INDIANA ESSAY
QUESTION I
February 2007

Ruby Company, LLC ("Ruby") has filed a lawsuit against Opal, Inc. ("Opal") in a St. Joseph County, Indiana Court. The suit is based upon an allegedly defective robotic saw designed and manufactured by Opal for Ruby.

Ruby's counsel has named Dr. Paul Smith as an expert witness who will testify at trial. Dr. Smith's expertise is robotic engineering. Dr. Smith lives in Rochester, New York. On January 10, 2007 Opal's counsel called Ruby's counsel by phone to schedule the deposition of Dr. Smith for January 12, 2007 at Opal's counsel's office in South Bend, Indiana. He followed up the phone call with a formal Notice of Deposition for that date and location. Attached to the Notice of Deposition were 25 interrogatories and 10 separate requests for production of documents directed to Ruby about Dr. Smith.

Neither Dr. Smith, nor Ruby's counsel is available for deposition on that date. Ruby's counsel notifies Opal's counsel in writing of their unavailability and suggests a more convenient date for the deposition. He also notifies Opal's counsel that Dr. Smith will charge $125.00 per hour for the deposition, and approximately $1,000 in travel expenses. In response to the Interrogatories, Ruby's counsel provides Opal's counsel with a copy of Dr. Smith's curriculum vitae, as well as his expert report regarding the specific defects in the robotic saw and the expert's opinions regarding the defects and a summary of the grounds for each opinion. Ruby's counsel objects to the remainder of the written discovery on the basis that it does not comply with Rule 26 of the Indiana Rules of Trial Procedure.

The only response of Opal's counsel is to file a Motion to Compel Discovery. The Motion seeks to compel the deposition of Dr. Smith and to compel Ruby to answer all of the interrogatories and requests for production of documents objected to by Ruby.

You are an associate with Ruby's counsel's law firm. Discuss any defenses that you would raise to the Motion to Compel Discovery.

INDIANA ESSAY
QUESTION II
February 2007

After suffering a mild stroke, a seventy-five year old Testator asked his divorced daughter to move into his home in Indianapolis, Indiana, so Testator could avoid moving into an assisted living facility. His daughter agreed and moved into his home and helped care for Testator. His two sons visited and noted Testator became resentful and jealous any time daughter's attention wavered from him. Two years after daughter moved into Testator's home, he had his attorney draft a will for him devising the Indianapolis home to his daughter and the residue of his estate to his daughter and two sons, in equal shares. Daughter then began dating a man that Testator disliked. Six months later, Testator died.

The children are unable to find the will with original signatures. However, they find a copy of the original will in Testator's safe deposit box at the bank with a note handwritten by Testator adding that he devises the home to daughter so long as she remains unmarried.

The daughter contacts you to probate Testator's will and to advise her regarding the distribution of property. What advice do you give her?

The sons contact the Testator's attorney to probate Testator's will and to advise them. What advice will Testator's attorney give them?

INDIANA ESSAY
QUESTION III
February 2007

The Indiana legislature enacted a statute that created the new Indiana Board of Data Privacy ("BDP") to address the problem of identity theft. The BDP consisted of seven board members to be appointed by the Governor. The legislature also passed a law that requires corporations (for-profit and non-profit) doing business in Indiana to "take all reasonable steps to guard against the loss or theft of their customers' personal data." The BDP was given the power to enforce this statute, as well as to make rules and regulations concerning the protection by corporations of personal data generally.

Diane, the Executive Director of the BDP, had once had some of her personal data stolen when she donated a computer to Charity, Incorporated ("Charity"), a non-profit corporation doing business in Indiana. Although the Board members of the BDP had not yet been appointed, Diane's first official act was to issue a press release stating that the BDP would henceforth require all non-profit corporations receiving donated computers to institute a program for "removing all personal data from the hard drives of any computer donated within Indiana." Diane also sent a letter to Charity's Indiana headquarters asking it to show cause why it was not in violation of the announced policy. This letter demanded that, within thirty days, Charity comply with the requirement and cited the statute regarding "reasonable steps" as authority for the BDP's position.

Paul, the head of Charity in Indiana, received the letter. He wrote back to BDP within ten days asking for clarification and indicating that, in any case, Charity could not comply with the demand within the time allotted. Upon receipt of the letter, the BDP notified Paul by a telephone call that a show-cause hearing for violation of the statute would be convened before an administrative law judge in thirty days.

Paul retained you to obtain an injunction to stop the hearing and any other action by BDP against Charity. What substantive arguments would you make to support the injunction? Address any potential roadblocks to state court jurisdiction. (Do not discuss Indiana civil procedure, corporations or constitutional law in writing your answer.)

