February 2007 Bar Examination Sample Answers

DISCLAIMER
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Question 1 - Sample Answer 1.

I.

The landlord may bring contract suits against Attorney & Lawyer, P.C. ("the corporation") or against Alex, but has no legal recourse against Bob personally. This question turns on the status of the lease signed by Alex Attorney. Crucially, it is a pre-incorporation lease. It is therefore binding on promoter, the party making the lease for the yet-to-be-formed corporation. It is also binding on the corporation if it is adopted by the corporation.

Alex Attorney is liable because he signed the lease. Despite signing "President" after his name (which is an unusual title for a partner in a two-person firm to use), as a promoter signing a pre-incorporation contract, he remains liable. The one exception is if there had been a novation but there is no new contract (at least none indicated) that was signed by Alex, by the corporation, and by the landlord that officially terminated his liability.

The corporation is liable because it adopted the lease contract by accepting its benefit. It did this by using the space for the law firm's legal practice.

Lou is not liable. He does not have the promoter liability Alex did, because he did not sign the contract. And the benefit of a corporation, including a professional corporation like the one Alex and Lou formed, is the protection for personal liability. He is, of course, "liable" for any money he has put into the corporation he is unlikely to see his $15,000 again.

II.

As in question one, Alex and the professional corporation are both liable but Lou is most likely not. This question turns on the protection from personal liability afforded by a professional corporation. The corporate form shields Alex and Lou (in their capacity as shareholders) from personal liability.

Alex is liable under a number of theories. These include fraud (assuming, of course, no innocent explanation for what seems like clear malfeasance for example, this assumes the bank did not raid the escrow and Bob's assistant did not convey a letter notifying him of the judgment), breach of contract, embezzlement, conversion, negligence, legal malpractice, and the full array of professional sanctions in the state of Georgia. If Alex has absconded with the client's money, he will likely be disbarred. Alex will likely protest that the corporation is the only liable party but to no avail: the corporate form offers no protection to a professional guilty of malpractice.

The corporation is liable for the funds Bob's contractual agreement was with the corporation ("the law firm would handle").

Bob is not liable as a shareholder. He might, however, be liable as one of the partners in the professional corporation or as a corporate officer if he was negligent about the oversight of corporate funds and there were no controls whatsoever on the escrow account. Such a complete abandonment of responsibility would violate his duty of care and expose him to liability in a tort suit for negligence.

Lou is able to recoup half of the $10,000 from Alex as they were partners when the $10,000 was paid.

III.

Lou has made two capital contributions to the corporation totaling $25,000. On the dissolution of the corporation, he would recover for both debts only after the corporation's creditors have been paid. Once they are paid, before the remaining assets are distributed to the shareholders (Lou & Alex), Lou would receive $15,000 for his capital contribution and $10,000 for his loan to the corporation. Any remaining money would then be distributed to Lou and Alex evenly.

IV.

Lou has two sets of duties. First, he has professional duties to his client, Bob. These duties are not excused by the fact that another lawyer in the firm handled the majority of the representation as one partner in the law firm, Lou has professional duties to the

clients of the firm. Here, Lou's duty of care and duty of loyalty to the client require him to act in the client's best interests and to investigate the missing funds. He should investigate thoroughly (with the diligence of a reasonably prudent professional) and should very quickly apprise the client of the missing funds and the possible source of the problem. He should do so "very quickly" rather than "immediately" because he should first try to reach Alex and discover what has happened. He should immediately contact Alex by walking down the hall, by phone, by e-mail and if Alex cannot be found, he should then immediately contact the client.

Second, Lou has professional duties as a lawyer in the state of Georgia. When he discovers the missing funds, he has a responsibility to report the problem to the State Bar. He should first try immediately to contact Alex, but if Alex has taken the funds out of the escrow, then he has a duty to report him to the state. It is not sufficient for Alex to return the money: Alex has violated his duties as a lawyer, and Lou's duties thus require him to report it.

Question 1 - **Sample Answer 2.**

1. A) The Landlord will have recourse against Attorney and Lawyer, P.C. (A&L) because that is the name on the lease. It appears that A&L may have no assets.

