INDIANA ESSAY
QUESTION I
February 2005

JT Plastiks, Inc. ("JT") is an Indiana corporation located in Indianapolis, Indiana. JT manufactures thermoformed plastic parts for sale to the automotive industry. The sole shareholders of JT are John Jensen and Tim Thomas. John and Tim are the sole directors. John is the President and Tim is the Vice President, Secretary and Treasurer of the corporation. The corporation is solvent and making a profit.

Harvey Supply Group, Inc. ("Harvey"), also an Indiana corporation, located in Elkhart County, Indiana, supplies various plastic raw materials to JT for use in its manufacturing processes.

A dispute has arisen between JT and Harvey over a $100,000 shipment of raw materials, with JT claiming that they never received the shipment and Harvey claiming that it was shipped and received by JT. The shipping documentation has someone's initials on it; however, JT does not recognize the initials as belonging to any of its' employees.

(1) Assume Harvey files a complaint to collect JT's past due account in the amount of $100,000, naming JT, John and Tim as Defendants. Based solely on the above facts, analyze whether John and Tim are personally liable for the account and the reasons for your conclusion.

(2) Assume that during the discovery process, Harvey obtains information establishing the following facts: JT has existed since 1992, and JT could produce records from annual shareholder and director meetings in 1992, 1993, 2003, and 2004. JT could produce no other records. JT did produce its Articles of Incorporation, Bylaws, and the annual reports JT filed with the Secretary of State each year since 1992. Harvey obtained documents showing that JT paid the following on John's and Tim's behalf: lease payments on a Cadillac for each; John's second mortgage on his home; and Tim's daughter's college tuition. Thirty days after the suit was filed, JT paid John and Tim each a $50,000 bonus, which reduced the corporate checking account to a $1,000 balance. Based upon these additional facts, analyze whether John and Tim are personally liable for the account and the reasons for your conclusion.

INDIANA ESSAY
QUESTION II
February 2005

On February 1, 2005, Danny Driver was operating his vehicle in Your County, Indiana. Assume Your County had a 100,000 population recorded in the 2000 Census. Driver disregarded a stop sign being held by a school crossing guard who was standing within a crosswalk directly outside an elementary school. Driver's vehicle struck and killed "AB", a student from the school, who was inside the crosswalk.

Driver's blood alcohol content was .27, and he was also under the influence of cocaine at the time he struck AB. Driver had no prior criminal history and had never received even a parking ticket before this incident.

Outraged that the maximum penalty under Indiana law for this Class C felony was eight years, the State Representatives for the districts within Your County gathered support from the media, citizens, and legislators around the State of Indiana. Assume that during the July, 2005, session the Indiana Legislature passed into law a statute providing in relevant part as follows:

> (1) After January 1, 2005, the offense of operating a vehicle while intoxicated causing death, a Class C felony, shall carry a penalty of twenty to fifty years in addition to the penalties for a Class C felony if committed in a county with a 99,000 to 100,000 population in the 2000 Census and if the victim was less than eighteen years old and was walking within a crosswalk within 1,000 feet of a school.
>
> (2) Any person who is convicted under this statute shall be considered 100% at fault for the occurrence in a civil action for damages and shall be liable for a minimum of $500,000 in compensatory damages.

The Your County Prosecuting Attorney filed a pleading in the criminal case against Danny Driver notifying Driver that the State of Indiana would seek to impose the penalty under the above statute against him.

You are an Indiana attorney representing Driver in the criminal case and in the claim for civil damages by AB's estate. Analyze any challenges to the statute that you may have under Indiana law and evaluate the likelihood that you will prevail. Be sure to give the reasons for your answer.

INDIANA ESSAY
QUESTION III
February 2005

John Smith was a resident of Marion County, Indiana. In January, 2004, he sold his business and retired. The next month, he gave each of his three children a monetary gift of $20,000.

John's first wife Sally, the mother of his children, died in 1995. John married Jane three years later. John died in October, 2004. His will was probated shortly after his death. It devised the entire estate in trust for Jane's benefit, during her life, and upon Jane's death, to his three children, in equal shares. John's oldest child, Adam, was appointed Trustee of the trust. Adam accepted the appointment.

Adam investigated and discovered that the insurance policy on John's life designated the estate as the beneficiary. He discovered additional assets of the trust consisting of John's home that Jane resides in, valued at $500,000; and a stock portfolio in the amount of $1,000,000.

Adam has just received a letter from his stepmother, Jane, asking that the trust distribute to her the insurance proceeds and pay the following expenses: property taxes, insurance, utilities incurred at the home, replacement of the furnace and the $15,000 cost to build a swimming pool in the back yard.

Assume the Uniform Principal and Income Act governs Adam's duties as Trustee of the testamentary trust.

Adam asks your advice on the following issues:

1. The federal tax consequences to John for the inter vivos monetary gifts made to his three children.

2. Whether the trust is obligated to distribute the insurance proceeds and pay the expenses requested by Jane.

How do you advise Adam?

INDIANA ESSAY
QUESTION IV
February 2005

On January 2, 2004, Bob filed a petition to dissolve his marriage with Cathy. Bob and Cathy had been married for ten years. They had no children.

