INDIANA ESSAY
QUESTION I
July 2006

Assume in the year 2005, Indiana courts dismissed 90% of all cases filed by incarcerated individuals, on motions to dismiss, motions for summary judgment, or for failure to prosecute the claim. The percentage of "civil rights" cases filed by non-incarcerated individuals that are disposed of on motions to dismiss, motions for summary judgment, or for failure to prosecute are comparable, but other types of cases filed by non-incarcerated individuals proceed to trial with much greater frequency.

The Indiana Legislature passed a statute effective on July 1, 2006, which applies to all individuals incarcerated in a facility of the Indiana Department of Corrections, if such facility is located in a county of between 110,000 and 111,000 persons. LaPorte County, Indiana, where two of the largest state prison facilities are located, has a population of 110,500 persons. No other county falls within the specified population range.

The statute requires an incarcerated person subject to its provisions, who wants to file a case in an Indiana trial court, to post a $1,000 cash bond with the Clerk of Courts at the time he or she files the action. The statute states that the bond's purpose is to indemnify the Defendants against attorneys' fees in the event a court later finds the prisoner's action frivolous.

Sam Thomas is incarcerated in the Indiana Department of Corrections in a maximum security institution located in LaPorte County. An employee in the facility searched his cell for drugs on July 10, 2006. The employee found no drugs, but destroyed Sam's personal property during the search. Sam believes his personal property was worth $15,000 and sent a complaint, summons and appearance to initiate an action in the Superior Court located in LaPorte County, where he was incarcerated. The Clerk returned the paper work without filing the case, due to Sam's failure to post the $1,000 cash bond.

Sam does not have access to $1,000 for the cash bond. Through a program at your law school, you are assigned Sam's case on a pro bono basis. What challenges would you raise to the statute? Give detailed reasons for your analysis. Limit discussion of any constitutional issues to the Indiana Constitution. Do not discuss federal constitutional issues.

INDIANA ESSAY
QUESTION II
July 2006

Anna Brown, who lives and farms in Jay County, Indiana, owned a John Deere 6200 tractor. She had no debt on the tractor. The tractor is not legally required to have a certificate of title and does not have a certificate of title.

Anna sold the tractor to Chuck Dewitt, also a Jay County resident. Anna executed a Bill of Sale, which showed the sale from Anna to Chuck for $20,000. Chuck paid Anna $10,000 in cash and executed a promissory note to Anna for the $10,000 balance. Under the note's terms, Chuck was to make monthly payments to Anna, and Chuck also agreed in the note that Anna had a lien on the tractor to secure payment of the $10,000 balance.

Anna put the promissory note on her desk at home and took no further action. Chuck made several monthly payments but then experienced financial problems. Chuck went to the Jay County Bank and borrowed $50,000. The Bank required Chuck to sign a written security agreement, which granted a security interest in "all farm equipment now owned or hereafter acquired by Chuck Dewitt." The Bank perfected its lien by filing a financing statement in the appropriate location.

After Chuck failed to make two monthly payments to Anna due under the promissory note, Anna came to Chuck's farm and picked up the tractor. She immediately sold the tractor to Emma Forbes, who paid Anna $20,000, which was the tractor's fair market value. Emma took possession of the tractor, and Anna gave her a Bill of Sale showing the sale to Emma for $20,000 cash.

After Chuck stopped paying the Bank the payments due under the loan, the Bank sued Chuck and asked the Court to foreclose the security interest in the tractor.

As between the Bank and Emma, who has priority in the tractor? Give detailed reasons for your analysis.

INDIANA ESSAY
QUESTION III
July 2006

Husband and Wife were divorced in early 2005. Wife was awarded custody of their only child, Daughter, and Husband was ordered to pay child support. Husband earns $75,000 and Wife earns $25,000 at this time.

Daughter turned eighteen years old in December, 2005. Daughter graduated from high school at midterm of her senior year, in December, 2005. Over Husband's objection but with Wife's approval, Daughter went to Central America in January, 2006, to do mission work with Helping Hands Mission. Helping Hands Mission has provided Daughter's food, shelter, and clothes while she is serving there.

Daughter is working in the Mission in part to assist the poor, but also to help build her Spanish skills. Daughter plans to return to Indiana in September, 2006, to begin college. She wants to major in biology and minor in Spanish so that she can become a physician and work at a clinic in Mexico. Daughter has not saved any money for college; however, her maternal grandparents set up an educational trust for her that is currently worth $120,000. Daughter and Wife want to use the trust fund for medical school expenses. Husband wants Daughter to use it for undergraduate school expenses.