If landlord cannot be paid by A&L, he may attempt to reclaim from the shareholders of A&L. Since

A&L was not properly incorporated at the time that the lease was signed, landlord may attempt to claim against Alex and Lou as partners rather than as a corporation. Partner's personal assets are available to satisfy all debts of a partnership. Alex and Lou could defend against this by claiming corporation by estoppel. Landlord always dealt with A&L and treated A&L as a corporation. It would now be improper to claim that A&L is not a partnership.

If it is shown that the corporation did not exist when Alex signed the lease, then Landlord may attempt to claim that Alex was the promoter for A&L and that Alex is personally responsible for any claims against A&L before it came into existence. Promoters are generally responsible for all contracts made before a corporation came into existence. A promoter and any contracting parties can agree to a novation which replaces the promoter's place in a contract with the corporation. There is no indication here that there was a novation. Generally, a corporation will be held liable for any pre-existence contracts by assuming the benefits. A&L did assume the benefits of the lease and is liable for the lease. In this case Alex as promoter and A&L as beneficiary of the contract are both accountable for the contract.

The landlord will also have a claim against A&L assets if the corporation is dissolved. Dissolution is discussed below.

1 B) Alex as stated above is potentially liable as the promoter of the corporation, or as a partner if the corporation did not exist at the time of the contract. Additionally, even if the corporation is determined to exist at the time of the leasing agreement by corporation by estoppel, the landlord may be able to pierce the corporate veil. If the landlord is able to show that the corporation was a sham and that the corporate assets were treated as personal assets of Alex and Lou, then he may be able to strip away the corporation and take Alex and Lou's personal assets to cover the debt. Here, the fact that the escrow account has been drained, and that the formation of the company was sloppy (filing late), indicates that the corporation may have been a sham. Additional signs of a sham corporation would be poorly kept board minutes, or skipped meeting of the board, or use of corporate funds for personal expenses.

1 C) Lou will not be liable personally as a promoter, but he may be liable personally if the corporation did not exist at the time of the lease and it is considered a partnership. Lou may also be personally liable if the corporation is determined to be a sham.

2 A) Biz has a claim against assets of A&L because that is the party he was in contact with.

2 B) Biz would also have a personal tort claim against Alex who is the individual that handled Biz's business and funds.

2 C) Biz may have a claim against Lou if Biz can show that the corporation was a sham and thus pierce the corporate veil as discussed above. This would allow Biz to take Lou's personal assets.

3 A) Lou has provided additional capital to A&L as a loan for $10,000 to cover the rent. Thus, he has a claim against A&L for funds. Lou could seek reimbursement for A&L. If the firm is dissolved, Lou would have a claim as a creditor of the firm. Any funds left after winding up the corporation would be used to pay creditors. First would come 3rd party creditors like the landlord. Second would come shareholder creditors like Lou, and last would come shareholders like Alex and Lou. (Alternatively, the monies may have been advanced, when there was a partnership between Lou and Alex, in which case Lou's claims may only be against Alex.)

Lou has a claim for breach of a duty of loyalty and duty of care against Alex. Alex was an officer

in the firm and thus owed a duty to the firm. Alex breached this duty by not making appropriate use of company funds.

3 B) Lou could seek the same compensation as was available in 3A, plus he would have a cause of action against Alex for a loan. This was created before the corporation was formed and Alex was acting as a promoter. Alex has liability as a promoter to Lou.

4) Lou should notify the Georgia Bar of the funds missing from the firm's escrow account and that a client has not been paid. If Lou does not notify the Bar, then he will be considered an accomplice of any wrongdoing.

Question 1 - Sample Answer 3.

1. Landlord.

(a) The landlord would have recourse against Attorney & Lawyer P.C. By occupying the leased premises after its incorporation, the professional corporation effectively ratified the lease even if there was no written ratification.

(b) The landlord would have recourse against Alex personally as there was no corporate existence at the time Alex signed the lease and the debt was created prior to the actual incorporation. Korey v. BellSouth Telecommunications, Inc., 225 Ga. App. 857, 485 S.E.2d 498 (1997), rev'd other grounds, 269 Ga. 108, 498 S.E.2d 519 (1998).