At the time Bob filed the petition, Bob and Cathy owned a marital residence with a $350,000 value and owned joint bank accounts totaling $50,000. Bob also had a 401 (K) retirement account through his employer.

On January 2, 2004, Bob was employed by a pharmaceutical company as a sales representative, and his annual salary was $150,000 per year. Cathy worked as a hospital administrator with a $75,000 annual salary.

On January 5, 2004, Cathy withdrew $10,000 from one of the joint bank accounts. Cathy used this money to take a Las Vegas vacation with three of her best girlfriends.

Bob and Cathy's case came before the court for final hearing in December, 2004. The court dissolved the marriage and divided the marital assets. In dividing the assets, the court granted Cathy an interest in Bob's 401 (K) plan based upon its value on the final hearing date, which included contributions Bob made between January, 2004, and the final hearing date.

Bob asked the court to divide the marital estate equally between him and Cathy. He presented no evidence to support this request. Cathy requested 80% of the marital estate. She presented testimony from a certified public accountant showing that at Bob's income level, he could replace the "extra" 30% of the marital estate in five years.

The court awarded 70% of the marital assets to Cathy and 30% to Bob. The Court included $40,000 in joint bank accounts in its' division.

The court awarded $500 per week in maintenance to Cathy for a two-year period. The court found that Cathy was entitled to maintenance due to the difference in the incomes between Bob and Cathy.

Bob has come to you to appeal the trial court's decision. Analyze the issues you will raise in the appeal. Do not discuss the procedural requirements for an appeal or the standard of review on an appeal.

INDIANA ESSAY
QUESTION V
February 2005

Dan Jones and Laura Smith are neighbors who share a common driveway. On the evening of July 4, 2004, a man driving a 1999 Toyota pulled into the common driveway to turn around. As the Toyota driver was exiting the driveway, he collided with Pamela Plaintiff. The Toyota driver immediately exited his vehicle, went over to Pamela's vehicle to check on her condition, and told Plaintiff he was sorry, but that the overgrown hedges that lined both sides of the common driveway obstructed his view while he was backing onto the street. The Toyota driver then got back in his car and fled the scene, never to be found.

Pamela Plaintiff filed a personal injury Complaint on September 1, 2004 against Dan Jones and Laura Smith. With the Complaint and Summons, Plaintiff filed a written Demand For Trial By Jury.

Plaintiff requested service by sheriff against Dan Jones and Laura Smith. The Summons return came back on October 1, 2004 for Dan Jones as "Left on Residence." The Summons return came back on October 1, 2004 for Laura Smith as "Left on Residence."

On October 15, 2004, an attorney entered an appearance on behalf of Laura Smith and requested an additional thirty days to file an Answer. The Court granted the request and authorized the Answer to be filed on or before November 14, 2004. However, no Answer was ever filed on behalf of Laura Smith.

No pleadings were ever filed on behalf of Dan Jones.

On January 5, 2005, Pamela Plaintiff's attorney filed a Motion For Default Judgment against the defendants. In the Motion, Pamela Plaintiff signed an affidavit stating that her damages are $100,000. On January 6, 2005, the trial judge signed a Default Judgment in favor of Plaintiff and against the defendants in the sum of $100,000 plus costs.

What can Laura & Dan do about the default judgments? Can either of them prevail? If so, explain. If not, explain. If either defendant does not prevail in his or her efforts at the trial court level, what steps do they need to take to appeal?

INDIANA ESSAY
QUESTION VI
February 2005

It came to the attention of Indiana legislators that, as a result of heightened security in public buildings, many people were forgetting to retrieve their personal items such as cell phones, wallets, car keys, and even briefcases, after passing through metal detectors and sometimes being subjected to a pat-down search. The legislature created a new public agency to handle this problem known as the Forgotten Property Bureau ("FPB"). It was comprised of a group of five commissioners and it had a support staff. The legislation that created the FPB made it clear that it was subject to all the normal statutes, rules, and regulations that generally govern Indiana administrative agencies.

Three of the five commissioners were close friends and decided to meet privately over lunch to discuss what the agency should do with the masses of valuable property left in courthouses and other public buildings around the state. As a result of this meeting, they agreed that this forgotten property should be "sifted" by staff, who would determine what items to throw away and what items to keep. Items kept would then be donated to charitable organizations on a list to be developed by the agency. At the first formal meeting of the FPB, these ideas were proposed as a package of agency rules. Public hearings were then held, and the rules were eventually adopted. The rules specifically provided that property was deemed "abandoned" and subject to forfeit if left in a public building for more than five business days.

Jane was a lawyer who had just purchased a "Raspberry," a new hand-held device that performed a variety of communication functions, including e-mailing and instant messaging. It cost her $600. One day she left her Raspberry on a small plastic tray when going through the metal detector at the courthouse. The next day she went on vacation; she did not realize that she had forgotten her device until over five days had passed.

By the time Jane contacted the courthouse to retrieve her Raspberry, personnel had sent it to the FPB. One of the FPB staff members, who realized how valuable it was, gave it to a charity on the FPB list. The charity then sold the Raspberry to Bob, who paid $300 for it.