Husband and Daughter have never been close in their relationship. Husband does not believe he should have to continue to pay child support or pay any of Daughter's college education expenses, especially since he wanted her to stay at home and earn money instead of going to Central America. Daughter plans to follow in her parents' footsteps and attend "Private University," which costs $30,000 per year for all expenses. However, because of her extended absence in Central America, some admissions papers were overlooked and so Daughter has not yet been admitted to college.

Husband filed a petition to terminate child support. Wife then filed a petition for college education expenses. Please discuss the factors the court will use in determining if Husband will be responsible for any child support, and if Husband and Wife will be responsible for some or all of Daughter's undergraduate expenses.

INDIANA ESSAY
QUESTION IV
July 2006

Mary was an Indiana resident with two daughters, Cindy and Kate. Mary was close to Cindy but had little relationship with Kate. Mary had the following assets, all of which were located in Indiana:

1. A residence titled as joint tenants with rights of survivorship with Cindy;
2. A lake cottage titled as tenants in common with Cindy;
3. A $100,000 certificate of deposit titled as joint tenants with rights of survivorship with Cindy;
4. A $50,000 life insurance policy payable to Mary's estate; and
5. A $50,000 life insurance policy payable to Cindy.

Mary had a will leaving her entire estate to Cindy, to recognize Cindy for all the time Cindy had spent over the years caring for Mary. Mary specifically stated in the will that she did not leave anything to Kate because she had given Kate at least $100,000 during Mary's lifetime.

Mary was in the hospital, and her doctor told Cindy and Kate that she had only a few days to live. Kate brought a lawyer to Mary's hospital room, and Mary executed a new will, revoking all prior wills, and leaving her entire estate to Kate. Assume the will was executed in a valid manner, and no issues exist that would permit a challenge to the will.

After Mary's death, Cindy came to your office to discuss the will and how Mary's assets will be distributed. Advise Cindy how Mary's assets will be distributed and give her the reasons why.

INDIANA ESSAY
QUESTION V
July 2006

On March 1, 2005, Plaintiff sustained serious injuries in an automobile collision. Plaintiff retained Lawrence Lawyer to represent him in a personal injury action in an Indiana state court. On May 1, 2006, Lawrence filed a Complaint for Damages in the Circuit Court in the county where the collision occurred. Lawrence did not include a request for a jury trial with the Complaint.

Counsel for the defendant filed an Answer on May 15, 2006, and the defendant did not request a jury trial. Plaintiff told Lawrence he wanted a jury trial, but Lawrence disagreed with Plaintiff.

On May 20, 2006, Plaintiff filed with the Circuit Court a document entitled "Plaintiff's Demand for Jury Trial." Plaintiff signed the document, and Lawrence did not know Plaintiff had filed it until Lawrence received a copy from the Circuit Court.

After discussing the matter further with Plaintiff, Lawrence decided to support Plaintiff's desire for a jury trial. On June 15, 2006, Lawrence signed and filed a written document entitled "Request for Jury Trial" in the Circuit Court.

You are an associate in an Indiana law firm. On December 1, 2006, the day before the final pre-trial conference, your senior partner hands you the file in this case and says that you are going to represent the defendant at trial. You quickly review the file. You find Requests for Admission from the Plaintiff, which counsel for Plaintiff mailed to your senior partner on May 15, 2006. You cannot find a document in which your senior partner responded to the Requests for Admission. One request stated: "Defendant was 100% at fault in causing this collision."

What issues would you raise at the pre-trial conference as related to the above, or what motions would you immediately file? Analyze how the judge would rule on these issues and/or motions and give the reasons why.

INDIANA ESSAY
QUESTION VI
July 2006

John James and Linda Lewis have developed nutrition software together and are interested in marketing and selling the software through a new business ("Newco"). The product emphasizes a healthy diet regimen and is expected to be extremely profitable.

Linda's cousin, George Smith, has agreed to provide most of the necessary capital to finance the initial business start-up costs. However, George Smith and his wife own a corporation known as GS Management, Inc. and he is insisting that his investment in this venture be through GS Management, Inc. George, Linda and John have discussed issuing GS Management, Inc. some type of preferred interest in Newco so that George gets his investment back before profits are distributed to John and Linda.

George would also like to get his business partner, Ben Hess, to invest in and be an owner of Newco. Ben Hess is a resident and citizen of Germany. George, Linda and John would manage Newco and would hold the power to vote. Ben Hess would not have a vote or any management responsibility.