An individual who purports to act on behalf of a corporation, knowing there has been no incorporation, is liable for all liabilities created while so acting. O.C.G.A.?14-2-204.

(c) Normally the landlord would have no recourse against Lou, who, as a shareholder of the professional corporation, would not usually be personally liable for the debt of the corporation. In this case, however, a partnership existed between Alex and Lou at the time the lease was signed, (before the corporation had been formed), thus subjecting both Alex and Lou, as partners, to liability for the lease debt.

Extra credit: Alex & Lou could have avoided personal liability by adding a provision to the Lease to the effect that upon incorporation, the landlord would look only to the corporation for payment.

2. Bob Biz.

(a) Bob Biz contracted with the professional corporation for legal services and thus he has recourse against the professional corporation to the extent of its corporate assets.

(b) Bob Biz also has recourse against Alex, the wrongdoer since, as a result of Alex's fraudulent acts, Bob Biz can pierce the corporation veil to reach Alex.

(c) Lou, as a shareholder, should not have liability for Alex's professional misconduct in failing to remit collected funds to Bob as he was not involved in the misconduct.

3.

(a) Lou Lawyer may sue Alex Attorney seeking contribution for one-half of the $10,000.00. At the time the Lease was signed, the professional corporation had not yet been formed and thus Lou Lawyer and Alex Attorney were acting as partners. They are therefore liable to each other as partners for the obligations incurred when they were partners. They could have contractually altered their relationship but did not do so.

(b) Even though Lou Lawyer understood the $15,000.00 loan to be to the corporation, that was not the case as the P.C. was not yet in existence. Thus, the loan was to the partnership and Lou would have a claim against Alex for $7,500.00 as they were partners at the time the loan was made. See Jamal v. Hussein, 515 S.E.2d (1999).

The facts do not state whether or not the professional corporation assumed the pre-incorporation debts of the partnership. If it did, then Lou would have recourse against the P.C. for repayment of the entire $15,000.00, (if it has the assets to pay the debt).

4.

Rule 8.3 of the Georgia Rules of Professional Conduct requires that a lawyer with knowledge that another lawyer has committed a violation of the Rules that raises a substantial question as to that lawyer's integrity or fitness as a lawyer, should inform the State Bar of Georgia. Thus, Lou should immediately report Alex Attorney's conduct with regard to the account.

Question 2 - Sample Answer 1.
(disclaimer)

Crimes of Sonny

Sonny was initially the victim of Abe. The issue is whether Sonny could pick up the gun and shoot at a retreating Abe. In Georgia in order to use deadly force, one must be in reasonable apprehension of death/great bodily injury. In this case Abe was crawling away. In Georgia, if the person is retreating, and the fear of harm, there would be no basis to use the deadly force. Here the facts state Abe had the gun knocked to the ground by Bea, he tried to run away, but on tripping, fell to the ground and began to crawl away. The use of deadly force was not justified.

Sonny would be guilty of aggravated battery. Battery is the harmful or offensive touch of another - without permission - the aggravated battery use of deadly force or the great bodily harm. Here is the use of deadly force.

Sonny would argue that his defense against Abe would be that he was 12 years old. In GA, to be liable for intentional crime, he would have to be 13 years old. The facts indicate that he was 12. He would be presumed not to have formed the requisite intent. However, Sonny would also argue that he had a right to use deadly force in defense of himself or another. But here would probably fail because Abe was retreating and Sonny was not in any apparent harm. A better argument is that Sonny is 12 and had just seen his mother shot and Abe was acting wildly, he would have no

way of knowing what Abe's intentions were. He would probably not be liable for shooting Abe.

Abe

Initially Abe would be liable for Aggravated Battery against Bea - based on the elements discussed above. The death of Bea would raise the issue of liability for murder. Murder is the killing of a human being by another with malice aforethought. It is specific intent crime.

Here Abe would argue that he had no intent to kill. Malice would be supplied by the commission of an act with the disregard for the high degree of human risk.

