

INDIANA ESSAY EXAMINATION  
QUESTION 1  
February 2016

As of January 1, 2016, John, an Indiana resident, had never been married. John had a Will leaving everything to his mother, Mary and, if she did not survive, to his only sibling, Sam. The Will does not appoint a Personal Representative.

John married Anna on January 10, 2016. John did not execute a new Will after his marriage. Six days after John and Anna married, John unexpectedly died. Four days after John's death, Mary died. Mary did not have a Will.

At the time of his death, John had the following assets:

1. House owned equally with Mary as tenants in common. Value of House – \$200,000
2. Joint Bank Account with Anna. Value of Joint Bank Account – \$5,000
3. Household Goods owned by John prior to his marriage. Value – \$20,000
4. Car titled solely in John's name. Value – \$25,000
5. Bank Account solely in John's name. Value – \$112,300

John had no debts. Assume the only estate administration costs are the following: (1) Court costs and publication fees of \$300; (2) Personal Representative's fees of \$4,000; and (3) Attorney's fees of \$8,000.

Anna wishes to obtain as much as she can from John's estate and especially would like to keep John's car since she does not have another vehicle.

1. Is John's Will still valid? Explain why or why not.
2. Assuming the Will is valid and admitted to Probate, explain who should be appointed Personal Representative of John's Estate.
3. Identify all assets in John's Estate and their value.
4. If Anna exercises all of her legal rights, explain whether she would be able to keep John's car?
5. What is the most (in dollars) Anna can receive from John's Estate? Explain the legal basis for the distributions to her.

MODEL ANSWER:

1. The Will is valid and should be admitted to Probate. Marriage does not revoke a preexisting Will. However, the wife has certain rights as explained later.

2. Mary would be the Personal Representative because she is named in the Will, however, as a result of her death Anna should be appointed Personal Representative because she has statutory priority as the surviving spouse. IC 29-1-10-1.

3. John's Gross Estate will consist of the following:

½ interest in the house	\$100,000.00
*Household Goods	\$ 20,000.00
Car	\$ 25,000.00
Bank Account	\$112,300.00
Total	\$257,300.00

\*IC 32-4-1.5-15 - Would be presumed joint if purchased during marriage, but these were purchased before marriage.

\*\*Do we need to say anything about the joint bank account with Anna? This became hers on death. So it passed outside his estate.

4. Anna should claim a Spousal Allowance of \$25,000.00. Since she wants the car she can take it as her Spousal Allowance.

5. Anna should elect to take against the Will. Because there was no previous marriage, Anna will be entitled to ½ of the net probate estate.

Estate Distribution:

Gross Estate: \$257,300.00

Less:

Court Costs	\$ 300.00
PR Fees	\$ 4,000.00
Attorney Fees	\$ 8,000.00
Spousal Allowance	\$25,000.00
	\$37,300.00

Net Estate \$220,000.00

Anna receives half the net estate (\$110,000.00) and her spousal allowance: \$135,000.00

Mary's Estate receives the remainder: \$110,000.00

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1)

### **Validity of a Will**

A will is a legal document that disposes of property at death. In order for a will to be valid there must be testator intent, testator capacity, and the formalities of will execution must be followed. When executing a will the testator must sign the will (or have another sign at the testator's direction), declare the document as the testators will, be executed in front of two disinterested witnesses, and those witnesses each must sign the will in the presence of each other and in the presence of the testator. The will must also be in writing. Indiana does not recognize holographic wills.

John had a will but the facts do not indicate whether the proper formalities were followed. It seems John had the intent to execute a will because he specifically directed where his property would go upon his death. Although he unexpectedly died, the facts do not suggest he was of unsound mind at the time of execution. However, John failed to provide for his wife in the Will. In Indiana, spouses are entitled to 50% of the estate. This is based on policy reasons that a spouse is entitled to be cared for and the standard of living should be maintained. Although Anna was not named in the Will, even if the will is valid, Anna is entitled to 50% of the estate. Because John was never married prior to Anna, and never had children with a previous spouse, Anna will be entitled to 50% of the real property and 50% of the net estate.

### **Personal Representative**

Anna should be appointed personal representative. A personal representative must be at least 18 years old, have the capacity to act as a personal representative, not be a felon, and Indiana prohibits certain types of corporations from acting as a Personal Representative. If the Personal representative is named in the will they are an executor. If they are not named in the will they are an administrator. The Personal

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representative is responsible for collecting the assets and taking control of the property, notifying creditors, notifying beneficiaries, paying creditors, paying taxes and distributing the property to beneficiaries. A personal representative is entitled to reasonable compensation.