John and Linda are concerned about personal liability from this business venture. Linda had heard from a friend that they should consider forming an S Corporation. John is convinced that he does not want to form a corporation at all because he heard that corporations are subject to double taxation. John and Linda have come to you for advice.

Briefly discuss whether the formation of an S corporation would address John and Linda's concerns.

Discuss whether Newco will qualify as an S Corporation and give the reasons why or why not.

Analyze whether another business entity form should be considered for Newco and briefly state the reasons why or why not.

Indiana Essay Question I
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2006

There are several challenges I would raise to attempt to invalidate the statute. This statute violates the rule against special laws, the open courts doctrine, and the Equal Privileges and Immunities clause under the Indiana Constitution.

I. Invalid Special Law

Under the Indiana Constitution, laws that are deemed "special laws" are unconstitutional. Usually, a special law can be identified when specific population parameters are included within the statutes applicability. Although this is not fatal to a statute it is one factor to consider. There is a three (3) step analysis to employ when faced with a special law. First, is it in fact a special law? A law applicable only to a specific location or specific group is deemed special. The law in this case is special because it only applies to LaPorte County. Next, is the law invalid under one of the 16 enumerated special laws set out in the Indiana Constitution? In this case we have a law regulating the rights of incarcerated persons in Indiana prisons. If the law is one of the 16 enumerated invalid special laws it will be held unconstitutional. A review of these 16 areas will give us our answer. Assuming it is not on the list of 16 we then need to ask whether the law is otherwise valid because of special or unique circumstances related to the location when the law is applicable. In past cases decided by the Indiana Supreme Court a law regulating a landfill in Tippecanoe Count was found a special law but more-the-less valid because the landfill was unique in the state as it was used for local purposes and was in a town with a University. Here, the fact that the law applies only to the correction facilities in LaPorte County is insufficient to allow the special law to stand. These are two of the largest facilities but by no means is this a reason to validate the special law. Simply the size of the facilities is not unique enough for the special law to apply.

II. The statute violates the Due Course of Law provision of the Indiana Constitution

Under the Indiana Constitution all courts are to be open where justice is administered freely and without purchase in a speedy manner. The requirement in the statute that makes the courts open to incarcerated persons only after posting a $1000 bond is unconstitutional. The stated purpose of the bond, to indemnify defendants from attorney's fees if the court finds the action frivolous, is not enough to hold the statute constitutional.

III. The statute violates the Equal Privileges and Immunities provision of the Indiana Constitution.

Under the Indiana Constitution disparate treatment among classes of people must be rationally related to inherent characteristics among the unequally treated groups. Further, the prefiuntial treatment must be uniformly applicable to those similarly situated. Here, we have classes of people being treated differently. One class includes those persons seeking legal relief but are incarcerated. The other class includes those persons seeking "civil rights" relief but are not

incarcerated. It could be argued that this is not an inherent characteristic sufficient enough for a challenge under the Equal Privileges and Immunities clause. Admittedly, the statute does not relate to race, gender, age, ect., or something one has no control over. However, persons who are incarcerated can only seek to change their status through legal relief. Thus, this inherent characteristic is one that is one that defines two classes. Thus, requiring the person to post a bond to seek legal relief while not requiring from others is disparate treatment based on an inherent characteristic. Is it reasonable? The stated purpose of the statute is for indemnification. However, as indicated, Sam Thomas cannot afford the $1000 bond and is being denied the right to have his day in court. This is a high price to pay for incarcerated persons because many do not have the means to get into court if this statute is upheld. Therefore, it is probably not a reasonable means to enforce the law.

Lastly, the statute is not uniformly applicable because incarcerated persons outside of LaPorte County are not required to pay the $1000 while LaPorte County inmates are required to do so.

For these reasons, I believe Sam has a good argument for attempting to have this statute turned on Constitutional grounds.

Indiana Essay Question II
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2006

As between Emma and the bank, it seems the bank is entitled to the tractor for the following reasons:

When Anna gave Chuck the tractor in return for the promissory note, she took a security interest in the tractor with the tractor itself being the collateral. A security agreement is an agreement whereby the creditor (Anna) gives value (tractor) to a debtor (Chuck) and to secure that debt the creditor takes a security interest in collateral (truck.) Here, there is a purchase money security interest (PMSI) because the value given and the collateral are both the tractor.

A creditor needs to perfect her security interest to give notice to the world and all other creditors that she has an interest in that collateral, thereby securing her priority should multiple creditors claim rights on the same collateral. A creditor usually perfects by filling in the appropriate office. With a non-inventory PMSI, as we have here, there are special rules for filing. A creditor can have priority on the collateral if she files within 20 days of the debtor receiving possession. Anna could have done this to give herself priority, but she did not. Anna did not file at all, and therefore did not perfect and give notice to all other creditors that she had an interest in this collateral.