When Jane found out what happened, she was incensed. She has consulted you about her rights against the FPB, the charity, and/or Bob. Advise her.

Indiana Essay Question I
Sample Answer
(Verbatim transcription of answer by an examinee)
February 2005

(1) JT Plastiks, Inc is an Indiana Corporation. It is formed by and made up two individuals. There are numerous ways to set up a company; sole proprietorship, partnership, Corporations, S Corporation, LLC, LLP. We know that JT Plastiks is a corporation. Many business we formed as Corporations because a corporation is a separate legal entity, which can sue and be sued. The individuals that form a corporation receive limited liability, in that if there is a claim against the Corporation, their personal assets are protected. There are three things that must be present for a corporation to be formed; there are (1) People (2) Paper and (3) Act. In this case we have the people (John and Tim), since they are incorporated in Indiana, they must have filed their articles of incorporation with the state, and they have entered into Agreements with the Corporate name so they have acted. Also, the name says "Inc." which is necessary. It appears that we have a legal Corporation here, and therefore John and Tim cannot be liable for the debts of JT Plastiks, Inc., personally. Now despite this limited liability, there are situations where the Corporation has been misused so that it is the mere instrumentality of another and it promotes injustice. When this is found, the Corporate Veil can be pierced and the individuals can be liable for Corporate debts. This issue will be covered in Section (2) of this question. In conclusion, there are many corporate forms that may be used when businesses are started. All forms of businesses have negative and positive aspects, and the "Corporation" is no exception. Although Corporations do receive double taxation, profits taxed at Corporate level and dividends faxed to shareholders, they have one very large advantage, the limited liability of the incorporators. John and Tim saw this benefit, and incorporated, therefore they are <u>not</u> personally liable for the accounts of JT Plastiks, Inc. JT Plastiks, Inc. must be pursued for the money.

(2) Although Corporations shareholders receive limited liability, there are times when the individuals will be liable for the obligations of the Corporation. This is called piercing the Corporate Veil and it is allowed when a Corporation is is so misused that it becomes the mere instrumentality of another and allowing it to protect the individuals promotes injustice. There are 8 factors that must be considered when deciding whether or not to pierce the Corporate Veil. These are as follows. (1) Public or Close Corporation (2) Undercapitalized (3) Fraudulent Misrepresentation (4) Formalities of Incorporation (5) Identity of Shareholders (6) Commingling of Funds (7) Absence of Corp. Records and (8) Payment of individual obligations out of Corporate Funds.

There factors must now be considered in right of the facts given.

(1) This is a small, close corporation. Only 2 shareholders.
(2) Undercapitalized? The corporation does not appear to be undercapitalized in this matter. They were making money and had money in their accounts before their "personal expenditures."
(3) Formalities of Incorporation—It appears that JT did incorporate correctly as they produced the Articles of Incorporation, By Laws and the annual reports that were filed with the Secretary of State.

(4) Fraudulent Misrepresentation—There does not appear to be any fraudulent misrepresentation by JT, but they did not recognize the initials that signed for the package, so this may be fraudulent misrepresentation, but probably isn't.
(5) Identity of Shareholders—It is very clear that John Jensen and Tim Thomas are the Sole Shareholders of JT. There is nothing wrong here. So far it appears that John and Tim are not personally liable for the Corporate debts. However, all factors have not yet been evaluated. Next,
(6) Commingling of Funds—It appears that this occurred. John and Tim both paid for Cadillac's out of Corporate Funds, John used Corp. money to pay his second mortgage, and Tim used Corp. funds to pay his daughter's tuition. Also, each took a $50,000 bonus leaving the Corp., JT, with only $1,000. This is sort of commingling. We need to know if they put personal funds in, or if they paid for more with Corporate funds, but still it appears they commingled funds.
(7) Absence of Corporate Records—JT has existed since 1992, but records could only be produced by JT for 1992, 1993, 2003, and 2004. It appears that some documents are missing. The documents filed w/ the Secretary of Sate each year were produced, but <u>many</u> other documents were still missing.
(8) Payment of Individual obligations with corporate funds—This factor was clearly violated by JT. Each Shareholder, John and Tim drove a Cadillac, paid for with corporate funds. This may be acceptable next, however, John paid the Second mortgage on his home with corporate funds. Also, Tim paid his daughter's college tuition with corporate funds. These are obviously personal obligations that were paid for with JT funds. Also, taking large $50,000 bonuses personally when the Corp. is only left with $1,000 is taking corporate money for personal gain which is against public policy.

For the reasons stated above, and due to the final three (3) factors, the Corporate Veil should be pierced in this instance and John and Tim should be personally liable for the account. Due to their misuse of the Corporation, the limited liability must be lifted and John and Tim should be liable for the amount.

Another issue that must be discussed, however, is the person who signed for the delivery. This person may or may not have been an employee of JT and his/her sttus must also be looked into.

Indiana Essay Question II
Sample Answer
(Verbatim transcription of answer by an examinee)
February 2005

In this case Driver has many constitutional challenges under Indiana law for both the civil and criminal damages by AB's estate.