Usually children are first in line to serve as the personal representative. However, because John did not have children, Anna will be the most qualified to be the personal representative.

### **Assets included in the Estate**

If an asset is included in the estate, it will be probated. However, trusts, life insurance, joint property with rights of survivorship, and Totten Trust are examples of assets that do not pass by probate. John had a joint bank account with Anna. Joint banks accounts have a right of survivorship and, upon John's death Anna will have sole title to the \$5,000 in that account which will pass out of probate.

The remaining assets in the estate that will be subject to probate include:

- Bank Account solely in John's name: \$112,300
- Car Titled solely in John's name: \$25,000
- Household goods owed by John prior to marriage: \$20,000
- House owned equally with Mary as tenants in common: \$200,000

### **Maximum Anna can Receive & Exercising the Legal Right to John's Car**

Anna will be entitled to 50% of the personal and real property in the estate. She will also be able to receive \$4,000 as compensation for being the Personal Representative. Additionally, Anna could claim \$25,000 from the spousal election. The spousal election can be used by a spouse before property is distributed. Anna could make the argument for the car because she shared it with John and would no longer have any other method of transportation. Anna could also mention that fair market value of the car is \$25,000 which is the same amount of the spousal election.

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Anna's total distribution therefore would be:

\$100,000 house

\$10,000 goods

\$50,000 bank account (this takes into account court fees and attorney fees and personal representative fees

\$4,000 Personal Representative compensation

\$25,000 Spousal Allowance Election

Total would be \$189,000.

INDIANA ESSAY EXAMINATION  
QUESTION 2  
February 2016

In Indiana, veterinarians practicing on the premises of a licensed horse racing track must possess:

- (1) A license to practice veterinary medicine from Indiana Board of Veterinary Medical Examiners (the “Veterinary Board”); and
- (2) A racing license from the Indiana Horse Racing Commission (the “Commission”).

Licensed veterinarians may employ persons licensed by the Veterinary Board as “veterinary helpers” to work under their direct supervision. However, under the applicable regulations, veterinary helpers “shall not diagnose, directly treat, or inject any animal.” Practicing veterinarians are also required to “assume all financial and regulatory responsibility for the actions of any licensed veterinary helper they employ.”

Dr. Ollie is licensed to practice veterinary medicine in Indiana and has an Indiana racing license. The vast majority of his practice involves practicing on Indiana horse racing tracks. Betty is an Indiana licensed veterinary helper and is employed by Dr. Ollie.

On November 1, 2015, Dr. Ollie received a notice from the Commission that it would be suspending Dr. Ollie’s racing license because it had received a complaint that Betty routinely applied Epsom salt to minor cuts in the mouths of horses stabled at Indiana horse racing tracks. A hearing on the suspension was timely set and conducted by an Administrative Law Judge (“ALJ”) on February 1, 2016. During the hearing, Dr. Ollie maintained that Betty had done nothing wrong since Epsom salt was not a prescribed medicine and her using it to treat a minor cut was merely a common home remedy.

Following the hearing, the ALJ entered a recommended order. Among other things, the ALJ found Betty’s use of Epsom salt was “routine horse dentistry that constituted an immediate danger to public health, safety or welfare, was not in the best interest of racing, and compromised the integrity of operations at Indiana race tracks.” The ALJ also found that Dr. Ollie failed to properly supervise Betty and recommended suspending Dr. Ollie’s racing license for one year. Despite Dr. Ollie’s timely objection, the Commission upheld the ALJ’s recommendation and issued a final order suspending Dr. Ollie’s racing license for one year.

Dr. Ollie is outraged with this result and concerned he will not be able to support himself or his family, especially if the suspension were to impact his veterinary license. He has vowed to pursue all means available to him to appeal the result.

Assume the Indiana Administrative Orders and Procedures Act (AOPA) applies to your answer.

1. What could Dr. Ollie do to continue treating horses on Indiana racing tracks while challenging the suspension?
2. Describe what Dr. Ollie must do procedurally to obtain judicial review of the suspension order.
3. Describe what Dr. Ollie must show to obtain judicial relief.

## **MODEL ANSWER**

(1) Dr. Ollie can seek a stay pending appeal. The Commission can stay the effectiveness of its final Order pending appeal. If Dr. Ollie seeks a stay, he must show a reasonable probability of success on the merits and must post a bond. If the Commission denies the request for stay, Dr. Ollie can ask the trial court for a stay.