Chuck then borrowed from the bank, which also took a security interest in the tractor (as the agreement covered "farm equipment.") The bank perfected its security interest in the tractor by filing.

When deciding which creditor has priority over certain collateral that is covered by more than one security interest, the law looks to the firsto file or perfect. This is because of the notice function filing or perfecting serves, warning subsequent creditors that they will not have first priority to that collateral.

In this case, Anna did not file or perfect. Therefore, the bank as priority with regard to this tractor, and when Chuck defaulted the bank had the right to that collateral.

However, matters are complicated here because Anna went ahead and repossessed the tractor and sold it to a seemingly innocent purchaser, Emma. Emma paid full value for the tractor without being aware of any security interest existing on the tractor.

Certain buyers take free of security interests on the merchandise they buy. One example is when the sale is authorized by the creditor. That is not the case here. Another example is the "garage-sale" rule, which looks like it could cover this transaction but it does not. That rule is for when an ordinary consumer buys from another (perhaps at a "garage-sale" type setting) and it only covers consumer goods that are not filed upon. In this case, the tractor is not consumer goods and it was filed upon. Another exception is the buyer in the ordinary course of business exception. A buyer in the ordinary course of business is one who 1) buys from a merchant dealing in goods of that sort 2) in a typical transaction for goods of that kind. Here, these requirements are not met. Anna was not a merchant of tractors and this was not a typical transaction because it was one non-merchant buying used equipment from another non-merchant.

Therefore, as between Emma and the bank, the bank would have priority in the tractor. This result may seem unfair to Emma, but buyers need to be very careful when they are buying used merchandise, from a merchant or a non-merchant.

Indiana Essay Question III
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2006

1) Petition to terminate child support. A parent's duty to support a child is terminated when the child reaches 21 years of age, marries, joins the military, is emancipated or when the child reaches 18 years of age and has not been enrolled in school for at least four (4) months and is capable of self support.

In this case, the daughter is eighteen years old and has been out of school for at least four (4) months and temporarily she is capable of supporting herself because the Helping Hands Mission has provided her food, shelter and clothes. However, a court could still find that the father must pay support.

First, although she is not currently in school, she is planning on attending college in September. Presumably, the reason that the legislature drafted the statute to provide a time period of four months without school is that when a person turns eighteen they usually graduate from high school in June and then being college (if they choose to go) 2-3 months later in August or September. Four months was presumably a good indicator of time in which to find out whether the child will attend college. In Daughter's case, she is planning to attend college (and even medical school) in September, she just happened to graduate in December. It is in the Court's discretion to determine that the duty to support should not be terminated. Therefore, in this case, the daughter is the exception where the four month time period is not a reliable indicator of whether she will be in college. Indeed, most colleges would prefer freshman to begin in the fall so she maybe did not have a choice in the matter.

Second, it appears that a court may find that she is not capable of supporting herself. After all, she was not technically supporting herself, it was Helping Hands mission that was supporting her. The court may also consider what kind of job she would have been able to obtain had she opted to work from January until she began school in September. The job most likely to be temporary and not pay very much. She most likely would have continued to live with her mother because it would be impractical and not cost efficient to move out and then move to college a few months later. Thus, although the court will consider the father's objection to the mission, it is likely that his daughter would not have been capable of self support even if she had worked from January to September. The court will also consider that the daughter decided to go on the mission to assist the poor and to help build her Spanish skills. Building her Spanish skills is part of her education and life goals of becoming proficient in Spanish and becoming a physician working at a clinic in Mexico. Thus, in a sense, the mission was part of her education and the court will take this into consideration. In conclusion, the court will likely not terminate the fathers duty to support. However he could file for an modification of support if he feels he should be paying less. The amount of child support is computed by the child support guidelines and the child support worksheet.

2) Petition for college education expenses. A court, in its discretion can order that a mother and/or father contribute to a child's college education expenses. This is usually set forth in a separate order, which is what the mother is requesting. The court will take into account the money that is in the daughter's educational trust, and the parties' conflicting wishes as to how the money should be used. It will also consider the fact that daughter wishes to enroll in Private

University which is $30,000 and that her parents attended the University. The Court will also look at the father's wishes for her to use the money in the trust because he is upset that she did not stay home and work until September.