INDIANA ESSAY
QUESTION IV
February 2007

Better Tire Company ("Better Tire"), an Indiana corporation, was recently formed by Bob and Zach for the retail sale and service of tires, wheels, rims and related products. Better Tire purchased products to sell to its customers from First Tire Company ("First Tire"). The purchase was financed through First Credit Corporation ("First Credit"). First Credit secured the loan by obtaining a security interest in the tires, wheels, rims and related equipment which were specifically identified by product description on an exhibit attached to the security agreement. First Credit perfected its security interest by filing a financing statement in the Recorder's Office, in the county where Better Tire's business operations are located. The financing statement included the exhibit from the security agreement and identified the collateral on the financing statement as "tires, wheels, rims and related equipment."

Better Tire needed additional operating capital shortly after the acquisition of these products from First Tire. Better Tire contacted a representative with Capital Bank and Capital Bank agreed to provide a $500,000 operating loan. As part of the terms of the operating loan, Capital Bank required Better Tire to execute a security agreement to secure its obligation to repay the indebtedness in "all inventory of Better Tire Company including but not limited to tires, wheels, rims and other related products." Capital Bank filed a UCC Financing Statement with the Indiana Secretary of State's Office, which described the subject collateral as "inventory."

After six (6) months of operation, Better Tire was unable to meet its debt service obligations and defaulted on both the loan to First Credit and Capital Bank. Both First Credit and Capital Bank filed legal proceedings to foreclose their respective security interests in the tires, wheels, rims and related equipment of Better Tire.

Explain which creditor has priority over the subject collateral and why.

INDIANA ESSAY
QUESTION V
February 2007

Smith, Jones and Parker are all close friends. They attended Indiana University's College of Engineering and graduated with engineering degrees in December, 2006. While they were in school, they developed a process of forming plastic parts. Smith, Jones and Parker intend to apply for a patent on this process, but they do not want to spend the money for this right now.

Parker finds a building for lease that would be perfect for the new enterprise. He signs the Lease Agreement and uses his savings for the $1,000 security deposit. The annual rent is $75,000. Martin owns the building and is the Landlord.

Smith, Jones and Parker approach Martin with their idea in hopes of getting Martin to put up the money to start a business with this new process. They all agree to form a corporation, SJPM, Inc. Martin agrees to contribute $500,000 for 51% of the shares of SJPM, Inc. Smith, Jones & Parker agree to contribute their process to SJPM, Inc. and receive 49% of the shares. They form the corporation using forms available over the Internet.

SJPM, Inc. uses its capital to pay rent, purchase office equipment, order the equipment necessary for the plastic forming process, and hire an office manager, two secretaries and a plant operations manager. Smith takes care of paying the payroll each week, however, he does not pay any payroll taxes to the State of Indiana, Department of Treasury or the Internal Revenue Service.

After a month, the parties have a meeting with Martin's lawyer to start the process of applying for the patent. The lawyer advises them that he did a patent search, that their process is not new at all, and that at least one company has a patent on that process so they should avoid using the process in their business. They decide to close the business. The plant manager is threatening a lawsuit because he had a two-year employment contract with SJPM, Inc.

1. What is Parker's obligation on the lease and why?
2. Discuss who is obligated for payroll taxes and why.
3. Discuss who is obligated to the plant manager and why.

INDIANA ESSAY
QUESTION VI
February 2007

Husband and Wife were married in December of 1995 while they were both juniors in college. Wife immediately discontinued her studies in computer science and began to work as a bank teller while Husband finished his undergraduate degree in business. Husband and Wife have four children. The oldest was born two months after Husband received his undergraduate degree. After this first child was born, Husband and Wife agreed that Wife would be a homemaker and discontinue employment outside the home. The youngest children are one-year-old twins. Wife recently discovered that Husband has been unfaithful and he has been spending $10,000 per year for the past two years on his girlfriend. Husband has moved out of the house and he is going to seek dissolution of marriage.

In 2006, Husband earned $100,000 as a manager. Had Wife completed her undergraduate degree, she would be earning approximately $75,000 per year.

Husband inherited $40,000 during the marriage. Currently, Husband has a bank account in his name with $20,000 in it. Husband also has a vested pension account through his employment with a current value of $30,000.

Wife brought a restricted trust account into the marriage. One year ago the restriction was removed so Wife withdrew $75,000 and used the money to enlarge the marital residence. No other monies have been withdrawn from the trust account. Currently the trust account balance is $50,000. The marital residence has a current net value of $100,000. Wife is concerned that she may not be able to afford the marital residence, but would like to retain it since it is the only home the children have known.

1. If the marriage is dissolved, which item(s) of property, if any, will be excluded from the marital pot for purposes of property division? Why?

2. Under the facts presented, what factors will the court consider in distributing the marital estate? Discuss.

3. Are there any circumstances under which Wife may be entitled to maintenance? Discuss.

Indiana Essay Question I
Sample Answer
(Verbatim transcription of answer by an examinee)
February 2007

We have several defenses to Opal's recently filed motion to compel.