(2) To obtain judicial review Dr. Ollie will have to allege and show that

- He has standing;
- He has exhausted his administrative remedies
- He has filed the petition for review in a timely manner (30 days);
- He has paid for and filed the agency record within the proper time (30 days unless an extension is granted); and
- and he has complied with any other statutory prerequisites.

Dr. Ollie's petition for judicial review must contain the precise relief sought. In addition, the notice of appeal must be served on the DCS, the Indiana Attorney General, and each party at the hearing within 30 days after being served with notice of challenged action.

(3) To obtain judicial relief, Dr. Ollie will have to demonstrate that he has been prejudiced by the Commission's action in one (1) or more of the grounds described below:

- arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- contrary to constitutional right, power, privilege, or immunity;
- in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- without observance of procedure required by law; or
- unsupported by substantial evidence.

If this burden is met, a court grant an order granting a motion for rehearing that would vacate the preceding final order. The order granting a motion for rehearing may direct that the hearing be reopened or may incorporate a new final decision.

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2)

1. Dr. Ollie has been the subject of an administrative adjudication and there are procedures in place to make sure that the agency acted constitutionally and procedurally proper in suspending his license. If Dr. Ollie wishes to continue treating horses on Indiana race tracks while challenging the suspension, then he should file a motion to stay with the circuit court where he resides or where the agency resides. The motion to stay, if granted, will have the effect of holding the suspension of his license in abeyance and allow Dr. Ollie to continue making his living, while a court sorts through the merits of his case. Giving the potential of the gravity of harm to Dr. Ollie and the small amount of harm that might come from continuing to let him practice during the appeal, I think a court would be inclined to afford Dr. Ollie the relief he seeks and grant the motion to stay.

2. To obtain judicial relief from the suspension order, he can appeal the decision to a circuit court. Before his case is ripe for appeal, however, he must show that he has standing, he has exhausted all of his administrative remedies and that his appeal is timely, or within 30 days of the final order from the administrative agency. Dr. Ollie clearly has standing as the outcome of the hearing directly harmed him, as it resulted in the suspension of his racing license and directly threatens his livelihood. Dr. Ollie must also exhaust all of his administrative remedies, or the procedures within the administrative agency before a court will hear his action. There are several exceptions to the exhaust requirement, one being if the issues are solely constitutional or if exhausting would be futile. While Dr. Ollie could potentially challenge the hearing as violating procedural due process and raising solely constitutional issues, this does not seem to be present on the facts. It states that the hearing was timely set and conducted, and Dr. Ollie received notice and an opportunity to be heard prior to the suspension of his license. This satisfies constitutional scrutiny. It is not clear on the facts whether the other exception that exhaustion would be futile because the agency does not have procedures in place would apply. If the agency has procedures that Dr. Ollie must follow to appeal the final order then he should go through this process in order to

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properly preserve his issues for judicial review - failure to do so could result in a court dismissing his case until he follows the procedures in place. Finally, Dr. Ollie must act timely, and he must file an appeal within 30 days of the final order or within 30 days from the outcome of any internal procedures he followed seeking to have to suspension overturned.

3. There are a number of alleys that Dr. Ollie can use to challenge the suspension of his license. The first challenge he can make is that the agency acted arbitrarily, capriciously, and abused its discretion. This alley is not limited to the record from the underlying hearing and will permit the court to view the agency's actions from a reasonableness standpoint. Given the amount of deference given to agency decisions, Dr. Ollie will likely be unsuccessful in his challenge. He may argue that the Commission had no right to suspend his track license resulting from alleged violations of the Veterinary Board's regulations, but given the conjunctiveness of being a vet on a race track, it is reasonable for these agencies to look out for one another. The next three challenges, I am going to group together. Dr. Ollie can challenge the lack of constitutionality with the agency decision; he can challenge whether the agency had jurisdiction over him; and he can challenge whether the agency acted procedurally proper in the hearing and the suspension. All of these challenges will likely be unsuccessful. The constitutional argument was addressed briefly above in that he could maybe challenge that the hearing did not afford him procedural due process but that is simply not the case on these facts. Also, it is pretty clear that the agency had jurisdiction over him and acted procedurally proper in the taking of his license. He is a vet that has a valid racing license that was given to him by the Commission. He could argue that the Commission lacked jurisdiction over here due to his alleged violation of the Veterinary Board regulations, but wehn his conduct occurs on the very tracks that the Commission licensed him to be on, then he is subject to agency jurisdiction. There are also no facts that the Commission did not act procedurally proper under the AOPA. There is no evidence that the ALJ was not impartial, ex parte communications, or any other potential impropriety in the hearing process that was not procedurally proper. Dr. Ollie's last challege, and maybe his only attempt at succes, is by challenging that the Commission's decision to suspend his