First, the prosecutor is seeking to apply this new law retroactively. The Legislature passed the statute into law in July 2005. The statute states that its applicability began after January 1, 2005 so that it would apply to Driver's accident on February 1, 2005. A criminal law cannot retroactively impose a harsher penalty, reduce the evidentiary requirement, or make an action a crime when it was not a crime before. Here, the Legislature has attempted to retroactively increase the penalty for a subcategory of Class C felony, as well as eliminate any way for a defendant to show by evidence that she was not 100% at fault.

Second, the Legislature has imposed a special law. Unlike the federal constitution, Indiana's has a special provision prohibiting Special Laws. The courts give much deference to the Legislature about whether a statute constitutes a Special Law. A law is special when it applied to one person or group of people or applied to only one location. The court would ask (1) Does the law apply to one group or location and (2) Does the law leave the group or location open for the possibility of other groups or locations to enter the category? Here, the law will likely <u>only</u> apply to my county, as it singles out counties with a population of 99,000 to 100,000. More importantly, this classification is closed already, as the population requirement is based on the 2000 census. No other county can enter this limited group in the future. The courts allow population to distinguish a group if the population is rationally related to the law. Here, it is not. Population has nothing to do with person under 18 being killed by intoxicated drivers in crosswalks near schools. Which brings me to my next point.

This new law creates an Equal Privileges and Immunities violation. The two part test in (1) whether the regulation is reasonably related to an inherent characteristic of unequal class, and (2) whether the privilege is uniformly applicable and available to all similarly situated persons. Here, the statute fails on both grounds. First, the statute makes a distinction between minors and adults. There is no inherent characteristic in minors that should trigger a harsher penalty when they are killed by intoxicated drivers. Why should the penalty be different if an adult is killed? Second, the harsher penalty does not even apply to all minors. The minor would have to be walking in a crosswalk w/in 1,000 ft. of a school. While the school zone distinction alone might be reasonable, it does not save the minor/adult distinction.

Finally, the provision stating that "any person who is convicted…shall be considered 100% at fault…" violated the Due Course of Law clause. In relevant part, the Indiana constitution provides that all courts shall be open, parties shall find remedies by due course of law, and justice shall be administered freely, completely, and speedily. Here, this statute essentially closes the courts to defendants and provides no due course of law. They would be found 100% at fault dispite any evidence they might have to the contrary.

I would likely prevail on all constitutional claims, although the special law and the due course of law claims are probably my strongest arguments.

Indiana Essay Question III
Sample Answer
(Verbatim transcription of answer by an examinee)
February 2005

1. There are several federal tax aspects to John's gifts to his children. A donor, here John, is entitled to give $11,000 per year per donee without incurring any gift tax consequence. Here, John gave each child $20,000, the first $11,000 of each gift is exempt or excluded for gift tax purposes. So assuming no election was taken to split gifts, John is liable for $9,000 of each gift or a total of $27,000 in gift tax liability. Had John and his then wife, Jane opted to split the gifts then they could have given each of John's children $22,000 ($11,000 form each John and Jane) without incurring any gift tax liability. The facts do not indicate whether John and Jane exercised this election.

In addition, it is important to note that John has a lifetime unified gift tax credit of $1 million. So assuming that John has not made any previous gifts which would have used up the entire $1 million credit, he can apply a portion of this credit to off set the $27,000 gift tax liability on the gifts to his children.

2. As trustee, Adam has a fiduciary duty to the beneficiaries of the trust. In a trust such as this one Adam must be very careful about his duties because he must manage the trust adequately for the benefit of the life estate holder of the trust, here Jane, and also for the remaindermen, Adam and his siblings. Jane has made a demand on the trust for the insurance proceeds, various taxes, bills and maintence expenses for the house (which is part of the trust) and for the cost of building a swimming pool. Under the UPIA the principal of a trust is generally to be left for the remaindermen unless the trust terms specify otherwise, the income of the trust is to go to the life estate holder for their benefit. So here, Jane is only entitled to the income.

Jane is not entitled to demand the insurance proceeds because insurance proceeds come from a contractual relationship between the insured and the insurance company. The beneficiary of the policy was John's estate and everything in the estate went in to the trust, so she is entitled to any income generated from the insurance proceeds but not the proceeds themselves.

The various expenses must be looked at individually. First, the property taxes. Generally speaking a life estate holder has the duty to pay taxes and expenses, but the remindermen can assist in these payments to prevent losing the property. The same theory applied here; if Jane can pay the taxes on her own she will probably need to do that, however if the income Jane receives from the trust is not enough to cover the expenses of the trust property then she will probably be entitled to additional dispursments from Adam and the trust. The terms of the trust are a bit ambiguous here stating "for Jane's benefit during her life". In Adam's discretion it may not be a bad idea to provide for property taxes, insurance, utilities and replacing the furnace. These are all general expenses that will ensure that the house will remain part of the trust. The $15,000 for the swimming pool should not be given to Jane, unless all of the beneficiaries consent. It is an excessive expense and beyond the scope of maintaining Jane in her normal lifestyle. It would be violative of his fiduciary duties to the remaining beneficiaries if he just handled the money for the pool over to Jane. Adam needs to remember his fiduciary obligations to all parties, act within the scope of UPIA and the terms of the trust agreement and be a prudent investor for both the life estate holder and the remaindermen.