1. As a preliminary matter, the Indiana Trial Rules require counsel to confer with opposing counsel prior to filing any discovery motions to attempt to settle the parties' dispute and/or to narrow the contested issues. In this case, Opal's counsel failed to satisfy this requirement prior to filing his motion to compel. This failure alone justifies the court's denial of the motion.
2. With respect to Opal's motion to compel the Smith deposition, the motion is also deficient because Opal has not properly served a subpoena on Dr. Smith to compel his attendance at the deposition. Although Rule 30 allows a party to compel another party's attendance at a deposition by merely serving a Notice of Deposition, Dr. Smith is not a party – he is simply an individual who has been retained by Ruby to testify as an expert. As a nonparty witness, Opal must issue a subpoena from the Indiana court. Because Smith is a resident of New York and likely not subject to jurisdiction of the Indiana court, Opal must go through the proper procedures to obtain jurisdiction over Smith with the assistance of a New York court (by using letters rogatory or an analogous procedure). Either way, by failing to issue a subpoena to Smith at least 10 days after serving the Deposition Notice, Opal has failed to follow the applicable Rules and cannot obtain an Order to Compel Smith's deposition.
3. Similarly, once Opal properly serves the subpoena, it will not be able to force Smith to travel to Indiana for the deposition and it will be obligated to pay Smith his reasonable fees for the time required for the deposition. As stated above, Smith is not a party to this suit and can therefore not be required to appear in this jurisdiction for deposition. Also, Rule 26 expressly requires the deposing party to pay reasonable fees to a deponent expert.

   If Opal continues to insist that Smith's travel to Indiana for the deposition or that it need not pay Smith's fees, we should consider a motion for a protective order once Opal properly serves the subpoena. We should consider filing the motion in the New York court that ultimately domesticates the subpoena.

   Finally, the court is unlikely to force Smith and Ruby to appear for deposition on an inconvenient date. Counsel typically coordinate schedules for depositions and, absent extra-ordinary circumstances or impending case deadlines, the court will not likely depart from this general practice. If Opal refuses to coordinate, Ruby should seek an appropriate protective order.
4. We should also seek a protective order with respect to the document request, and interrogatories served on Ruby. Rule 26 allows for limited discovery concerning an opposing party's testifying expert. Generally, a party is entitled only to a current CV and to a copy of the expert's report, where such a report has been prepared. Courts will generally also allow a deposition of the expert, but they do not allow free-wheeling interrogatories and document requests relating to the experts opinions. Based on the facts as you have relayed them, it appears that Opal's requests and interrogatories are too broad.

Indiana Essay Question II
Sample Answer
(Verbatim transcription of answer by an examinee)
February 2007

I would first advise the daughter about some of the basic tenants of Indiana's law regarding wills so that she can understand the framework for my advise and inform me of any facts that appear to be relevant.

I would tell her that Indiana requires a testator to be at least 18 and of sound mind to execute a will. The will must be published to two witnesses and signed by the testator (or at his direction and in his presence) before 2 witness. The witnesses must sign in the presence of each other and the testator. For a will to be probated someone will need to attest to the testor's signature and/or that of the witnesses, if the witnesses are alive they can testify as to the formalities being observed. If the will is self-proving (signed before a notary under the penalty of perjury with an affidavit attesting to the formalities-this could also be a separate document) testimony is not required.

A testator is presumed to be of sound mind. While the testator here suffered a stroke, so long as he had the capacity to recognize the objects of his bounty, understood generally his possessions, and the effect of his actions his capacity will not be an issue.

A question could arise as to the where abouts of the original will. The brothers may question whether the will was revoked or destroyed by the testator because he did not like the daughter's boyfriend. Revocation by a physical act requires intent and destruction or mutilation of an essential part of the will. Here, although the original cannot be found a copy of the will was found in the testator's safety deposit box with a note that may have been written after the boyfriend come into the picture (because of the marriage restriction). If there is no additional evidence that the testator revoked the will by physical destruction, then likely the will can be admitted to probate.

Another question that might arise is whether the testator's handwritten note prevents the daughter from marrying for fear of being divested of the home. This is invalid for two reasons: 1. is in an invalid restraint on alienation and void against pubic policy; and 2. the writing was not executed in such a way that it will be recognized by the probate court. A will can incorporate a document if it is described in the will, it exists at the time of execution and at the testator's death, and can be identified by the description in the will it can be incorporated. Here, there is no indicate that any of these requirements are met. The will is described very briefly, but no mention of additional documents are made. This paper and its restriction will have no effect on the probate of the will

Unless the brothers can point to and prove any reason the will should not be probated, she is likely to take according to the terms of the will.