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racing license lacked substantial evidence on the record. It is typically very hard to win under this challenge as it is limited to the record of the hearing and is extremely deferential to an agency's decision. Nonetheless, Dr. Ollie can argue that there was no evidence on the record (at least not in the facts) to support the ALJ's findings that Epsom salt on horse teeth created a danger to public health, safety or welfare, was not in the best interest of racing, and compromised the integrity of operations at race tracks. Such a finding, without evidence on the record to support it, would not be enough to deprive Dr. Ollie of his racing license for a year. It is nothing more than conclusory allegations and unless there is substantial evidence on the record to support the finding, Dr. Ollie may be able to challenge his suspension on this ground.

INDIANA ESSAY EXAMINATION  
QUESTION 3  
February 2016

Kate and Michael were divorced in 2013. At the time of the divorce, Kate was receiving treatment for breast cancer and was very ill and unable to continue working. Michael was employed earning \$200,000 as a primary care physician.

Kate and Michael agreed to share joint legal custody of Jane (age 3) and Zach (age 4). The parties also agreed that Michael would have physical custody of the children and Kate would have parenting time for a few hours each Saturday as her health permitted. Neither party was ordered to pay child support to the other.

Kate's health improved tremendously. She recently started working again as a school nurse. Her salary is \$40,000 per year. She also began spending a lot more time with the children, including a few overnight visits each week. Michael remarried and his new wife is not fond of Kate. Since the divorce, Michael's income has decreased to \$180,000.

Kate filed a Petition to Modify Child Support and Parenting Time. The Indiana Child Support Guidelines calculation shows Michael should be paying Kate \$300 per week. Michael does not believe the amount calculated using the Indiana Child Support Guidelines is fair. Michael proposes that the court enter a lesser amount of child support. The case proceeds to hearing.

1. What are the statutory grounds for a modification of child support?
2. Should the court modify child support given the facts above? Explain why or why not.
3. Will the fact that Kate now has overnight parenting time affect child support? If so, how?
4. Explain whether the court is required to follow the Indiana Child Support Guidelines when calculating child support?

MODEL ANSWER:

- A. Child support may be modified upon a showing (1) of changed circumstances so substantial and continuing as to make the current terms unreasonable; or (2) that a party has been ordered to pay an amount in child support that differs by more than 20% from the amount that would be ordered by applying the child support guidelines and the order requested to be modified or revoked was issued at least 12 months prior to the petition requesting modification.
- B. Yes. Child support should be modified because Kate can meet both of the grounds for modification set forth above (substantial change of circumstances & 20% difference at least 12 months from prior order).
- C. Yes. A credit is issued to the parent paying child support if he/she exercises overnight parenting time. A separate worksheet and grid are used to calculate the number of overnights exercised by the non-custodial parent and the corresponding credit.
- D. Yes. Indiana had adopted the Indiana Child Support Guidelines. There is a rebuttable presumption that the amount of the award that would result from the application of the guidelines is the correct amount to be awarded. If the court determines child support to be more or less than the Guidelines, the reason(s) for the deviation must be set forth in the order.

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3)

To: Senior Partner

From: Applicant

Date: 2/23/16

## MEMORANDUM

This question raises four issues: 1) What are statutory grounds for modification of child support? 2) Should the court modify child support given the facts of this case? 3) Will the fact that Kate now has overnight parenting time affect child support? 4) Is the court required to follow the Indiana Child Support Guidelines when calculating child support? These issues are governed by Indiana Family Law.

### Issues and Analysis

#### I. What are the statutory grounds for modification of child support?

In order for there to be a modification of child support, there must be either 1) Substantial change in circumstances or 2) the current child support amount deviates from the Indiana Child Support Guidelines by greater than 20%. Also, normally you can't petition for modification of child support until at least a year after your prior petition.

#### II. Should the court modify child support given the facts of this case?

Yes, the court should modify child support given the facts in this case. There have been several substantial changes in circumstances that would justify a change in support. During their previous arrangement Kate was deathly ill and unable to take care of the children for more than a few hours one day a week. Kate had no overnight

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days and did not necessarily need the support money for only watching the child for a few hours. Also, now that circumstances have changed the current support arrangement of zero deviates from the Indiana Child Support Guidelines by greater than 20%. Also, Michael's \$20,000 drop in salary and Kate's ability to work and receive \$40,000 are also substantial changes that could justify modification.