The other issue would be whether Abe would be guilty of Felony Murder which is murder committed in the commission of the enumerated crimes. In Georgia, the enumerated crimes are burglary, arson, rape and kidnaping. None of these crimes occurred here. However, even if they were, in Georgia a lesser included crime merges into the Felony - murder, and he could only be convicted of the underlying felony. However, the requisite underlying felony does not exist.

In Georgia, Abe could be guilty of killing the fetus. It would have to be a viable fetus in order to come under that provision. The facts are not specific enough to say if the pregnancy had progressed to a point where the fetus was viable.

Abe's Defenses

The facts specifically indicated Abe was just out of the half-way house for cocaine addiction and he was acting incoherent and wildly. The facts also indicate when he was shot, that he could not have surgery until after the effects of the drugs wore off.

The issue is whether he has a defense of insanity. Georgia uses a combination of McNaughton and the Irresistible Impulse test. Under McNaughton, the person to not be able to distinguish between right and wrong. The irresistible impulse says that at the time of the crime, the person is under a mental defect such that the defect causes such an impulse they cannot control their impulse. Here, as stated earlier, it appears that Abe could reasonably raise the defense that he was insane at the time due to drug use. If it was voluntary use which cocaine is, he would have to fall under the tests of insanity to negate his specific to kill. There are not sufficient facts to say one way or the other but it is a reasonable defense to raise and request blood samples and get other info on behalf of Abe. Abe could also argue he had not specific intent to kill. He could argue that at best involuntary manslaughter - the killing in the commission of an inherently dangerous activity. He could argue that pulling the pistol was inherently dangerous, but no intent to kill.

There are not sufficient facts to make an argument as stated before that his intent was robbery and thus possibly falls in the category of felony murder. He might be guilty of murder, or at a minimum involuntary manslaughter. The facts are just not enough to make a conclusion that he would be able to claim insanity as a defense.

Question 3 - **Sample Answer 1.**
(disclaimer)

Part One

Federal diversity jurisdiction requires two elements:

(1) there must be diversity of citizenship and (2) the case in controversy must exceed #75,000. Diversity of citizenship requires complete diversity between all plaintiffs and all defendants. Thus, no plaintiff can be from the same state as any defendant. The case in controversy refers to the amount of damages alleged by the plaintiff in the complaint. If this amount is $75,000 or less, there is no diversity jurisdiction and the case cannot be heard in federal court.

Part Two

John Jones and ABC, Inc. are both citizens of Georgia, therefore there is no diversity jurisdiction for this claim. For purposes of federal diversity jurisdiction, a person is generally considered a citizen of the state in which he resides. A corporation, however, is considered a citizen of the state in which it is incorporated and in which it has its principal place of business. Thus, it is possible for a corporation to be a citizen of two states, or even more, as a corporation can be incorporated in more than one state. John Jones is a resident of Georgia, thus he is a citizen of Georgia for federal diversity jurisdiction purposes. ABC, Inc. is incorporated in Delaware, thus it is a citizen of Delaware. However, ABE has its principal place of business in Georgia, thus it is also a citizen of Georgia. Because diversity jurisdiction requires complete diversity between the plaintiff and defendant, there can be no diversity jurisdiction over a claim by Jones against ABC. Both are citizens of Georgia.

Part Three

The amount in controversy as it relates to Jones' claim against ABC may or may not be sufficient for the purposes of federal diversity jurisdiction. As discussed above, federal diversity jurisdiction requires that the amount in controversy exceed $75,000. With respect to a claim related to a loan, the original amount that was payable to the plaintiff plus any interest that has accrued is the proper measure of damages for determining amount in controversy. The original amount payable to Jones under the note he holds was $50,000. This alone is not enough to satisfy the amount in controversy requirement. However, the note provided for simple interest at the rate of 12% annum. Because the note is payable on or before June 30, 2006, the note could include as much as $30,000 in interest. Once this amount is added to the original amount of $50,000, the amount in controversy is met.

Part Four

Bill Smith and ABC are not citizens of the same state, thus a claim by Smith against ABC satisfies the diversity requirements. As discussed above, federal diversity jurisdiction requires complete diversity between all plaintiffs and all defendants. Bill Smith is a resident of Alabama, thus he is a citizen of Alabama. As discussed in Part Two, ABC is a citizen of both Delaware and Georgia.