B. Advice to the Brother's

The attorney to the brother's is likely to tell them that any contest to the will must be proven by the brother's. A will must be admitted to probate w/in 3 years of the testator's death or before a final judgment is entered deposing of the property by intestacy. The brothers could file objections to the will once it is filed with the court and that would allow them 30 days to support their cause. At they very latest they could challenge the will 3 months after it was admitted to probate.

Assuming the brother's were interested in contesting the will they could argue the following.

1. the original could not be found because it was revoked and destroyed by the testor
2. the testator lacked capacity
3. the will was a product of undue influence; or 4. fraud.

The advice relating to the first two grounds would be consistent with the advice given to the sister above, and it is going to be very difficult to overcome the presumption of capacity or to prove revocation without additional information.

Undue influence is also difficult to show, but there is some potential here. A court will consider the following factors:

1. the opportunity to influence; 2. the influencer received a benefit from the will; 3. the testor's susceptibility or vulnerability; and 4. whether the testator succumbed to the influence.

The testator is a stroke victim, while this does not make him lack capacity it may show that he was vulnerable-he was vulnerable enough to have to ask for help from the daughter. The daughter does not appear to have had an opportunity to influence the testor-she lived with him and was his caretaker. This could give her some leverage to exploit to get him to favor her in the will. The daughter also was favored in the will she took the home and one-third of the residual estate. There is not enough in the facts here to see if the testor bent to her influence (if used), but the testator did seem to have a little bit of a mean streak to him-the handwritten note, the resentful and jealous behavior. The may evidence that he was an independent person capable of generating his own feelings. In any event this is a difficult claim to win.

Fraud can occur in the factum-(i.e., this is not a will you are signing) or can be a misrepresentation-i.e. your sons don't love you that causes a fraudulent will to be signed. There does not appear to be fraud on these facts.

Both attorneys should advise their client that if the will is not probated, the entire estate will be discended in intestecy and it appears each of the kids (unless there are facts we do not know) would receive one-third.

Indiana Essay Question III
Sample Answer
(Verbatim transcription of answer by an examinee)
February 2007

I. Rulemaking
  a. Enabling Statutes
  b. 12 Rule making Steps
II. Adjudication
  a. AOPA
  b. ALJ

The Indiana general Assembly may delegate authority to an agency. To do so, the General Assembly must create a valid statute. The agency created then has the authority to act outlined by its enabling statute. Pursuant to this statute, the agency may engage in rule making, adjudication, and investigations. In our present situation, it appears the legislative created the BDP and its enabling statute allows it make rules and regulations, as well as enforce the statute.

In order for an agency like BDP to enact rules, it must comply with its enabling statute. This provided that the agency would be governed by 7 board members appointed by the Governor. Since Diane acted prematurely and the board members have not even been appointed, we may try to seek an injunction based on the fact it is operating outside the scope of its authority under the enabling statute.

Next, Diane has just made a rule and failed to follow the proper process. First, BDP must give notice of intent of the rule in the Indiana Register. If the rule will have an impact greater than $500,000, BDP must provide a fiscal analysis. Next, it must give notice followed by an opportunity for the public to comment. Once it reviews the amounts, BDP may incorporate changes so long as it is a "logical out growth" from the original rule. BDP must then present it to the Attorney General and Governor for review. Then it can formally adopt the rule. The entire process must take place with in one year and BDP may withdraw it if it seem fit until it is finally adopted.

In this case, Diane simply made up her own rule. She by-passed the rule making process, did not wait for the other board members, and went after Charity from what it appears to be a vendetta. For this alone, we should be able to get an injunction and have the rule removed as it fails to comply with the enabling statute and Indiana agency rule making. But, we are not finished.

Agencies may also adjudicate. Unless otherwise specified in the enabling statute, statewide agencies are governed by the Indiana Administrative Orders and Procedures Act (AOPA). This provides guidelines on how an agency will adjudicate an issue. Diane's rule requires Charity to prove something very difficult, why it was not in violation of the law. The burden should be on the agency to prove violation, not on the organization to prove its innocence. Additionally, 30 days to comply with a new rule is burdensome and unreasonable. For adjudication purposes, the AOPA allows a administrative law judge (ALJ). This person does not have to be a lawyer or member of the bar and it may consist of multiple persons (generally no more than 3). The ALJ must be disinterested persons, having no interest in the outcome. Additionally, ex parte communications are prohibited. In other words, none if the parties may speak with the ALJ.

The ALJ proceeding is somewhat like a trial. We can provide evidence, depose parties, and question witnesses. However, a reasonable amount of time is required, and in this case 30 days in unreasonable. Plus, a phone call to you is not adequate notification.