III. Will the fact that Kate now has overnight parenting time affect child support?

Yes, the amount of overnight days that a parent has with the children affects child support. The number of overnight parenting time days that a parent receives is one of the major factors that determines if you get support and how much support you get under the Indiana Child Support Guidelines. Now, that she has overnight days Kate needs support to feed and take care of the children during her parenting time. The goal of child support is to give the children the same monetary support as if both parents lived together. Here, Michael makes \$180,000 and Kate makes \$40,000 child support is now necessary to give the children the same monetary support on Kate's overnight days as they are receiving on Michael's days.

IV. Is the court required to follow the Indiana Child Support Guidelines?

The Indiana Child Support Guidelines are exactly what their name implies. They are guidelines. The court does not have to specifically follow the amount of support that is calculated from the guidelines. However, if they deviate from the guidelines the court must issue the reasons why they are deviating in its order. The guidelines exist because they want their to be a uniform calculation and fairly uniform application. A court can deviate from them though.

INDIANA ESSAY EXAMINATION  
QUESTION 4  
February 2016

Sue West owns Sue's Cookies which she originally operated out of a small location, leasing all her equipment. Sue worked in the shop with her boyfriend, Bob, and their friend Jane, who was the cashier. As Sue's Cookies became successful, Sue decided to relocate to the local Mall.

Sue recently inherited a large fortune. After seeing an advertisement for incorporating one's business to protect one's personal wealth, Sue obtained legal forms from LawKaboom.com. Together, Sue and Jane filled out the forms for "Baker's 12, Inc.," showing Sue as the sole shareholder and Sue and Bob as the company's two directors. Under "Officers," Sue wrote: Jane May, President; Bob Tao, Vice President; and Sue West, Secretary/Treasurer. Sue and Jane then put the forms aside while preparing for the relocation.

Sue then negotiated a 20-year lease from the Mall. Sue had Jane sign the document since Jane was going to be the company's president. On June 20, 2014, Jane signed the Mall lease "Jane May, President of Baker's 12, Inc.," and Sue delivered the executed lease to the Mall.

Once they finished the move and started up the new store, Sue and Jane finally got around to finishing the legal paperwork. Jane signed the Articles of Incorporation for Baker's 12, Inc. and properly filed the document with the Secretary of State. Sue then opened a bank account for Baker's 12, Inc. Sue signed the remainder of the LawKaboom.com documents, including minutes of the initial shareholders and directors meetings, which ratified all actions of the officers and incorporator taken before incorporation. No further corporate records were created or kept and no further business-related filings were ever made.

Sue ran the business as she always had, with the business using all the old signage, product packaging designs, and logos bearing the name "Sue's Cookies" and leasing all of the equipment. The business eventually became so successful that Sue began paying all of her personal bills through Baker's 12, Inc.'s account and also used the company's ATM card and checks to take whatever cash she felt she needed out of the company's account. As a result, despite its success, Baker's 12, Inc. consistently only had enough money on hand to pay rent on the Mall space and equipment, pay wages, and buy inventory.

In December 2015, Bob switched vendors and bought 10 cases of cream cheese later determined to be tainted with bacteria. Thousands of consumers became deathly ill. Lawsuits mounted and patrons stopped shopping at the bakery. Although more than 18 years were left on the lease, Sue moved the business out of the Mall and stopped paying any of the bakery's obligations.

Assume Indiana law applies.

1. Does Bob have personal liability under the Mall lease? Why or why not?
2. Does Jane have personal liability under the Mall lease? Why or why not?
3. Are Sue's personal assets safe from any liability arising from either the lawsuits over the tainted products or under the Mall lease? Why or why not?

## Model Answer

1) Bob has no liability under the mall lease. His only interest or position was as an officer and perhaps an employee. Bob has incurred no liability under the mall lease.

2) Jane, on the other hand, while also an officer and employee with no other interest in the company, signed the mall lease on behalf of Baker's Dozen, Inc. before the company was incorporated, knowing it was not yet incorporated. Persons purporting to act as or on behalf of the corporation knowing there was no incorporation are jointly and severally liable for all liabilities created while so acting.

3) Sue's personal assets are not safe from the mounting lawsuits or the mall lease obligations.

The actions of the corporation are its actions, not those of its shareholders, such acts will not be attributed to the shareholders except in extraordinary circumstances.

In extraordinary circumstances, a Court may "pierce the corporate veil", common law which developed to prevent fraud or injustice through misuse of the corporate form.

The acts of a corporation may be attributed to its shareholders (thereby creating shareholder liability) when the corporate form has been so ignored, controlled or manipulated that: 1) the corporation was a mere instrumentality of another; and 2) allowing such misuse of the corporate form would constitute fraud or promote injustice.