Because Smith and ABC are citizens of no states in common, there is complete diversity and the diversity requirements for federal diversity jurisdiction are met.

Part Five

The amount in controversy as it relates to Smith's claim against ABC is probably insufficient to satisfy the requirements of diversity jurisdiction. As discussed in Part Three, federal diversity jurisdiction requires that the amount in controversy exceed $75,000. Furthermore, this amount may include any interest that has accrued on a loan. The original amount payable on the note held by Smith was $25,000, which is well below the amount in controversy requirements. Furthermore, although the note includes simple interest at 12% per annum, this would only lead to a total interest amount of $15,000. This brings the total amount in controversy to $40,000, which is still well below federal diversity jurisdiction requirements.

Part Six

John Jones and Bill Smith cannot bring a single action in federal court against ABC, and, even if they could, they could not aggregate their claims to meet the amount in controversy requirements. Federal diversity jurisdiction requires that all plaintiffs be diverse from all defendants. Thus, if even one plaintiff is from the same state as the defendant, the claim will fail to satisfy diversity jurisdiction. In addition, while a single plaintiff may aggregate all of his claims against a single defendant that arise from the same transaction or occurrence in order to satisfy the amount in controversy requirement, two separate plaintiffs may not aggregate their claims against a single defendant to do so.

While Smith is diverse from ABC, the presence of Jones as a plaintiff would destroy diversity for both if they brought a single claim. Both Jones and ABC are citizens of Georgia, thus there is no complete diversity. Even if there was complete diversity, Jones and Smith may not aggregate their separate claims against ABC. They are not from the same transaction or occurrence and they are being brought by two plaintiffs against a single defendant.

Question 3 - Sample Answer 2.
(disclaimer)

1. In order for the US District Court to have subject matter jurisdiction based on diversity of citizenship, it must be shown that there is complete diversity between the parties. Complete diversity means that no plaintiff can reside or be domiciled in the same state as any defendant. Additionally, diversity jurisdiction requires a claim for damages in excess of $75,000. The amount actually awarded does not affect diversity jurisdiction. the only requirement is that there be a good faith claim of damages exceeding $75,000.

2. John Jones is a resident of Georgia according to the facts. ABC is incorporated in Delaware and has its principal place of business in Georgia. For diversity jurisdiction, a corporation is deemed to "reside" in any state where it is incorporated or has its principal place of business. Therefore, for

diversity purposes, ABC is a resident of both Delaware and Georgia. Therefore, there is not complete diversity (because John and ABC both reside in Georgia) and the district court would have no subject matter jurisdiction based on diversity of citizenship.

3. It appears that the amount in controversy between John and ABC meets the requirement for diversity jurisdiction in federal court. ABC borrowed $50,000 from John at a 12% annual interest rate. Over the length of five years, the interest accrued is in excess of $25,000.01 and, therefore, meets the amount in controversy requirement ($50,000 + $25,000.01 = $75,000.01).

4. An individual is determined to be a resident of the state where domiciled, therefore, Bill is a resident of Alabama. There is no indication that Bill does not intend to maintain his permanent residence in Alabama, so he is considered a resident of Alabama for diversity jurisdiction purposes. As mentioned earlier, ABC is a "resident" of both Georgia and Delaware, so complete diversity does exist between Bill and ABC.

5. As previously discussed, the amount in controversy must exceed $75,000 in order to invoke diversity jurisdiction. Bill's claim is for $25,000 and does not meet the requirements for diversity jurisdiction.

6. Bill and John cannot bring a single action in US District Court. There is no complete diversity because John and ABC are both residents of Georgia. Additionally, aggregation of their claims is not appropriate. Aggregation is only appropriate when a single plaintiff wishes to aggregate separate claims to meet the amount in controversy requirement. Accordingly, the claims of John and Bill, separate plaintiffs cannot be aggregated.

Additionally, there is no way the court could exercise supplemental jurisdiction over either of their claims. Supplemental jurisdiction is only appropriate when a claim is already properly in federal court and there are additional claims arising out of the same nucleus of facts that do not invoke federal jurisdiction. In such a case, the court can hear the other claim, not invoking federal jurisdiction. However, there are no claims properly in federal court under these facts and a plaintiff cannot use supplemental jurisdiction to cure lack of diversity.

