be liable to supplier because partners are agents for the partnership and each other. However, if the court finds that Mary and Farmer are NOT partners, then Mary will only Be liable if there was apparent/ostensible authority and supplier relied to his detriment. Since Mary Never had any conversations or business dealings with supplier and never held Farmer out to be her agent then she probably won't be liable to him. However, Supplier can argue that Being on Mary's farm and farming it gave the improper appearance to the public that they were partners and that he relied on Farmer's representation, then Mary should be estopped from Denying his claim because she benefited from the seed and the fertilizer. Mary will probably still win because his argument unintentionally points out that if it was a real Pship, Supplier would have been paid because the debts would have been distributed before Farmer and Mary get their shares, but since NO partnership then Mary got her "proceeds" and Farmer got his "proceeds" which were enough to cover Supplier Bill.

Indiana Essay Question II
Sample Answer
(verbatim transcription of answer written by an examinee)
February 2004

TO: Charles Contractor
FROM: Applicant
DATE: 2/24/04
RE: Suit to seek award of contract

(I) Suing for a Declaration Judgment & Injunctive Relief

It appears that there are several successful challenges which we may bring to obtain the contract that was denied by the County Board of Public Works.

In order to obtain the most immediate relief and to obtain the greatest chance of having the contract awarded to Charles' construction company, we will bring a suit in equity, seeking two remedies: (1) a declaratory judgment and (2) injunctive relief. A declaratory judgment is a statement by the court regarding the legality of a law, or the interpretation of a legal instrument such as a contract. A declaratory judgment can be issued where there is an issue of contention between two or more adverse parties, where the parties are seeking a ruling of interpretation, rather than an award of damages. A declaratory judgment is the best remedy to seek in our suit because the trial court can move an action for a declaratory judgment ahead on the calendar, and it will provide quick, efficient relief, if we are successful.

We will also seek an injunction to keep the board from awarding the contract to Wanda, or to keep the contract award from moving forward. To obtain this relief, we will need to show that there is an important issue of law involved, that it is a matter of public importance at stake, that our ultimate relief if we sue for damages will be inadequate, that the opposing party has been given notice of our suit for an injunction and has had an opportunity to be heard, and that we will likely prevail on the merits. Since there are issues of gender discrimination involved, and the best remedy is the awarding of the contract, we will have a good chance to obtain an injunction, since there are several constitutional challenges we can make under the Indiana Constitution.

(II) Challenges under the Indiana Constitution

A. Special Legislation

Since there are no further administrative remedies which we need to exhaust, we will challenge the award of the contract in trial court (superior or circuit court), where we will also argue that the law awarding a set percentage of contracts to woman-owned businesses violates the provision in the Indiana Constitution which bars special legislation. Special legislation is generally prohibited, and is legislation that does not apply uniformly throughout the state. Here, the facts indicate that the law in question only applies to counties with a certain population, though there are similar laws applying to counties with a lesser population. The test for special legislation is whether the subject matter of the law is amenable to general application, and if it is being applied specifically. Here, the legislation is not uniform throughout the state. Nevertheless, courts have basically allowed legislation that applies to counties on the basis of population, under the rationale that eventually it could apply to all counties. Courts tend to be diferential where legislation is challenged as special, and this we should make other constitutional challenges as well.

B. Due Course of Law

The due course of law provision in the Indiana Constitution is similar to that in the federal constitution, guaranteeing due process before one is deprived of property. For administrative actions, the due process principles are codified in the AOPA, which applies to state agencies. Here, we could argue that denying the contract on the basis of is a violation of the due course of law provision, as a property right, the award of the contract, would have gone to Charles' construction company but for gender reasons.

C. Equal Privileges and Immunities

Art I, section 23 of the Indiana Constitution provides for equal privileges and immunities, somewhat analogous to the Federal Constitution's concept of equal protection, but with a different analysis.

When interpreting the Indiana Constitution, courts look to the text, history, framers' intent, and precedent under the constitution. The fact that the constitution was changed in 1984 to include gender-neutral language will assist us in challenging this gender-based law on the awarding of contracts.

The equal privileges and immunities clause asks (1) if the disparate treatment on the basis of gender is rationally related to the inherent characteristics of the class, and (2) if those within each class are treated equally. Here, we can challenge the law because it does not treat all male-owned contractors equally but varies based on their geographic locale. *FN

D. Germaneness

We could also challenge the law as lacking germaneness since it deals with more than one issue. However, courts are very deferential in reviewing laws under the germaneness requirement of the Indiana constitution, and thus this is not our best challenge.