This is a fact sensitive inquiry where shareholder liability is asserted and the factors considered include whether the corporate form has been adhered to, whether corporate assets have been treated as such or as personal assets and whether there has been an attempt to deceive third parties.

Veil piercing is an extraordinary remedy not given in every case because it goes against public policies favoring corporations.

The burden is on the party seeking to pierce the corporate veil to prove that the corporate form was so ignored, controlled or manipulated that it was merely the instrumentality of another and that the misuse of the corporate form would constitute a fraud or promote injustice.

Courts consider 8 factors (not elements) in determining whether the corporate form was an instrumentality of another (and whether the corporate veil can be pierced):

- 1) Fraudulent representation by Corporation shareholders or directors;
- 2) lack of corporate records
- 3) under capitalization
- 4) Use of the corporation to promote fraud, injustice or illegal activities;
- 5) Commingling of assets and affairs;
- 6) failure to observe required corporate formalities;
  - 7) other shareholder acts or conduct ignoring controlling or manipulating the corporate form; and
- 8) payment by the corporation of individual obligations

Sue has placed her personal fortune at risk by:

- 1.) having a lack of a complete set of corporate records;
- 2.) being arguably undercapitalized;
- 3.) commingling assets and affairs by using corporate accounts as her “cookie jar”;
- 4.) ignoring the corporate form by failing to hold annual or other meetings of shareholders and directors (or substituting the same with signed consents to corporate action), running the business as she had before incorporation without regard to the corporate form and failing to file an assumed name certificate with either the secretary of state or County Recorder; and
- 5.) paying Sue’s personal obligations directly out of the corporation.

It should be noted that operating under a name other than the name of the corporation is not an element or factor to consider in determining whether the corporate veil can be pierced, but rather the failure to file an assumed name certificate does fall within the “failing to observe corporate formalities” factor. (*Aronson v. Price*, Ind. S. Ct. 644 NE2d 864, 1994).

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4)

This is a business organizations question.

(1) *Jane, Bob, & Sue's personal liability under the Mall lease.*

Jane and Sue entered into a pre-incorporation contract with the mall for the lease of the bakery. Jane executed and Sue delivered the executed lease to the Mall on Baker's 12, Inc.'s behalf - knowing that the corporation was not yet in existence (because they had not yet filed the paperwork or had the first shareholder and director meetings). A pre-incorporator that executes a contract for a corporation that they know is not yet in existence is personally liable for the contract, unless the corporation later ratifies the contract and a novation takes place. In this case, the corporation eventually ratified the lease but there was never a novation. Thus, Sue and Jane are personally liable for the mall lease. Bob did not act as an incorporator with Sue and Jane in executing and delivering the lease. Thus, he is not personally liable under the mall lease (generally shareholders, directors, and officers are protected by limited liability).

(2) *Are Sue's personal assets safe from any liability arising from either the lawsuits over the tainted products or under the Mall lease?*

Corporations are creatures of statute, under the Indiana Business Law Act, and are fundamentally based on the premise of limited liability. That is, shareholders, officers, and directors are generally not personally liable for the obligations of the corporation. Courts are reluctant to ignore the corporate existence. However, when the corporate form has been so manipulated, controlled, or ignored as to constitute the mere instrumentality of another, that to recognize the corporate existence would promote fraud and injustice, the court will pierce the corporate veil and hold culpable shareholders liable for their actions.

The following factors are typically used by the courts in determining whether to pierce the corporate veil. None of these factors is dispositive or to be given any specific weight; however, undercapitalization is a critical factor. The test is very fact specific. (1) Whether the corporation is private or closely held. Here, the corporation

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is closely held because there is only one shareholder - Sue. (2) The lack of corporate formalities. Here, Sue did not create new signage indicating the company was now a corporation by putting Inc., corp., or co. behind the name. Further, the facts state that no further corporate records were created or kept and no further business-related filings were made (shareholder and director minutes should be taken, and filings with the state should be made annually). (3) Undercapitalization of the company compared to its undertakings. Here, Sue took out a 20 year commercial lease and was growing her bakery but the company consistently only had enough money on hand to pay rent on the mall space and equipment, pay wages, and buy inventory. (4) Identity of the officers, directors, and shareholders. Sue was the sole shareholder but she was also one of the two directors and one of the three officers of the corporation. (5) Commingling of corporate funds. Sue began commingling the funding by paying all of her personal bills through the corporation's bank account and also used the company's ATM card to take cash whenever she pleased. (6) Absence of corporate records. As indicated above, after the initial shareholder and director meeting, no further corporate records were retained. (7) Use of corporate funds to pay personal debts. As indicated above, Sue was using the corporation's account to pay her personal bills. Finally, (8) Fraudulent misrepresentations. This factor is neutral.