Question 3 - Sample Answer 3.

(disclaimer)

1. Subject matter jurisdiction of federal courts generally is limited to controversies involving (a) assertion of a right under federal law (federal question jurisdiction); or (b) federal diversity jurisdiction. Federal diversity jurisdiction has two elements: (1) complete diversity between plaintiffs and defendants; and (2) amount in controversy, exclusive of interest and costs, of greater than $75,000. With respect to the first factor, no plaintiff may be a citizen of the same state as any defendant in the action. With respect to the second factor, the amount in controversy must exceed $75,000; a $75,000 claim is not sufficient.

2. The facts indicate that Mr. Jones is a resident and citizen of Georgia. Thus, Georgia is his domicile. The facts indicate the ABC was incorporated in Delaware and has its principal place of business in Georgia. For consideration of diversity of citizenship issues, a corporation will be

deemed to have its domicile both in its state of incorporation and the state in which its principal place of business is located. Thus, ABC is a citizen both of Delaware and Georgia. Because Mr. Jones (as plaintiff) and ABC (as defendant) are both considered to have their respective domiciles in Georgia, diversity is lacking as between them, and Mr. Jones cannot proceed against ABC in federal court based on lack of diversity jurisdiction (and the apparent absence of a federal question).

3. The principal amount of the note issued to Mr. Jones was $50,000, which is less than the monetary minimum of $75,000. At issue is whether the interest on the note (12% per annum from January 2, 2001 through June 30, 2006) can be added to the principal to reach the $75,000 minimum. It appears that interest for 5 ½ years at 12% simple interest would be $33,000, bringing the total claim to $83,000.

A general principle applicable in federal courts is that interest and costs are not considered in arriving at the statutory minimum. Here, the note has matured and a sum certain is alleged to be due. (This is unlike a case in which the interest is accruing based, for example, on a statute providing for recovery of pre-judgment interest, where the sum is uncertain and is not an element of the damages for the underlying cause of action. Also, if Mr. Jones were to claim interest for further interest, since June 30, 2006, this further interest would not be a sum certain properly includible in the amount for determining if the $75,000.01 threshold has been reached; this would not be a sum certain due based on the face of the note.) The failure to receive the interest when due pursuant to the terms of the note is a key element of Mr. Jones' underlying claim. Mr. Jones' claim appears to meet the amount in controversy requirement based on the principal amount combined with the interest due on the matured debt.

4. For the reasons noted above, ABC is considered a citizen both of Delaware and Georgia. We are told that Mr. Smith is a citizen of Alabama. Accordingly, complete diversity exists as between these parties because there is no individual state of which they both are residents.

5. Mr. Smith's claim is based on the principal amount of the note ($25,000) and interest for 5 ½ years (12% per annum), which is $16,500. The total is $41,500. Even though it appears interest on the matured debt could be considered, Mr. Smith's claim does not reach the minimum (i.e., more than $75,000).

6. In matters involving multiple parties (either plaintiffs or defendants), all plaintiffs must be diverse from all defendants. For the reasons noted in #2 above, Mr. Jones could not proceed in federal court based on the lack of diversity, and Mr. Smith's being a co-plaintiff (despite his diversity to ABC) does not change this result.

Plaintiffs in federal court may aggregate their claims to reach the jurisdiction minimum only when their respective claims are considered indivisible. At a minimum, they must arise out of a common set of facts. Although the facts do no allow us to conclude with certainty whether there is an indivisible right being asserted, the fact of multiple notes being provided by ABC (as opposed to a single note being payable to both) suggests that the requisite indivisibility for aggregation purposes does not exist. More facts would be needed to be certain.

Question 4 - Sample Answer 1.
(disclaimer)

The statute of frauds would apply because contracts for the sale of real property

require that they be in writing. However, there are exceptions. One such exception is the doctrine of part performance. Oral agreements for the sale of real property will be enforced where: (i) the full purchase was paid; (ii) part of the purchase price has been paid and the buyers are in possession of the real property; or (iii) the buyers are in possession of the real property and have made improvements to the real property. Here, Fred and Ethel paid the full purchase price, so their oral agreement for the purchase of Grinch's real property will likely be enforced.