Indiana Essay Question IV
Sample Answer
(Verbatim transcription of answer by an examinee)
February 2005

(1) 401(k)—The parties will have to prepare a qualified domestic relations order (QDRO) for Bob's 401(k). His account cannot be split without the QDRO being approved by the 401(k) Plan Administrator. In addition, the account should be split as of the date Bob filed the petition, January 2, 2004, not as of the date of the final hearing. Cathy should not receive any contribution made, or any earning on Bob's portion of the account after January 2, 2004. Once the QDRO is approved by the Plan Administrator, an account will be set up for Cathy under the 401(k) plan. If the plan allows and Cathy so chooses, she can withdraw her account and have it paid to her or rolled over to an IRA.

(2) Marital Pot—Indiana's property division rules upon divorce follow the "marital pot" theory. All property from the marriage, whether acquired before or during the marriage, is included in the property division. The only things not included are future interests, professional degrees, and anything acquired after the dissolution petition is filed. Any unnecessary expenses incurred by one party after the petition is filed could be counted against that party in the property division. Thus, Cathy's $10,000 withdrawal to go to Vegas should be thrown back into the pot and counted as part of her allotment.

The marital residence, bank accounts and the 401(k) should all be included in the marital pot. The court starts with a presumption of a 50/50 split. However, the parties may offer evidence to overcome the presumption. In this case, Cathy offered evidence that she should receive a greater portion of the pot because Bob has greater earning capacity. Current earning capacity and future earning potential are two factors the court will look at to determine if the 50/50 presumption is overcome. It will also look at what each party contributed to the marriage. This is not just economic contributions. It will also look at contributions to home life, children (if any) and whether one spouse supported another while in school. The court will also look to see if any property was acquired prior to the marriage, or if either party received property by gift or inheritance during the marriage. We do not have much evidence regarding these factors, except that Bob may have earned more, and therefore contributed more economically, during the marriage. Because Bob did not present any evidence that the pot should be split 50/50, the court must have relied on Cathy's evidence to determine the 70/30 split. In an appeal, we could attack Cathy's evidence and bring evidence of our own. However, the courts are extremely reluctant to change a property division once it is finalized. We probably would not have much luck with this appeal.

Maintenance—The maintenance award is clearly appealable. Indiana law only allows spousal maintenance in certain specific situations:

(1) By the agreement of both parties. There is no evidence of such an agreement here.
(2) if the spouse seeking maintenance is physically or mentally disabled. There is no evidence of Cathy's disability.
(3) if there is a child who is disabled and needs care. There are no children here.
(4) if the spouse seeking maintenance needs to complete his or her education to increase earning potential. There was no mention of further education here.

The court cannot award maintenance based on disparate incomes. The maintenance award is invalid.

Indiana Essay Question V
Sample Answer
(Verbatim transcription of answer by an examinee)
February 2005

Dan's argument against default judgment

Dan may argue improper service of process to set aside the default judgment. Service is proper when it gives the defendant the best possible notice under the circumstances. In this case, the summons return stated "left on residence". This service of process is not sufficient unless the summons was also sent by mail to the last known address. In addition, Courts often set aside default judgments, preffering to decide a case on its merits instead of a mere technicality. The fact that Laura apparently received her summons based on the appearance of her attorney does not mean that Dan received his or that service was proper. Therefore, Dan should prevail.

Laura's argument against default judgment

While Laura will not likely be successful arguing improper service of process because her attorney made an appearance and this argument was not made, she has another argument available to her. A defaultee who has entered an appearance is entitled to a three day notice before a default judgment is made. Based on the given facts, this notice was not made. The court may also take into consideration the large amount of damages assessed because of their "overgrown" hedges and decline to uphold the default judgment to decide the case on the merits.

Appeal

If either Dan or Laura do not prevail at the trial court level, they have one right to appeal. If there is new evidence that is capable of production within 30 days that could not have been discovered earlier with due diligence, it is mandatory that they file a Motion to Correct Error under TR 59 within 30 days of the trial court's final judgment.

If they are unsuccessful on this motion or do not need to take this step, they will have to file a Notice of Appeal within 30 days of the Court's ruling on the motion or within 30 days of the trial court's final judgment, whichever is applicable. (Also note that if the Court does not rule on the motion to correct error within 45 days, it will be deemed denied.)

Within 30 days of filing the notice, the clerk shall have completed a record and the appellant's case summary filed. If the clerk fails to complete the record, a motion may be made within 15 days of the required completion date.

Within 30 days of the completion of the Clerk's record, the Appellant's brief is due. Then the appellee's is due 30 days later and the appellant's response is due 15 days thereafter.

Next, a request for an oral argument may be made although it is not mandatory that the court grant it.

Within 30 days of an adverse decision, appellant may request a rehearing. Transfer can also be made either within 30 days of adverse decision or 30 days of rehearing. Rehearing is not a prerequisite to transfer.