Applying the above factors, it is very likely that a court would pierce the corporate veil in this instance and hold Sue personally liable. Her personal assets would not be safe from and liability arising from either the lawsuits over the tainted products or under the Mall lease (as discussed above in paragraph (1) [pre-incorporator liability]).

INDIANA ESSAY EXAMINATION  
QUESTION 5  
February 2016

1. Under the Indiana summary judgment rule, does the non-moving party ever have any burden? If so, when does that burden arise, and what is that burden?
2. What elements must a party prove to obtain a preliminary injunction in an Indiana state court?
3. Plaintiff Pete sues Defendant Debbie in an Indiana state court.
  - a. Pete requests certain emails in discovery. Debbie believes the emails are covered by attorney-client privilege. Briefly describe two ways to obtain a trial court decision on whether the emails are privileged.
  - b. Suppose the trial court rules that the emails are not privileged and Debbie must produce them in discovery. Is Debbie entitled to appellate review of that decision? Why or why not?
4. In what circumstances, if any, is filing a motion to correct error under Indiana Trial Rule 59 mandatory?



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5)

(1) Yes, the non-moving party may have the burden under the summary judgment rule to designate facts that demonstrate that there is still a genuine issue of a material fact in the case. Generally, the moving party has the burden of proving the summary judgment standard: that no genuine issues of material fact exist in the case, and that the moving party is entitled to judgment as a matter of law. The moving party does this by presenting designations of evidence that it would like the court to take note of, filing a brief stating its argument, and introducing interrogatories in support of its motion made by those who have personal knowledge of the assertions being made, have the capacity to testify according to those statements, and would be able to introduce the statements into evidence (i.e. are admissible under the rules of evidence). It is here that the non-moving party's burden arises. It must also submit evidence, via interrogatories or designations, that proves that there IS a genuine issue of material fact. Under the summary judgment standard, the court will presume that facts stated by the non-moving party are as they claim them to be; however, if the non-moving party fails to submit evidence as to the material facts of which there is a genuine issue, then it will have failed to meet its burden.

(2) In order to prove a Preliminary Injunction, a party must prove that (i) there is a reasonable likelihood that it will prevail on the merits of the case, (ii) that it will suffer irreparable harm if a preliminary injunction is not issued, and a post-judgment remedy at law (or monetary damages) would be an insufficient remedy, (iii) that the harm suffered by the moving party if an injunction is not received is greater than the harm that the defendant will suffer if an injunction is awarded, and (iv) that granting the injunction would be in the public's interest.

(3)

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(a) There are two ways in which a trial court's decision may be elicited regarding the privileged nature of Discovery issues. First, Pete can file a motion to compel with the Trial Court (note that as a prerequisite Pete must show that he made a good faith effort to settle the discovery dispute between the parties without getting the court involved). A motion to compel is an action asking the court to issue an order *requiring* a party to comply with a discovery request. Pete will argue why he believes the list is discoverable, while Debbie will counter with the reasons that she believes the matter is privileged. The court can then issue an order, at its discretion, in any number of ways. It can compel the discovery, compel the discovery in a limited capacity, or disallow discovery of the emails due to the attorney-client privilege. If the court issues an order to compel and Debbie violates it, the court may impose sanctions. Secondly, Debbie may be the one to file a motion with the court, filing for a protective order. A protective order may be issued by the court to protect a party from discovery motions that are abusive, cumulative, or involved privileged information, like attorney-client communications. If the court issues a protective order, then Pete will not be able to get access to the emails.

(b) Debbie is not entitled to an appellate review of the court's decision that the emails are not privileged because it is an interlocutory, and not a final judgment. Generally, an Indiana appellate court may only hear final judgments. A final judgment is one that resolves all issues and claims brought against all parties. The only interlocutory orders that are immediately appealable as a matter of right are those that deny or grant a motion for a preliminary injunction. However, the court does occasionally provide for an exception if the trial court "certifies" its judgment by writing on the judgment: "there is no just reason for delay, and the court is expressly directing the entry of judgment," and the appealing court files a Motion for Acceptance of the appeal with the Indiana Court of Appeals demonstrating that she will suffer irreparable harm if an immediate appeal is not granted. These grounds are narrow, however, and if Debbie is unsuccessful on them, she will have to re-bring the appeal after the trial court has issued a final judgment.