2. Meddler will probably move for ejectment or trespass to real property (or maybe even eviction) against Fred and Ethel, but he will probably be unsuccessful. He will argue that he is a bona fide purchaser of the real property for value without notice of the claim of Fred and Ethel to the property. Since there was no deed recorded reflecting a conveyance of the property from Grinch to Fred and Ethel, Meddler was aware that Fred and Ethel lived at that property since he lived right across the street from them. Their presence on the property was patent. In fact, he had an obligation to inspect the property before purchase. Such an inspection would have revealed the presence of others on the property, and he would have been obligated to inquire as to the potential property rights of those people already on the property. Even though Meddler was aware that Fred and Ethel were on the property, he made no effort whatsoever to determine what interest, if any, they had to the property. As such, Meddler will probably not be successful in his claim.

3. Fred and Ethel will most likely have a valid defense to Meddler's claim. First, their oral contract is most likely enforceable. However, since the agreement is between them and Grinch, not Meddler, they may need to bring Grinch into the lawsuit to resolve all claims to the property. They could sue Grinch for breach of contract and specific performance (assuming he still had title) to have the property turned over to them. Second, their interest on the property is superior to that of Meddler. Fred and Ethel and Grinch entered into an oral contract way before Grinch and Meddler made their contract for the sale of the property, and Fred and Ethel finished paying off their debt on the property before Meddler was able to purchase it from Grinch. Third, the facts and arguments made in paragraph two above would support Fred and Ethel's defense. Thus, they have meritorious defenses. They could also argue equitable defenses, such as unclean hands on the part of Meddler since he was aware of their presence on the property, and he proceeded with transaction with Grinch in spite of this knowledge.

The counterclaim will most likely be successful, and a constructive trust will be imposed. The same facts in the preceding paragraph, along with the fact that Meddler was aware that Fred and Ethel lived at that property, that their presence on the property was patent, that Meddler had an obligation to inspect the property before purchase which would have revealed the presence of others on the property, that Meddler would have been obligated to inquire as to the potential property rights of those people already on the property, and that Meddler made no effort whatsoever to determine what interest, if any, Fred and Ethel had to the property, support their counterclaim which would probably be in equity (as against Meddler). Assuming that the conveyance from Grinch to Meddler was technically property (recorded deed, consideration, etc.), the court will probably enter a constructive trust so that Meddler conveys title to the real property to Fred and Ethel. Meddler's recourse will be against Grinch for fraud in the inducement, breach of contract, etc.

Question 4 - Sample Answer 2.
(disclaimer)

The issue here is whether the Statute of Frauds applies to an oral agreement for the sale of land. The Statute of Frauds applies to these facts because it is a sale of land. To prevent fraud, the Statute of Frauds was created requiring that certain contracts must be in writing and not merely oral agreements in order for them to be enforceable in a court of law. These include, goods valued over $500, marriage agreements, surety, sale of land, contracts that cannot be performed within a year, and the lease of goods of $1000. Here, the contract is within the Statute of Frauds as it is one of the specific agreements that is required to be in writing. Thus, as oral agreement will not be accepted for the sale of land.

However, there is an exception to the Statute of Frauds concerning the sale of land which allows the enforceability of an oral contract which should have originally been in writing if there is partial performance (in this case payment) on the parcel of land. Thus, because Fred and Ethel Jones have made all of the payments on the land (not just merely part of them which would also suffice), the Statute of Frauds will be satisfied and a writing will not be required to create an enforceable agreement between Jones and Grinch. Thus, an enforceable contract exists between Grinch and Jones for the sale of land.