Indiana Essay Question VI
Sample Answer
(Verbatim transcription of answer by an examinee)
February 2005

Jane,

I am very sorry to hear about your property loss. Let me outline the steps we need to take to rectify this action:

1) Rulemaking by an Administrative Agency

It appears that the Forgotten Property Bureau ("FPB") is a state agency because the Indiana legislature indicated it was subject to all the normal statutes, rules and regulations that generally govern Indiana administrative agencies. As such, the FPB is governed by the specific rules under Indiana's Administrative Orders and Procedures Act ("AOPA"). And, it appears that FPB violated AOPA in adopting its rule regarding unclaimed property at government buildings.

A Rule, rather than an Order, is what the FPB issued here because its action applied broadly or generically to all people, not just one individual or group. I will explain where the FPB went wrong in adopting this Rule.

a) Notice

An Indiana Administrative agency must give notice of its proposed rule in the Indiana Register and to the public before holding a public hearing. Such notices must be give 30 and 21 days respectively before holding a hearing. It does not appear that such notices were given. The notice must include a summary of the rule proposed, the reasoning for it and other pertinent information.

b) Solicitation of Public Comments

During the notice period, before and after the hearings, the agency must solicit public comments and rely on them for the rule. Further, the proposed rule should have been submitted to the Indiana Economic Development Council and the Department of Commerce of the State for commenting if those departments would be affected by this rule. If either of those departments replied with comments to the FPB, the FPB would be required to respond specifically to such department in writing! It does not appear such solicitation requirements were met by the FPB.

c) Hearing

The hearings must be public with the proper notice given. If an agenda is prepared for the meetings it must be available and posted at the public meeting place 48 hours before the hearing. If minutes are taken at the hearing, they must be available as well, after the meeting. The rule that is adopted by the agency must be a logical outgrowth of the comments collected at the hearing(s) and solicited from other departments and the public.

-Open Door Law-

Indiana has a strong policy against secrecy. The FPB apparently violated this policy by holding closed meetings to decided "official action," which is action taken on behalf of the agency that is final and not confidential. "Meetings" are discussion of official actions or public business other than executive sessions consisting of job performance, litigation or budgeting. Also, chance social gatherings of public agency officials are not "meetings." However, the private lunch meetings of the leaders of the FPB are "meetings" where the public has a right to be and even record the contents.

We can seek judicial review to void this rule based on a violation of the Open Access to Meetings in Indiana if we can show the public was harmed, which I believe we can.

d) Submit Proposed Rule to Attorney General and Governor

Once an agency has proposed a rule based on a logical outgrowth of commenting, the Agency must submit it to the Attorney General who has 45 days to disapprove it, then to the Governor who has 15 days to disapprove it, which can be extended by 15 days.

Then, the agency submits the Rule for publication to the Indiana Secretary of State. The Rule may become effective not sooner than 30 days after its submission to the Indiana Secretary of State.

I do not have evidence that these specific rules were followed when the FPB made its rule regarding abandoned property. We can seek judicial review of this rule, but courts are hesitant to review rules by agencies due to the separation of powers issues, that is, agency's rules are similar to legislative statutes. However, courts will get involved where an agency has grossly manipulated its procedural powers. I believe this is just such a case, and the court will take our case.

Those are the actions we will take against FPB. What further actions can you take?

2) Personal Property Rights—Bailments & Abandoned Property

We can argue that you did not abandon your "Raspberry" but merely created a bailment by leaving it with the state. A bailment is a rightful possession of property by someone not the owner. You did not intend to leave your property behind, but the State was not stealing it. So, arguably, the State was the rightful holder, and, as such, owes a degree of duty to you, the owner. The degree of care they owe you is only slight care because the bailment was for your sole benefit. So, you will only recover against the state or FPB on a bailment claim if they were grossly negligent.

We will argue that disposing of the property in its entirety after passing a faulty Rule is grossly negligent. I am unsure of the success of this claim.

Further down the chain is the charity who then took possession of the property. If your property was a bailment, good title could not be passed by the bailee, the FPB or State; therefore the charity nor the Buyer, Bob, could receive good title. Thus, no bona fide purchaser existed, and you could recover from the charity and/or Bob to receive damages or your property recovered.

However, if the Rule withstands attack, and your property is deemed abandoned, you will be losing a claim against the charity and Bob because abandoned property belongs to no one and the first to find it is the rightful owner. Hence, the FPB could pass title as the owner of the abandoned property.

I would argue that the FPB cannot give up the abandoned property in only 5 days! The Indiana Unclaimed Property Act requires 7 years to pass before property escheats to the state as presumed abandoned. This goes back to FPB's duty of care owed to bailed goods, but it is likely a court will find presumed abandonment upon only 5 days is gross negligence.

Lastly, if the property is deemed lost, the finder has good title against all except for the rightful owner, you. So, you could bring a cause of action against FPB for the lost item. The FPB would there in turn have to seek recovery from the charity and Bob.

I believe this lays ont all of the proposed remedies you have options of pursing. Please call me if you have further questions.

Yours Truly,

X

Multistate Performance Test I
Sample Answer
(Verbatim transcription of answer by an examinee)
February 2005

INTEROFFICE MEMORANDUM

TO: Atty. Thomas Burke
FROM: Applicant
DATE: Feb. 22, 2005
RE: Fee-Splitting Agreement in Kingsley matter

You requested a memorandum of law analyzing two key issues in the Kingsley case. While I have found some controlling precedent on both issues, I want to stress that more research is probably warranted in a few areas. I will highlight them as I encounter them in this memo.