There are some roadblocks to our efforts to obtain an injunction. A court will generally not hear a case unless a final administrative order has been issued by the ALJ. Therefore, we will need to overcome this hurdle.

For a court to hear our injunction request, we must demonstrate: Standing, Exhaustion of remedies, and Timeliness. Additionally, we should consider jurisdiction and venue issues if applicable. I believe we have standing. The BDP has identified us as violating Diane's rule and charged Charity. Because BDP has not properly crated a rule, it is unclear if we have exhausted our remedies. However, because we are seeking to stop the ALJ hearing, this should be overlooked. Normally, we would wait until BDP issued a final order. But, because of the failure to properly promulgate a rule and the nature of Diane's attack, an injunction is of the essence. Plus, it is a timely issue. Waiting for a final order may cause harm where an injunction will stop the BDP action. On a final note, we should ensure the injunction request is filed in the proper venue and jurisdiction.

It appears we have a strong case. The agency did not follow rule making procedures and we were not given adequate time to prepare for the ALJ, thus, I'm confident a court will issue an injunction so the proper procedures will be followed.

Indiana Essay Question IV
Sample Answer
(Verbatim transcription of answer by an examinee)
February 2007

Capital Bank has priority over the subject collateral. The issue is which party has priority over the subject collateral in these secured transactions. Secured transactions are governed by UCC-Article 9.

The general rule regarding priority in collateral is the first party to file or perfect takes priority.

In this case, First Tire has a security interest in the "tires, wheels, rims and related equipment" in Better Tire's business. First Tire's claim of priority fails for several reasons. First, in order for a secured party to <u>attach</u> to collateral, the secured party must pay value for the collateral, the debtor must have rights in the collateral, and the secured party must obtain a security agreement (SA) authenticated (signed) by the debtor which contains a sufficient description of the collateral. To perfect this interest, the secured party must attach and then file a financing statement in the appropriate place and the financing statement must also contact a description of the collateral (although it may be more general than that given on the SA). Perfection may also be done via possession or control.

In this case, First Credit is an unperfected secured party because it should have obtained a security agreement and filed a financing statement outlining its interest in Better Tire's <u>inventory</u>, <u>not</u> its <u>equipment</u>. Better Tire is in the business of selling tires, wheels, rims, and related products; thus, those things constitute its <u>inventory</u>, not its equipment. First Credit mis labeled its security interest on both the security agreement and the financing statement calling the collateral "equipment" and not inventory. Any other secured party looking at the financing statement would not be able to tell the collateral was actually on Better Tire's <u>inventory</u> and not its equipment.

In addition, First Credit did not file the financing statement in the proper place. Financing statements for corporations should be filed in the Secretary of State's office in the state of the company's incorporation (here, Indiana) Instead, First Credit filed the financing statement in the Recorder's office in the county where Better Tire's business operations are located. Again, filing is designed to put other secured parties on notice of all security interests attached and perfected on debtor's collateral. By filing in the Recorder's office, no other secured party will be able to find the financing statement to see someone else has a security interest on the subject collateral. Because First Credit mis labeled its security agreement and financing statement as covering "equipment" rather than "inventory", and because it filed the financing statement in the wrong office instead of Indiana's Secretary of State's office, First Credit does <u>not</u> have a perfected security interest and Capital Bank will take priority if it filed or perfected properly.

Capital Bank properly filed and perfected its security interest in Better Tire's inventory. Capital Bank loaned $500,000 to Better Tire and executed a security agreement to secure Better Tire's obligation. The security agreement covered "all inventory…including but not limited to tires, rims, and other related products." This was a proper and sufficient description of the collateral and properly identified it as "inventory" and not "equipment."

Capital Bank attached when it gave value for the collateral, gave Debtor rights in the collateral, and executed a security agreement that sufficiently described the collateral and was signed by the debtor. (This signing, etc. is assumed since facts do not indicate otherwise.)

Next, Capital Bank perfected its interest when it filed the financing statement in the proper place, Indiana's Secretary of State's office. The description of the collateral as

"inventory" on the financing statement is also sufficient. Any subsequent secured party could look up the collateral for Better Tire in the Secretary of State's office or website and be put on notice that another party has a security interest in Better Tire's inventory. Thus, Capital Bank properly filed <u>and</u> perfected first and will have priority over First Credit's claim on the subject collateral.

[It is also important to note that neither First Credit nor Capital Bank obtained super priority status. Although First Tire may have had a Purchase money Security Interest (PMSI) in Better Tire's inventory, which would have given it super priority status over the other secured parties, it did not obtain this status because of its errors in labeling and filing (explained above) and because it did not file notice to other creditors of its security interest within 20 days of when the debtor received the collateral.]