In sum, if we can demonstrate likely success on the merits on any of these issues, we may be able to obtain an injunction, since there are issues of public concern involved.

FN* We can also argue that the disparate treatment of contractors on the basis of gender is not rationally related to the goals of the law. While review under the equal privileges and immunities clause is deferential, we could argue that based on the adoption of gender-neutral language in the constitution that equal treatment on the basis of gender is a "core constitutional value", which is similar to Price's holding on free expression, the legislature may not materially burden. Thus, while review under the equal privileges and immunities clause is generally not under a strict or exacting standard, we could potentially get the court to review this law more stringently under earlier case law.

Indiana Essay Question III
Sample Answer
(verbatim transcription of answer written by an examinee)
February 2004

John's Assets

The probate court would allocate ½ of the personal property to Kate with ¼ in real property. The two children from his prior marriage will receive ½ personal and ¾ real property from John's estate.

At issue is whether John's oral statements at death constitute a valid will.

Under Indiana probate law, nuncupative wills (oral wills) are valid if death is imminent and person dies from that imminence. Oral wills are limited to personal property with value of 1K unless in military then 10K. Two disinterested witnesses are required with the oral statements placed into writing within 30 days. Finally, for an oral will to be valid it must be sent to probate within 6 months and may not revoke a written will. If a person does not have a will or an invalid will then the person's estate will be governed by the laws of intestacy. A subsequent wife will receive ½ personal property and ¼ real property if there are children from a prior marriage. The children from prior marriage will receive the remainder.

Here, John attempted to make a nuncupative will. However, it would be invalid under Indiana law. He tried to transfer both real and personal property to Kate. The personal property is assumed to be over 1K and would not constitute a valid nuncupative will. Kate and John's children would claim under intestacy law because John did not have a valid written will.

Kate would receive ½ personal property within John's probate estate and a value of ¼ in real property. The children from John's prior marriage would split the remainder of John's estate equally. Kate's seventeen year-old son would receive nothing from John's estate under intestacy law. He was not a biological son of John's nor was he adopted by John.

Calvin Customer's Bushes

A court would find that Calvin Customer should obtain his bushes from Kate.

At issue is whether Calvin has a right to the bushes he left in John's care.

Under Indiana law, abandoned property is property where the owner shows actual intent to give up both title and possession to the property.

Here, Calvin left his expensive and rare bushes with John's business for care and upkeep. He left them there in January 27, 2003 and has now come to claim his property. The facts do not state that he has any intent to give up both title and possession to the bushes. No mention is made regarding a contract for time the bushes were to be kept but John is in the business of caring for expensive plants, Calvin did not abandon the bushes.

A court would order Kate to return Calvin's expensive bushes because he showed no actual intent to give up both title and possession to his property.

Indiana Essay Question IV
Sample Answer
(verbatim transcription of answer written by an examinee)
February 2004

In general, the scope of permissible discovery includes those matters relevant to a party's claim or defense or reasonably calculated to lead to the discovery of admissible evidence.

The items at issue here, the test results, if any, and the knee appliance are critical to establishing the manufacturer's liability for manufacturing and marketing a defective product.

A. Steps to obtain responses

Assuming the "first discovery request" was a request for production of documents and tangible things, Defendant's response would have been due within 30 days of service of the request (plus an additional three days if the request was served by mail).

After 75 days, Defendant's responses are long overdue. However, the first action required under the Indiana Trial Rules, is a conference among counsel, during which counsel engage in a good faith effort to resolve any issues before resorting to court intervention.

Assuming opposing counsel does not agree to comply with the discovery request voluntarily, I would prepare and file a motion to compel the production of the test results and the appliance. This motion must include reference to the specific discovery requests at issue, an explanation of the need for the matters requested, (i.e., within scope of permissible discovery) that Defendant has failed and (as of the conference with opposing counsel) refused to comply, and requesting that the court order compliance. As a practical matter, it would be effective to attach, as exhibits to the motion to compel, highlighted copies of the discovery requests at issue and the letter from Defendant's president promising to have the appliance tested immediately. Also, a proposed order compelling responses to the discovery requests should be attached to the motion and brief.