ISSUE #1: Was Greene a partner/associate of Kingsley for purposes of FRPC R.200?

As you are probably aware, this distinction is critical, because the client-protection policy against fee-splitting contained in R.200 is only applicable if the two lawyers are <u>not</u> considered partners or associates. It appears form the rule that if the fee-splitting agreement is made between partners or associates, the client-protection provisions of R.200 are not applicable.

Relevant case law on this issue comes form <u>Chambers v. Kay</u>, a 2002 case from the Franklin Court of Appeals. <u>Chambers</u> sets forth a totality – of – the – circumstances standard for evaluation of this issue focusing on two key areas:

(1) the level of supervision by the permanent attorney over the temporary are, including:
  (a) the amount of indirect and direct control the temp had over the representation (including litigation strategy)
  (b) The amount of oversight exercised by the permanent lawyer over the temp,
  (c) the degree to which the temp controlled her working environment,
  (d) the temp's relationship with the client, and
(2) the compensation scheme existing between the two lawyers, evaluated as:
  (a) if contingent on the outcome of the case, it is more likely that the temp is NOT a partner, and
  (b) if not contingent on the outcome of the case, more likely that the temp IS a partner.

The court in <u>Chambers</u> notes as well that more weight is give to the compensation scheme than the level of supervision in evaluating the balance of factors.

In applying this rule to the case at hand, I find the following factors relevant:

(1) Level of Supervision:
  (A) Karen Greene had limited control over the overall representation of Moreno. Her purpose was essentially limited to research and discovery based on her technical expertise. This purpose was set forth

in the fee agreement. In fact, Greene had stopped working for Kingsley before the trial, and did not participate in it.

(B) Kingsley exercised substantial oversight over Greene's activities on legal matters, but gave her fairly free reign over technical matters within her area of expertise.

(C) Green had limited control of her work environment, working in a space Kinsley temporarily cleared for her in her office. Kingsley showed no sign of intent for Greene to have any permament place in her office.

(D) Green's relationship with Moreno was very limited, consisting only of telephone calls and a few face-to-face meetings supervised by Kingsley.

(2) Fee Arrangement:

The fee arrangement between Greene and Kingsley contains both contingent and non-contingent elements. However, the bulk of Green's compensation was based on a 30% share of whatever fee Kingsley received, which was contingent on the amount Kingsley recovered for Moreno. Also, while the agreement provides for a $50/hour salary for Green's contributions, it expressly states that these payments are to be treated as an advance on the 30% share Greene was entitled to in the event of successful recovery by Kingsley. Thus, it appears that the substance of this agreement is to create a contingent scheme of payment.

Considering these factors as the totality of circumstances, it appears that the degree of supervision exercised by Kingsley would suggest that Greene was an associate/partner, while the compensation scheme indicated that Greene was not an associate. Since the compensation is to be given more weight in this determination, and there are some facts (eg Greene's freedom to work in her area of expertise and conduct discovery) that call Kingsley's level of supervision into question, it is my belief that a court will likely find that Green was not a partner/associate, and thus the client-protection provisions of FRPC R.200 are applicable.

Issue # 2 Were the requirements of R. 200 met by the arrangement and communication with Moreno?

FRPC R.200 was created to provide a high level of protection to the client in cases of fee-splitting agreements. The rule states that theses agreements are <u>unenforceable</u> UNLESS:

(1) there is full, written disclosure of the existence of the agreement and of its terms, <u>and</u>
(2) The agreement does not increase the total fee solely due to the division and is not unconscionable.

In the Kingsley matter, it appears that #2 has been satisfied, as there is no indication that the total fee was affected by the arrangement—in fact, this was clearly communicated to Ms. Moreno in Kingsley's 10/23 letter, and Kingsley collected her standard 33% fee

when judgment occurred. As this is standard practice and no unconscionable, element #2 of the rule is satisfied.

More problematic is element #1 of the rule, which requires full disclosure of the agreement to the client in writing and informed consent by the client, also in writing. The appellate court in Margolin indicates strong policy reasons requiring complete compliance with this rule, including

(1) to be sure the client is aware of the joint representation at all times,
(2) indication of the exact terms & the agreement by the lawyers on them,
(3) preventing the lawyers form altering the agreement w/out the client's knowledge, and
(4) so the client has the ultimate power to consent or withhold consent.

This rule will be strongly construed in favor of the client.

In our case, it is evident that Ms. Moreno did not receive full written disclosure of the agreement. While Kingsley did send a letter and obtain Ms. Moreno's consent to the existence of the arrangement, she only fully understood and agreed to its exact terms orally, in a phone conversation with Greene on 11/1. Thus, an argument could be made that Moreno could not have given adequate consent to the fee-splitting arrangement.

Although more research may allow me to be more conclusive on whether the exact terms actually had to be communicated in writing to Moreno, it is my feeling at this time, give the court's powerful stance toward protection of the client through this rule, that a court would likely find that the agreement does not comply with FRPC R. 200, and, thus, is not enforceable.