Indiana Essay Question V
Sample Answer
(Verbatim transcription of answer by an examinee)
February 2007

1. Parker is obligated personally on the lease.

Parker's actions of signing a lease before the corporation was formed labels him as a promoter. A promoter will be liable personally on this lease until the corporation expressly relieves him from the debt. This relief is called a novation (spelling?). Because the corporation has accepted the benefits of this lease it will likely also be liable; however, this mere acceptance does not release Parker of his liability, per Indiana Statute and Indiana's Business Corporation Law (IBCL). Martin, as an individual, is still owner for the facts do not show him donating the building to the corporation. Thus, Parker is liable to Martin.

2. Assuming there is a valid corporation, the corporation will be liable for the payroll tax.

To have a valid corporation, they must file the Articles of Incorporation with the State, list the incorporators names and address, state the agent of corporation and address, list the number of authorized shares and make sure thies name identifies it as a corporation with a purpose.

From the facts, it appears all of these formalities have been met as the facts state that forms were filled out, percentages have been divided, and the name is listed as "Inc."

Indiana is a pro-management State. Thus, in order for a manager to be liable he must breach his fiduciary duty and act in a way that is in willful disregard or gross negligence to the best interests of the corporation and owners. A manager owes a duty of care and a duty of loyalty to the company. The duty of care states that the manager will acts as an ordinary product manager would in the same or similar situation as if the business was his own. Indiana Code has basically adopted the Business Judgment Rule by codifying it into the duty of care & requiring the managers to act in good faith.

Smith is identified as the one who failed to pay payroll taxes to the State of Indiana, Department of Treasury or the Internal Revenue Service. Smith's actions will not make him personally liable as long as he acted in good faith For this mistake. There are no facts to show Smith's mistake was intentional or willful. Normally an ordinary person would pay the taxes; however, Smith may have made an honest mistake. For example, he may have believed Someone else was in charge of that or maybe he did not know these had to be paid as he does not have a business background.

Thus, even though the mistake was made by Smith, the corporation as a whole will be liable. It is a separate legal entity that limits the liabilities of this owners, directors and shareholders.

3. Assuming again there is a valid corporation, the corporation will be liable for the contract of the plant manager.

A contract entered into before the dissolution of a corporation will be the debt of the corporation. SJPM, Inc. hired the plant manger well before they decided to close the business. Thus, in the winding up process, this contract may be considered as a debt to be paid before each owner can receive his capital contributions back.

Lastly, it is important to note that although Martin put up most of the capital the corporation now owns this. The division of the corporate assets will be decided in the dissolution and winding up process.

Indiana Essay Question VI
Sample Answer
(Verbatim transcription of answer by an examinee)
February 2007

#1 Marital property is valued at the date of separation.

Indiana follows the one pot theory under which all assets acquired before and during marriage are considered maritial property and are subject to property division upon dissolution. The pot closes on the date of separation and any assets acquired after that date are not included in the pot. Debts are also part of the pot. The only things excluded from the marital pot are contingent or unvested assets or interests as well as future earning potential, such as the wages a spouse expects to earn after separation. Paid debts and expenses are not in the marital pot because they are accounted for in the current value of assets.

Thus in the instant case, the followings are <u>not</u> part of the marital pot:

$20,000 spent on Husband's girlfriend – paid expense, reflected in current bank account

$100,000/yr Husband's income – future income streams

$75,000/yr Wife's potential income – future income streams

$40,000 Husband's inheritance – not current asset: meaning, current value reflected in other assets such as bank account

$75,000 Wife paid from trust to enlarge residence – a past expense accounted for in the value of residence now

#2 Indiana requires a fair and equitable division of property upon dissolution of marriage. There is a strong presumption that a 50/50 distribution of property is fair and equitable. This means each spouse takes the half the fair market value of assets minus liabilities. However, a court may deviate from the 50/50 presumption where other factors demonstrate a different division is fair and equitable. The factors considered are

1. each spouses role in generating the assets
   (including homemaker's role in providing home comfortable)
2. whether any property was brought into the marriage or acquired through gift or bequest
3. The economic circumstances of the parties
4. Tax consequences.
5. Whether one spouse misbehaved with regards to financial matters

Here, factors 1, 2, 3, and 5 are present.

1. Hus
2. Wife is likely to take economic responsibility for children (i.e. they will likely live with her)
3. Wife's trust and Husband's inheritance
5. Husband spent $20,000 on girlfriend

#3 Wife may be entitled to rehabilitative maintenance.

Indiana allows maintenance in only two circumstances

1. where either spouse or child is disabled and spouse is unable to work as a result.
2. rehabilitative maintenance so that spouse may pursue vocational education.

Maintenance under #1 is indefinite in duration. Maintenance under #2 is limited to three years. Both forms of maintenance terminate with the death of one of the spouses or remarriage of either.

Here, no disabilities are present in the facts. Thus only rehabilitation maintenance, presumably so wife could finish undergraduate degree, is an option, limited to three years.