If Defendant fails to comply with the court's order compelling discovery, I would continue to seek compliance by asking that the court assert additional pressure. The most likely results would be contempt, awarding of attorneys fees, awarding an adverse inference, i.e., that the trier of fact may infer from Defendant's failure to produce the results or appliance, that these items would have produced negative results for Defendant (e.g., that the appliance was indeed defective as alleged), or, if the court considers Defendant's conduct sufficiently egregious, it may order "death penalty" sanctions, i.e., enter default judgment against Defendant.

B. Response to disclosure

Under the Indiana Trial Rules, the scope of permissible discovery extends only to matters within a party's (or non-party's) possession, custody or control. By offering this sworn statement, Defendant has attempted to remove the appliance from the realm of proper discovery. However, because the statement is sworn and because we lack the power to read Defendant's mind or enter its facilities to search for the appliance, we will largely be bound by Defendant's word. Of course, we should request additional discovery relating to the matters set forth in the statement, including how it was discarded, when, where, under what circumstances, who else had access to it, and who else know about it.

Moreover, the purported inability to produce the appliance certainly does not relieve Defendant of the obligation to produce the test results, if any exist.

Because Defendant has effectively prevented us from accessing vital evidence in our claim against Defendant, we should consider several options: (1) we could request that the court hold a show cause hearing, where Defendant should have to demonstrate why it should not be held in contempt; (2) we can request and adverse inference (see above); (3) amend the Complaint to assert a spoliation claim; or (4) move the Court for entry of default judgment.

Contempt is unlikely because Defendant will undoubtedly argue it did not act intentionally in disregarding the court's order but negligently. An adverse inference would be helpful. This is probably the most likely course. The Court will be hesitant to enter a default judgment unless we establish that Defendant's "accidental" loss of the appliance was actually willful concealment. Finally, the spoliation claim would be of little use because it would probably not address the magnitude of harm caused by the loss of the appliance.

Indiana Essay Question V
Sample Answer
(verbatim transcription of answer written by an examinee)
February 2004

Question One:

In considering the ex parte Petition for Immediate Temporary Guardianship, the court will consider a variety of factors.

First, a procedural rule should be addressed regarding the ex parte hearing. In order for a hearing to be ex parte, a party must certify: (i) what efforts were made to contact the party being excluded; (ii) irreparable injury if it is not heard immediately; and (iii) a party bringing an ex parte order must present both sides of the case because the other side isn't there to present the evidence in their favor.

The likelihood of an ex parte order here is very slim. First, the child still lives with her mother and she has sole legal custody. Second, mother is moving (or desires to move) to Florida with him in 30 days. This gives the mother plenty of time to be heard. Thus, ex parte is not really warranted here, especially absent a showing of efforts made to contact mother, irreparable injury, and a showing of both sides of the case by the grandparents.

As far as the Petition itself, the court will look heavily upon the best interest of the child factors. Those factors will also be considered in the permanent guardianship analysis.

It is unlikely that the court will grant the Temporary Guardianship Motion, since Grandparents were guardians of the child but were only the guardians for 6 years so that support would be paid. For temporary immediate guardianship, there hasn't been a strong enough showing by the Grandparents that this is an emergency situation so severe as to hear this ex parte and rule immediately. They are more likely to succeed on the permanent guardianship claime.

Question Two: With respect to Maternal Grandparents' request for permanent guardianship, the court will place great importance in the best-interests of the child analysis. Under this analysis the following factors are considered: (i) the age and sex of the child; (ii) the wishes of the parents; (iii) the wishes of the child, with greater weight placed on this factor if the child is 14 or older; (iv) the child's interrelationship with family, such as siblings; (v) the child's adjustment to home, school and community; (vi) the health of the parties; and (vii) whether the child had been cared for by a de facto custodian.

Balancing these factors, the courts also pay special attention to a child's interest of staying with his parents. Anyone challenging guardianship or even visitation must presume that the child's best interests with respect to his or her grandparents are being taken care of by the custodian parents. In other words, it is the presumption that the parent acts in the best interests of the child, making it hard for a "de facto custodian" to overcome this presumption. Further, Indiana law has also included as a factor in the analysis of whether a de facto custodian should

obtain custody a history of the living arrangements of the child. In other words, a child under 3 must have lived with that individual for the past 6 months, and a child over 3 years old must have lived there for a year.