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(4) Filing a motion to Correct Error is generally NEVER a mandatory prerequisite to filing a Notice of Appeal. However, it is mandatory under two exceptions, and two exceptions only: (i) when the appealing party is arguing that the judgment awarded is either too low or too high, or (ii) when the appealing party is arguing a new issue of law.

INDIANA ESSAY EXAMINATION  
QUESTION 6  
February 2016

The Indiana General Assembly passed a bill relating to discipline of out-of-state attorneys admitted to practice in Indiana. The preamble of the bill provides:

*Preamble:* This law is enacted to regulate attorney misconduct committed by out-of-state attorneys practicing in Indiana courts. It is intended to allow the courts and legislators in those counties most impacted by out-of-state attorneys to more directly control the consequences stemming from disciplinary infractions committed within that jurisdiction.

The bill further provides that disciplinary complaints filed against attorneys for actions occurring in Indiana counties that share a border with another state and have a population greater than 175,000 shall be subject to the following:

1. Disciplinary authority for any attorney admitted to practice law in this state who neither resides nor has a primary office in Indiana shall be vested in the Circuit Court for the Indiana county in which a complaint has been initiated.
2. All appeals of disciplinary proceedings originating in the Circuit Court shall rest with the Indiana State Senator for that Senate District.

Disciplinary complaints in all other cases will remain unchanged by this new law.

Discuss any issues that may arise under the Indiana Constitution should this bill become a law. Do not discuss federal constitutional issues.

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**Indiana State Board of Law Examiners**

**ID:**

**Question:** 6

**Exam Name:** INBar\_2-23-16\_PM

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6)

To: Senior Associate

From: Applicant

Date: 2/23/16

## MEMORANDUM

This question implicates three distinct areas of Indiana Constitutional Law: 1) Special Laws; 2) Equal Privileges and Immunities; 3) Separation of powers.

I. Is this an unconstitutional special law under the Indiana constitution?

It is generally unconstitutional for the general assembly to pass a special law that targets a specific person, location, or set group. Here, we must first examine is this is a special law or generally applicable statewide? The Indiana General Assembly passed a law that only affects Indiana counties that border another state and have a population greater than 175,000. On its face this is not special law however it must be determined in application if this is a special law. It can be a special law if this population quota and county location requirement make this law applicable to one or two specific counties. If it is a special law there are sixteen prohibited special laws listed in the constitution. This law extends over into one of the explicitly prohibited areas. This law extends the jurisdiction of circuit courts. Also, for a special law to be valid the locale must have a unique characteristic or problem that justifies the law. Here that does not seem to be the case. This bill is an unconstitutional special law.

II. Is this law unconstitutional under the Indiana Constitution because it violated equal privileges and immunities?

Under the Indiana constitution all people are granted equal privileges and

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immunities under the laws generally. If the state passes a law that violates this section of the constitution there is a two prong standard it must pass. They must show that 1) the disparate treatment is rationally related to inherent differences in the classes and 2) the law must be generally applicable to the intended class. Here, there is no rational relationship to treating out-of-state attorneys any different from in state attorneys for the same crimes. Therefore, the law fails under this constitutional section. Also, it is not generally applicable to the intended class because it only affects complaints for actions that occur in counties that border other states. So, out-of-state attorneys that break laws in counties that don't border another state are treated differently. This law fails both prongs of the equal privileges and immunities requirements under the Indiana Constitution.

III. Is this new bill unconstitutional under the Indiana Constitution because it violates the separation of powers?

This probably the easiest area to show that the new law is unconstitutional. The Indiana Constitution specifically outlines that there should be a separation of powers. This is actually written in the text of Article 3 unlike the federal constitution where it is not actually written. Here, this new law vests in the circuit courts the power to hear attorney disciplinary complaints and regulate the practice of law in Indiana. The Indiana constitution grants original jurisdiction to the Indiana Supreme Court to govern the practice of law and discipline in Indiana. There is also a separation of powers violation because the new bill grants an Indiana Senator in a specific district to hear the appeals from an out-of-state attorney disciplinary proceeding. This is an unconstitutional delegation of judiciary power to a legislative member. The general assembly cannot usurp judiciary power in this way because it violates the separation of their powers. The Indiana Supreme court has exclusive jurisdiction in this area to regulate and determine who hears these issues. Also, this law grants jurisdiction to circuit courts to hear these disciplinary complaints if they are filed in that county. This is in direct conflict of the personal jurisdiction requirements to hear a case laid out in Indiana Trial Rule 4.4. The trial rules are another area that is governed by the Indiana

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Supreme Court. This bill clearly fails as an unconstitutional law that violates separation of powers.