Husband and Wife could provide for maintenance in a dually executed separation agreement, which would thereafter be enforceable.

Multistate Performance Test I
Sample Answer
(Verbatim transcription of answer by an examinee)
February 2007

Memorandum, as requested.

TO: Laura Levine
FROM: Applicant
DATE: February 27, 2007
RE: Tamara Shea-Real Estate Contract

I. INTRODUCTION

Tamara Shea, our client, will likely be able to recover the $18,500 she has lost from her deserved commission in the Remick-Anderson sale. Franklin code will make it very difficult to recover From Remick under a breach of contract claim, but Franklin case law makes it very evident that Anderson will be liable For the full amount under an interference with prospective economic advantage claim.

II. The Franklin Civil Code §1500, along with interpretations of Franklin Case law will not allow Shea to recover in Breach of Contract against Remick

A. The strict statute of Frauds of Franklin will likely hold Shea's agreement to be interpreted by the terms only in the agreement expressly.
Shea will be unlikely to break Franklin Civil Code §1500's requirement that all agreements "for the sale of real property" or "to procure a purchaser or seller of real estate" to be in writing. FCC§1500(c), (d)(1). Shea's contract was exclusive in nature and biding for all buyers procured, but the fact that its terms had clearly expired will almost certainly release Remick from liability. The Court of Appeals declares that the Franklin statute of Frauds "is strictly enforced" in order "to protect consumers." The court will be hesitant to allow brokers to bring any potentially "False claims by brokers for commissions." Mather.

B. Shea's additional communication with Remick of her writings and conversations will likely be insufficient to warrant an extension of the Contract
An extension of the expiration period in the contract would revive contract liability. Shea did get oral approval from Remick for the extension and sent her a written extension agreement. However, Remick never Signed. The Mather case explained that "writings that related to the broker's commission" that "were from the broker to the client" alone were not sufficient to satisfy the statute.

III. Shea will likely succeed against Anderson in a claim for her lost $18,500 comission

A. Shea will not succeed using an interference with contractural relations claim.
For Shea to succeed in a interference of contracts claim, she must prove the first element of the claim, "(1) a valid and enforceable contract between the plaintiff and a third party" had, indeed, existed. Using the previous analysis it will be very unlikely to prove that Shea still had a valid contract with Remick.

B. Shea will be able to recover from Anderson because his actions clearly meet the elements required for interference with prospective economic advantage.

There are five elements that are required for bringing an "interference" claim all of which he appears to satisfy.

1. Shea possessed "an economic relationship between "herself" and the "third party" containing "the probability of future economic benefit."
This first element of an "interference" claim is clearly met by Shea and Remick's continued relationship and communication. In Mather, the court concludes that it is sufficient that "a contract likely would have been consummated but For the conduct of the tortfeasor," or, Anderson.

2. Anderson had the second element of "knowledge of the existing relationship."
By Anderson's extensive conversations and inquiry into the precise nature of the commission and contract, it is obvious Anderson possessed requisite knowledge.

3. Anderson's Acts were "intentional and improper," "designed to disrupt the relationship
Unlike the Downy Case, where it was uncertain or immaterial whether the defendants actions were intentional/improper, Anderson specifically induced Remick to breach to her benefit and his through enticing her to act in violation of the contract.

4. Shea received an "actual disruption" of the relationship."
Remick would not return calls and the relationship was destroyed after Anderson's Actions.
5. Shea also received economic harm as a proximate result of Anderson Actions
The final, fifth element is obvious from Shea's $18,500 loss she received from Anderson persuading Remick to do away with their Relationship.

IV. Conclusion

Shea will prevail over Anderson to receive $18,500 commission through the interference claim. However, no likely claim exist against Remick. There was a clear violation in tort of Shea's rights in the contract.

Multistate Performance Test II
Sample Answer
(Verbatim transcription of answer by an examinee)
February 2007

2-27-07

Regina Snow, Esq.
Phoenix Cycles, Inc.
Re: George Glickman
Dear Ms. Snow

This letter is a followup to your conversations with Michael Simmons on ----date. Based on current law we feel that Mr. Glickman's FMLA rights have been violated by Phoenix Cycles for the following Reasons. In addition, due to these violations, we feel Mr. Glickman is entitled to the following damages. This letter will address several key points much by you during your conversation with Michael Simmons.

1. No Substantial changes to Mr. Glickman's employment.

You claim that there were no substantial changes to Mr. Glickmans employment upon his return to Phoenix cycles. This is NOT the case. Before Mr. Glickman took his 9 week leave of absence (he is entitled to 12), he was employed as the Vice-President of Marketing. Upon his return, he was notified that he had been demoted to Coordinator of Bicycle Marketing. In his new position he now reports to Sue Cowen who was his equal when he left.