The court will likely find that the father and mother will be responsible for some of the expenses of college but it will likely be very little. The court will probably require the daughter to use the funds in her trust because it is a large amount of money (however it would only pay for 3 years of private school). Most likely the court will that she should not be penalized for opting to go on the mission instead of work because it was preparing her for school. Usually the child is required to contribute to her college expenses, so she will likely have to use some of her educational trust funds. However, the parents will likely have to contribute a small portion, but, once again, it is in the court's discretion.

Indiana Essay Question IV
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2006

Because no issues exist that would allow Cindy to challenge the validity of the second will that leaves her entire estate to Kate, it will be distributed under the second will.

1. Residence

Because the residence was titled as joint tenants with rights of survivorship with Cindy, Mary's interest in the property extinguished upon her death. Nothing passed into the estate. Cindy is the sole owner in fee simple of the residence. Kate has no interest in the residence.

2. Lake Cottage

Mary and Cindy were tenants in common on the lake cottage. Therefore, Mary had an undivided ½ interest upon her death that could be devised or passed via intestate succession. Because her will devised Mary's entire estate to Kate, Kate now owns Mary's undivided ½ interest and Cindy continues to hold her undivided ½ interest.

3. $100,000 CD

Because this was held in joint tenancy with rights of survivorship, noting passes into Mary's estate. In this type of tenancy the interest must be transferred during life, because the interest completely extinguishes at death. Cindy is now the owner of the entire $100,000 CD.

4. Life Insurance Payable to Mary's Estate

Life Insurance is a contractual obligation between the owner of the policy and the insurance company. Upon Mary's death the insurance company became obligated to pay the beneficiary designated. Because Mary designated the beneficiary to be her estate, Kate will get the money after all the estate expenses have been paid. The priority of expenses such as funeral expenses and taxes generally come out of the residuary estate before the beneficiaries of the will are allowed to take.

5. Life Insurance Payable to Cindy

Cindy will receive this money because the life insurance is not an estate asset, but, as mentioned earlier, a contractual obligation between the owner of the policy and the named beneficiary. Because this money doesn't pass through the estate, Kate doesn't receive a portion.

Regarding the advancements to Kate of $100,000, there must be a writing signed by either the testator or the beneficiary acknowledging that the lifetime gifts were intended to be advancements on the will. Here we had a signed writing in the previous will but because that will was revoked, it appears that Mary's intent was to change the advancement to an outright gift.

Indiana Essay Question V
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2006

First, I would consider whether this matter was properly commenced to find any faults w/ procedure or process. It appears the venue is permissible as it was filed in county where accident occurred. Likewise the court may assert personal jurisdiction because the accident occurred in the county-gives rise to specific jurisdiction. Plus, the defendant has waived personal jurisdiction by not asserting a 12B motion or affirmative defense. Subject matter jurisdiction is proper for the same reasons. The Complaint was filed and our Answer was timely, (assuming we received summons, etc.) Therefore, my two central issues to discuss at Pre-Trial Conference are 1) The jury trial demands, 2) Request for admissions.

A. Jury Trial
Indiana provides for a right of all persons to request/demand a jury trial. This can be done by either the Plaintiff ("P" or the Defendant ("D"). The facts indicated P did not properly raise/assert this demand in the Complaint. However, P could have amended the Complaint before any responsive pleading was filed to add the jury demand. P neglected to do so. Accordingly, D filed a timely answer without a jury demand. In order for P to properly assert this demand it must be in the Complaint. Since P filed no amended Complaint before D's answer P needed to seek leave of the court to effectively amend the Complaint w/this demand. Accordingly, P's pro se attempt to demand the jury is not valid. Further, P's attorney's attempt to request a jury trial was not timely, proper procedure, or properly worded to trigger the right.

Therefore I would file a motion to strike both P's pro se demand and D's request for a jury trial. I would file with the clerk or with the judge and properly serve P's attorney. Due to the conflict between P & her attorney, the judge may want a hearing on the motion after P's attorney files a Response brief/pleading. If my motion(s) are unsuccessful, I would file a Motion to Reconsider under TR60. Assuming it is denied, I would make an objection at trial on the record (out of jury's presence) to preserve the issue for any appeal. Last, if defendant lost at trial I would file a Motion to Correct Errors – alleging procedural error. If this is denied by the trial court, I would file a timely Notice of Appeal. Ultimately, judge will grant my motion(s) to strike because the demands/requests were time barred & improper, with leave of the court.