Thus, based on analysis of the facts and applicable rules of law, it is my feeling that since Ms. Greene was not Ms. Kingsley's associate or partner, the fee-splitting agreement was required to comply with FRPC R.200. Since it apparently did not, it is my belief that he agreement is unenforceable. I am willing to perform further research on this matter if you feel it is warranted.

Multistate Performance Test II
Sample Answer
(Verbatim transcription of answer by an examinee)
February 2005

February 22, 2005

William L. Caldwell
Belle, Bruce & Caldwell LLP
Attorneys at Law
473 Bayliss Ct.
Margot Bay, Franklin 33501

Re: Reynolds v. Preferred Medical Providers

Dear Mr. Caldwell,

We represent Rowena Reynolds and her deceased father, John Reynolds. As you know, Ms. Reynolds is suing your client for several wrongs committed before the death of her father. John Reynolds's insurance plan was sponsored by Preferred Medical Providers.

Your correspondence dated February 21, 2005, states that the arbitration clause in Mr. Reynolds's policy is enforceable despite the admitted non-compliance with Franklin Medical Insurance Contract Act (MICA) §63.1. MICA §63.1 requires specific language to appear in bold red type directly above the signature line on the enrollment form for the insurance policy. You agree that this specific language did not appear on the enrollment form that Mr. Reynolds signed.

However, in your letter you pointed to two federal statutes that may preempt MICA. If this were true, which we do not believe is the case, your client's arbitration clause would be valid despite its failure to follow MICA §63.1. The two statutes to which you referred are 42 U.S.C. §1395mm (c)(3)(c), which is a portion of the Medicare Act, and the Federal Arbitration Act.

Preemption by federal statutes can occur in two situations. First, if, when writing a statute, Congress intended to occupy the field of the legislation to the exclusion of any state regulation. This is called "field" preemption. The second situation is where there is a direct conflict between the federal statute and state regulation. This is called "conflict" preemption. We do not agree that the statutes you have referenced preempt MICA §63.1 by either field or conflict preemption.

I. <u>The Federal Arbitration Act does not preempt MICA §63.1 due to the McCarran-Ferguson Act.</u>

In your letter you pointed to <u>Casaro v. Super Sub Associates</u> as the basis of your contention that the Federal Arbitration Act (FAA) preempts MICA §63.1. In <u>Casaro</u>, the court found that the FAA preempted an Olympia state statute relating to arbitration clauses. The court determined that Congress intended to occupy the field of arbitration when drafting the FAA.

However, the Franklin Court of Appeal distinguished <u>Casaro</u> when finding the FAA did not preempt MICA §63.1 in <u>Smith v. Modern Care of Franklin.</u> The <u>Modern Care</u> court determined that <u>Casaro</u> did not apply to MICA §63.1 because the McCarran-Ferguson Act ("MFA") did not come into play in <u>Casaro</u>. The MFA states that no federal law that does not specifically relate to the business of insurance can preempt a state law that regulates the business

of insurance. The Modern Care court held that MICA §63.1 was a state law that regulates the business of insurance. The FAA clearly does not specifically relate to the business of insurance. Therefore, the court held that the FAA does not preempt MICA §63.1.

Therefore, your argument that the FAA preempts MICA §63.1 is invalid and the FAA does not prevent a court from finding that the arbitration clause is unenforceable under MICA §63.1.

II. The Medicare Act does not preempt MICA §63.1 because the Act was not intended to occupy the field.

Your letter states that Preferred Medical Providers ("Preferred") filed the enrollment form in question with the Secretary of Health and Human Services in compliance with 42 U.S.C. §1395mm. That statute requires that marketing materials and forms for Medicare policies must be submitted for approval by the Secretary of HHS at least 45 days before distribution. The Secretary will disapprove materials if they are "materially inaccurate or misleading or otherwise make a material misrepresentation." Your argument is that the Medicare Act preempts MICA §63.1 and that the filing made pursuant to 42 U.S.C. §1395mm protects yore client under the Medicare Act.

However, the Report of the Conference Committee on the Bill Proposing Amendments to the Medicare Act makes it clear that Congress did not intend to occupy the field in this area of Medicare. It states that "the Secretary should not be the sole regulatory voice in the matter, recognizing that states may differ on the measure of protection they wish to provide for their elderly residents." The Report concludes that states may "append whatever additional protections they deem appropriate, especially in the area of ensuring that senior citizens are fully informed of their rights…." Therefore, there does not appear to be field preemption of MICA §63.1.

Neither is there conflict preemption. MICA §63.1 does not directly conflict with the Medicare Act. It simply provides "additional protection" as described in the Committee report.

I conclude with the following facts:

(1) The FAA does not preempt MICA §63.1.
(2) The Medicare Act does not preempt MICA §63.1
(3) MICA §63.1 invalidates arbitration clauses in insurance contracts that do not make the required disclosure directly above the signature line in the enrollment form.
(4) Your client admits that its form does not meet MICA §63.1.

Based on all of the above, we believe that the arbitration clause in Preferred's contract is unenforceable and we reject your demand for arbitration. We will continue with our suit as filed in the Franklin state district court.

Please let us know if you have any questions concerning this matter.

Sincerely,

Arthur McBride.