Under §2614 of the family and medical leave act, Mr. Glickman is entitled, on return from his leave "to be restored by the employer to the position of employment held by the employee when the leave commenced (i.e.: Vice President) or to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment."

The U.S. Ct of appeals has interpreted an equivalent position to mean "virtually identical to the employee's former position in terms of pay, benefits, working conditions, including privileges, perquisites, and status. Ridley v. SGH, p.11. Moreover, the court stated that there must be similar opportunities for promotion and salary increase.
Phoenix Cycles demotion of Mr. Glickman is subtutrally in violation of §2614. Mr. Glickman does not have: 1) the same status (he went from vice-president to Coordinator, 2) Same benefits/privileges. (he now has to report to a former equal & does not have his (2) employees under him, 3) same pay (although he has equal salary he will not get same bonus, 4) opportunities for promotion & salary increase (by being a vice-president his opportunity for advancement was greater than being a coordinator and 5) working conditions were different (he now has to answer to a new boss, his freedom and management opportunities have been diminished). Although he will receive the same pay (as you point out) other employment losses clearly violate §2614.
Legitimate Business Reason – You pointed out in your conversation with Michael that there was a legitimate Business Reason for the demotion. This is not the case. Mr. Glickmans Position was not being terminated prior to his leave. His position was not even questioned. In fact, Your company praised him for his hard work and stated the new line of bicycles were not possible without his contribution. The results of the study are not conclusive either. The study indicates that the two departments should be combined. But, Mr. Glickman is clearly more qualified for the position than Sue Cowen. Mr. Glickman worked there longer, had more management experience, and knew the industry much better than Sue. Mr. Glickman was more Senior than

Sue and should have received this position if the Consolidation was necessary. The Report itself even states that in order for the consolidation to be effective, Phoenix must have a manager w/experience and creativity. Mr. Glickman had both of these traits. Furthermore, Phoenix did not even interview Mr. Glickman for this position.

3. FMLA permits an employer not to reinstate if he is a high level employee.

Section 2614 (b) exempts highly compensated employees from restoration but only if:

A) denial is necessary to prevent substantial and grievous economic injury to the employer and

B) the employee notified the employer of the intent to deny restoration at the time the decision is made.

Phoenix did not comply with either of these two requirements.

First, Mr. Glickmans denial was not done to prevent substantial and grievous economic harm to phoenix. This is a high Standard. Min inconveniences and costs that are normally incurred are not substantial. Jones v. Oakton School District p. 15 More over, the injury must be as a result of putting Mr. Glickman back into that position, not because that position existed. There are no substantial economic harms done to Phoenix by restoring Mr. Glickman to V.P. For instance, Phoenix did not have to hire a V.P. to replace and pay a termination fee. Basically Mr. Glickman would slide back in as V.P. with no additional costs. Furthermore, his dept was running under budget and doing a stellar Job developing New Products.

Secondly, Phoenix did not notify Mr. Glickman when they decided to remove him as V.P. Per the statute they should have notified him well before he came back to work. Failure to do so prejudiced him so he could not attempt to find Other employment. If he would have known that his job was not available he could have attempted to find another V.P. while he was on Leave. Furthermore, Phoenix even stated in its letter to Mr. Glickman that they would notify him if his position was not available upon his return.

Enforcement of FMLA

Section 2617 provides that any employer who violates the FMLA Shall be liable for damages in the amt of

1)any wages, salary, employment benefits or other compensation denied or lost
-Mr. Glickman did not receive (or will not) his bonus of $25,000. He is entitled to that.

2)an additional amt as liquidated damages equal to the amt above and Reinstated. Mr. Glickman is entitled to these double damages because Phoenix did not act in good faith.

Phoenix attempted to limit his leave to 2 extra weeks instead of 4, Passed over him with regard to the restructuring, failed to notify him that his position had been substantially changed, and failed or will fail to pay him his bonus of $25,000 for the work on the new product line. Phoenix's attempt to cover this injustice up by Suggesting that his position did not change substantially and they had a right to do it based on a legitimate business purpose and because he is a highly Compensated employee further shows their lack of good faith.

Accordingly, we feel Phoenix has violated the FMLA by not restoring Mr. Glickman to his pre-leave position. Failure to do so should result in an award of $50,000 and restoration of his vice president position.

Mr. Glickman deserves all of the Rights and privileges of the FMLA. He only took 9 of his allotted 12 weeks. He clearly was eligible for leave since the first 5 weeks were for a serious injury (stroke) and the last 4 weeks were for the arrival of his adopted child. See §2612 (a)(1)(B) and (D).

If you have any Questions or Comments regarding this letter please let us know. Failrue to provide adequate relief to Mr. Glickman will result in a claim against Phoenix for violation of the FMLA.