B. Request for Admissions

First, I would try not to panic when I couldn't find the Defendant's answers. Accordingly, the first step I would take is to request a viewing of the Court's record of the case from the Clerk. Maybe senior partner misplaced the originals & I can simply get a copy. If the facts turn out no answers were filed, this is a problem. Requests for admissions are a discovery tool which can be used by either party. The requests are written questions which the party must admit or deny. P properly served D with such a request on 5/15/06 and D had until 6/18/06 (or the next business day if 6/18 is a weekend or holiday) to respond. D should have & is required to respond in 30 days although D received an additional 3 days due to P's service by mail. If responses are not received within 30 (in this case 33) days, all requests for admissions are deemed affirmed and admitted.

If such is the case, this is disastrous for defendant's case given a potential admission of 100% liability/fault. Defendant will likely lose at trial because his fault has been established. This could result in a malpractice action by D against our firm.

My first plan of attach if we did not respond would be to seek leave of the court to respond, with a possible agreed motion with P's attorney. In al likelihood P's atty would not execute such a document and the court would not grant leave to amend.

Accordingly I would pursue the same route as previously discussed by filing:

1) Motion to Strike any admissions, if denied I would file 2) Motion to Reconsider under same theory of excusable neglect, neglect, surprise, etc. This would require that D also plead an affirmative defense.

Ultimately, the judge will deny any motion to strike the admitted answers as it would be unduly prejudicial to the plaintiff. However, court could find the negligence of our firm is excusable neglect & not hold D liable for mistakes solely by his attorney, particularly if P seeks a high damage award. Accordingly, there is a possibility our Motion to Reconsider could be granted.

Indiana Essay Question VI
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2006

I. S Corporation

An S Corporation is a corporation that is formed to comply with Subchapter S of the internal revenue code. It must observe the same formalities a non-S corps (C Corps). It must have one or more incorporators who form the corporation by filing articles of incorporation with the Indiana Secretary of State. It may adopt bylaws, it must comply with various corporate formalities, and it provides limited liability to its owners (owners are liable only for their investment.) The major advantage of S Corps is that they provide pass-through taxation (as opposed to the double taxation John mentioned). This means that the S Corp (unlike a C Corp) does not pay state or federal taxes at the corporate level. The only income tax is payed by owners when they receive dividends. In order to get this favorable treatment, however, a corporation must meet several strict requirements, three of which may present problems here.

II. S Corporation Qualification

The three requirements likely to cause problems here are that S Corporations must (a) issue only one class of stock, (b) have only individual owners (rather than corporate stockholders), and (c) have only U.S. residents as stockholders. The problems these requirements create are obvious. Selling shares to GS Management, Inc. would violate the second requirement. Selling a separate class of stock to George or GS (or anyone else) would violate the first rule. Selling stock to Mr. Hess would violate the third rule.

III. Alternatives

There are several other ways to set up a business (including the various types of partnerships), but I would suggest considering forming Newco as a limited liability corporation, also called an LLC. The LLC is a fairly recent kind of business organization (it has only been allowed in Indiana since 1993.) An LLC is probably best-suited to address both of your concerns because it provides both pass-through (or single) taxation and a liability shield for owners (although your should note that LLC owners are still personally liable for their own Torts or Torts of those you directly supervise. So, for instance, if you did something in your work for Newco that injured someone, that person sued you and won, and Newco could not pay the judgment, the plaintiff could come after you.

To form an LLC, you will need to develop an operating agreement in which you decide who will make what decisions and who will be entitled to what (absent such provisions, profits would be distributed in proportion to capital investment). Assuming there is not already a business called Newco LLC, you can use this name and form the LLC by filing papers with the Indiana Secretary of State and paying a fee. You will need to comply with some formalities (although fewer than if you were forming a corporation) regarding keeping records and filing reports with the Secretary of State every two years, but we will embody this in the LLC agreement and discuss this in detail later if you decide on an LLC.

Multistate Performance Test I
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2006

MEMORANDUM

TO: Elaine Dreyer
FROM: Applicant
DATE: July 25, 2006
RE: Larson Real Estate File

1. Karen Larson's disclosure obligations regarding the sale of her Terrapin Heights home in Franklin.

A. Common Law

Prior to the passage of Franklin Statue §350 in 2005, Franklin followed the caveat emptor doctrine regarding sales of real estate. This is a "buyer beware" doctrine which places the burden on the buyer to exercise due diligence in inspecting the real property prior to purchase (Hernandez v. Comfrey). The seller does not have an obligation to disclose defects in the property, but also may not intentionally misrepresent nor fraudulently conceal material facts of the property. (Hernandez). To violate this duty, a seller must be shown (by plaintiff) to have misrepresented a material fact (or concealed with intent to mislead in the case of fraud); justified reliance by the buyer; and injury. A 'material fact' is defined by case law as "one relating to the quality of the property which might decrease its value" (Wallen v Daniels).