In balancing the factors, the child is only 6, but her custodial parent (Mom) wants her to live with her. We don't know the child's wishes, but they aren't to be given much weight since she is only six. There is no evidence of any relationship with other family other than her grandparents; in fact, we are not even aware of her relationship with her father or where he lives, which is important for the court to utilize in its analysis of the child's best wishes.

The grandparents make a valid point that they are concerned for her to be uprooted from her first grade class, but in order to give that claim any merit, we would need to know if (a) the child was comfortable there; (b) she was well adjusted; and (c) whether or not, as a 6 year old, she has really adjusted to her school community.

Everyone involved seems to be healthy, but it should be noted that Grandparents are getting older and may not be able to provided an active, healthy life for the child, despite their obvious care for her in the past.

Applying the de facto custodian analysis, a real issue to consider is whether the child living off-and-on with her grandparents in 1996-2002 would make them a de facto custodian. Further, the facts do not indicate where the child spent 2002-present.

Due to the strong interest in preserving the parent-child relationship under circumstances such as those and an absence of "clear and convincing" proof that the child is better off with her grandparents, I think that although Grandparents make a valid and concerned claim, the court is likely to keep custody with the mother, especially in light of the fact that the facts show that mother had taken adequate financial steps to make the move to Florida plausible for she and her son or daughter.

Indiana Essay Question VI
Sample Answer
(verbatim transcription of answer written by an examinee)
February 2004

A security interest in its broadest sense is a concept whereby one party (creditor) loans or extends credit to another party (debtor) and the creditor obtains an interest in the property (collateral) of the debtor. Security interests are governed by Article 9 of the Uniform Commercial Code which has been adopted by the state of Indiana.

The first requirement for the validity of a security interest is that there be "attachment," the security interest must attach to the collateral. A security interest is said to be attached when (1) a creditor gives value and takes an interest in the debtor's collateral and (2) the debtor has rights in the collateral.

Next, after a security interest attaches it must be perfected. Perfection merely provides notice "to the world" of the agreement between the debtor and creditor.

These concepts can now be applied to the transactions between Tire Max, PTC, and Third National Bank.

The security interest between Tire Max and PTC is unperfected, and consequently PTC would have no rights in Tire Max's inventory. The issue surrounding this transaction pertains to perfection of the security interest.

The transaction between Tire Max and PTC created a purchase money security interest or (PMSI). A PMSI is created when credit is extended for the sole purposes of acquiring property and a security interest is then granted in the property acquired. A PMSI transaction will give rise to an automatic perfection period of 20 days but the perfection will expire if the security interest is not perfected by some other means. Generally security interests may be perfected by filing a financing statement with the Secretary of State's office where the debtor resides.

Here, the facts reveal that PTC filed a financing statement with the county recorder in the Indiana court where Tire Max was located. This manner of filing is insufficient. Any other party that extends credit to Tire Max and takes a security interest in Tire Max's inventory would have priority.

As between PTC & Tire Max alone, the security agreement between them is still valid and enforceable. This, despite PTC's misfiling it still has priority in Tire Max's inventory over Tire Max itself. Consequently, Tire Max's default on its obligation to PTC would justify PTC's foreclosure on the inventory.

A secondary issue in this matter concerns the security interest of Third National Bank. The facts reveal that Third Nation Bank took a security interest in Tire Max's "equipment and personal property" and properly perfected that interest by filing with the Indiana Secretary of State. While this filing would cover any equipment owned or possessed by Tire Max, it would not likely cover the inventory.

Article 9 of the UCC as adopted by the state of Indiana places emphasis on certain categories of collateral. These categories include goods, inventory, equipment, general intangibles, accounts, chattel paper, etc. These different types of collateral have different methods of perfection, and while filing a financing statement may perfect one category of collateral, it will not suffice for others.

Here Third National took a security interest in "equipment and personal property", as provided in the financing statement filed with the Secretary of State. Because "inventory" is not "equipment" for purposes of UCC, the filing will be insufficient. Further, the filing of a

financial statement for "personal property" would not act to perfect an interest in "inventory" as "personal property" is far too vague a description and not recognized as a category of collateral by the UCC.

Therefore, neither Third National nor PTC would be perfected as to an interest in Tire Max's inventory. However, the security agreement between Tire Max and PTC regardless of the non-perfection would likely allow for PTC to repossess the inventory.