Although the passage of §350 (discussed below) has removed the doctrine of caveat emptor, a seller still remains liable at common law for intentionally misrepresenting or fraudulently concealing a material defect (Wallen).

B. Franklin Real Property law (§350)

Franklin Statute §350 was passed in 2005 and changed a seller's duty to disclose from the previous caveat emptor doctrine under common law. Under §350 (b), a seller must submit a disclosure statute listing all known material facts relating to the residential property and its surroundings. Section (a) of the statue makes it applicable to Ms Larson's case in that it applies to sales of residential property with at least one and not more than four dwelling units, with the state of Franklin.

This new duty under §350, however, does not entail a requirement that sellers inspect the property for latent material conditions or defects (Wallen).

2. Meridiens' cited defects and Ms. Larson's Compliance with Disclosure

A. Drug Rehabilitation Group Home

The Meridien's first claim that Mr. Larson's failure to disclose the plans of Health Homes to open a rehab facility blocks from the property was a violation of her duty to disclose material defects, and will significantly diminish the property value. However, the court in Wallen stated that §350 does not subject a seller to liability for failing to disclose facts that a buyer could have discovered with reasonable effort.(Wallen). The court further noted that a buyer still maintains a responsibility to exercise diligence in inspecting a home, and a buyer will not be held liable when "relevant information is freely available." (Wallen).

The Branford Courier, a local newspaper, carried an article regarding the rehab home on June 1, 2006. That, alone, would likely justify a finding that information on the home and its impact on the neighborhood was freely available. But, in addition, Mrs. Meridien had a cousin,

Brad, who lived in Branford and surely was aware of this development. Ms. Larson complied with her duty to disclose on this issue.

B. Historic District Zoning

The Meridians further contend that Ms. Larson's failure to disclose the Historic zoning ordinace was a breach. Indeed, Branford city Ordinance §11.50 makes Terrapin Heights, Branford a historic district and therefore limits changes to the exterior of properties located there. However, a similar zoning issue was raised in Wallen, where the court found that "we will not burden the seller to research local building codes and advise a buyer" (Wallen). Furthermore, Ms Larson noted on her disclosure statement that the property was zoned 'Residential – Historic', thereby putting the Meridiens on notice. Ms. Larson did not breach her duty here.

C. Water Stains on Ceiling.

Ms. Larson may have more difficulty here. The Meridiens will likely claim that she fraudulently concealed a material fact here. In order to prove this, they must show that she did so with intent to mislead, there was justifiable reliance and injury.

The stain and roof damage is likely material, as it will affect the homes value. The main question will be Ms Larsons intent to mislead. She admitted to being aware of the damage, and having the roof looked at. Because of a high estimate she post-poned fixing it, and merely repainted the ceiling so it was less noticeable. It is likely, then, that a court will find that she did mislead.

A court would also likely conclude that the Meridiens were justified in reliance, because it was not on the disclosure statement. There will be injury, because it is a fact that would affect the decision making of a reasonable buyer (Hernandez). Ms Larson did not comply with her disclosure duty in this case.

D. Fire Damage

Ms. Larson states that she had no knowledge of a fire. The Meridien's will likely contend that this was an intentional misrepresentation, of fraudulent concealment. However, the plaintiff must show knowledge on the part of the seller (Hernandez). Here, Ms. Larson learned of the damage, and the previous fire after it was discovered and she consulted the prior owner. She had no knowledge, and was not under an obligation to conduct her own inspection under §350 (Wallen). Ms. Larson did not violate her duty here.

E. Vinyl floor

The main question here is if this is a material fact. The Hernadez court defined material as something that would affect the decision maker of a reasonable buyer, not minor or de minimis defects (Hernadez). The Wallen court further contended that a material fact is one ' relating to the quality of the property which might decrease its value (Wallen).

The Meridien's contend only that the vinyl was severely worn. This would not affect a decision to buy the house, or decrease its value. Ms Larson is not liable.

3. Relief Meridiens may obtain.

The only defect Ms. Larson may be liable for is the fraudulent concealment of the water damage to the roof. The Meridiens may obtain repair costs, or the difference in value b/w the property as is represented in the disclose statement, and an independent appraisal (Wallen). Section 350 further subjects Ms. Larson to liability for any actual damages suffered as a result of the condition, in addition to attorney's fees and court costs.

Ms. Larson will need to get an independent appraisal to fix the damage, but may be liable for $30,000 to replace the roof, if that is the actual damage suffered from non-disclosure.

Multistate Performance Test II
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2006

MEMORANDUM

TO: Gail Brown
FROM: Applicant
RE: Parker v. Essex Productions
DATE: July 25, 2006

This memo will analyze the reasons why our firm should not be disqualified from representing Ms. Parker in her lawsuit against Essex Productions. Although Alexander, one of our associates previously worked at a firm infrequently retained by Essex, his work on their behalf does not disqualify our firm from representation.

I. Knowledge imputed to entire firm

A. No screening off-Rule 1.10

Unlike many other States, Franklin does not permit a firm who has an attorney with a potential conflict of interest to "screen off" that attorney from litigation-meaning to make sure that attorney does not participate in the dispute. The attorney's knowledge is instead imputed to the entire firm, which is precluded from representation. This only applies to attorneys, not to support staff or law clerks. (Holden v. Shop Mart-Stores, footnote 2)

B. Conclusion- So if Alexander is precluded from representing Parker, the entire firm would be as well.

II. Current Relationship

A. Unlikely to be considered current relationship

Although Alexander's relationship with Essex is unlikely to be considered a current relationship, I will address it briefly.

B. Applicable Standards

Rule 1.7 states that "a lawyer shall not represent a client if the representation of that client will be directly adverse to another client" unless the lawyer reasonably believes there is no conflict and the client agrees.

C. Analysis

Although Alexander reasonably believes there is no conflict, Essex does not agree to the representation. However, Alexander has moved to a new law firm and no longer represents Essex, so they are not a current client.

To terminate a client relationship an attorney must show: 1) express statement of either attorney or client – Essex's president, Gasso was given a statement by Alexander's former firm that representation would be continued by a different attorney, Gasso knew of this, as he

stated when he approached Alexander about the Parker case, at a chance public meeting. At that time Alexander expressly told him he was no longer his client, as he had moved firms

The other potential ways to terminate a relationship with an existing client are 2) inconsistent acts and 3) lapse of relationship over time-Alexander last did work for Essex in Feb. 2005, and began work at a new firm in June 2005-this may be a sufficient lapse.

D. Conclusion

Essex does not qualify as a current client of Alexander (inputed to the firm), due to his express knowledge Alexander no longer represented the company.

III. Conflict of Interest-Former Client

A. Applicable standards

Rule 1.9 states "a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

Although disqualification do occur, they are far from automatic.

To find a current conflict of interest the court will analyze standards laid out in Holdend v. Shop Mart Stores:
1) valid attorney client relationship between attorney and former client
2) interests of present and former clients must not be adverse
3) former client must not have consented in informed manner, to new representation and
4) the current and former matter must be substantially related.

B. Is the matter substantially related

The case will turn on this question.
The subject matter is substantially related if
1) "unique factually & legal issues presented in both cases are so similar there exists a genuine threat that confidential info may have been received which could be used against the former client" (Holden v. Shop Mart)

2. Alexander did not receive confidential information

Alexander was not the main attorney for Essex. He only worked for them on small matters. The company, Essex, has another primary law firm.

Alexander wrote two contracts for Essex which were rudimentary in nature, and rarely spoke with persons at Essex. He visited their office on only one occasion, and that visit was social, to drop off a CD, rather than directly related to his employment.

There would have been no reason for Essex to provide Alexander with confidential information as a result of his work.

3. Distinctly different contracts

Alexander wrote a contract for Essex regarding a series of concerts they were promoting and drafted a recording contract.

At no time did Alexander advise or write contracts for Essex regarding an employment agency license, the matter of the current dispute. Further, even if Alexander had provided advice on this subject, this suit deals with Essex's failure to get an employment agency license, not a problem in a license.

4. Purpose of the law

The purpose of the conflict of interest law is to protect a case where an individual has a personal relationship with an attorney who provides for all or substantially all of their legal advice.

Such is not the case here. Alexander was not the primary attorney for Essex. He billed only 25 hours for the "major" projects he worked on. Although he was personable to Glass at heir chance meeting after he left his former employment, their relationship was not the type the statute was designed to protect.

5. Who is harmed

The real person who would be harmed if our firm were disqualified would be Ms Parker. She was paid a substantial amount already in attorneys fees, and it would be unfair to her if the firm were disqualified.

6. Who is Representing Essex

As further support of Alexander's statement that his former firm is not the primary legal provider for Essex, the court should note that Eagin, not Alexander's former firm is representing Essex in this matter.

IV. Conclusion

Alexander's former representation of Essex clearly does not warrant disqualification, due to his minimal contacts with the client and minimal amount of work for Essex. The court should dismiss Eagin's motion.