Meddler's claim against Ethel and Fred Jones is based on the fact that he purchased the land directly from the owner Sam Grinch as a bona fide purchaser. He now wants to remove Ethel and Fred from the land as he believes he purchased the property for value. A bona fide purchaser is one who purchases property, for value, with no notice of another's prior rights. Because Meddler was unaware of the oral agreement between Grinch and the Jones, he will be a bona fide purchaser for value. However, to actually prove that he has rightful possession of the land, he must also prove that he had no notice that the property was owned and conveyed to someone else. Notice will be assumed where a reasonably prudent person would have notice under the circumstances, so the merits of Meddler's claim to remove the Jones hinges on the notice requirement for him to be a true bona fide purchaser. If a reasonably prudent person would know based on the facts of the case that the property belonged to the Jones, then constructive notice will be implied and Meddler cannot recover as a Bona Fide Purchaser.

Because the purchase of the land was set up more like a lease than anything, this also creates a problem for the Jones because it would be that much harder for a party such as Meddler to do a Deed search and have actual notice the land was sold.

The issue here is whether Meddler had notice that Ethel and Fred owned the land before he purchased it. Ethel and Fred's counterclaim that the property was rightfully theirs is probably a recoverable claim as they made all of the payments on the land and once they completed the payments, it was Grinch's duty to convey the land to them as rightful owners. Because Grinch did not convey the property or the deed, there is no way they could have recorded the deed to give Meddler actually notice of their rightful ownership. Thu s, Ethel and Fred will probably maintain that while Meddler may be a bona fide purchaser without actual notice, he had constructive notice that the Jones owned the land because they had lived on it for along period of time and had a

home on it that was their own. The issue here is whether the notice was sufficient so that Meddler would know the property was already sold. While he did live across the street, he had no knowledge the Jones owned the land the land payments were set up more like a lease agreement than anything else. Furthermore, because the Jones lived in a mobile home, it would be tough to actually know if they owned the property or just leasing it until they drove to the next place. However, it seems that it would not be too much to ask for Meddler to walk across the street and have a five minute conversation with the Jones to find out who owns the property.

Meddler probably cannot recover and force Ethel and Fred to move because he did have constructive notice and if there were any questions as to the deed on the land, he could have simply walked across the street and asked the Jones if they owned the property or were just leasing it, thus inferring the constructive notice and giving the property to the Jones. Furthermore, Fred and Ethel should probably have first right on the land because they entered into a contract that eventually satisfied the Statute of Frauds and paid off the property.

Question 4 - **Sample Answer 3.**
(disclaimer)

The Statute of Frauds

The Georgia statute of frauds does apply to the conveyance of real property, as is the case here. The statute of frauds requires that the contract for the sale of property be in writing, reasonably describe the property, identify the parties, and be signed by the party against whom enforcement is sought. Accordingly, Fred and Ethel's ("the Jones") agreement with Sam and Meddler's agreement with Sam should have been in writing.

However, there are exceptions to this requirement. One is part performance. Part performance of land sale contract can be accomplished by (a) paying the full purchase price, (b) taking possession and paying part of the purchase price, or (c) taking possession and making substantial improvements.

As the Jones took possession of the land (they were living on it) and made all payments to Sam under the oral agreement, they have certainly partially performed. Accordingly, they meet an exception to the statute of frauds.

The facts suggest that Meddler paid the entire $18,000.00 purchase price to Sam. If this is true, Meddler has also partially performed. Accordingly, he also meets an exception to the statute of frauds.

2. Meddler's claims against Fred and Ethel.

Meddler is unlikely to succeed on his claim against the Joneses. Sam "conveyed" (though he really just entered a contract to convey the property to the Jones, a conveyance occurred for all intensive purposes - especially considering the doctrine of constructive trust as discussed further in Section 3) the property to both Meddler and the Jones so this brings up the issue of who has greater rights to the property.

In determining the priority of competing titles to land, Georgia follows a race-notice statute. Under such a statute, a subsequent purchaser may take title to land free and clear of the rights of a prior purchaser of the same land if the subsequent purchaser purchases the land without notice of the prior party's rights and files a deed to the property before the prior purchaser. Meddler had notice that the Jones had at least some rights in the property as he knew they were living on it - due to his living across the street. Arguably, he could have assumed the Jones were simply tenants; however, the Jones' presence would seemingly suffice to put Meddler on notice to an extent that he should have at least inquired further. Accordingly, Meddler would have a hard time claiming that he purchased the land from Sam without notice of the Jones' rights. Therefore, being on notice, Meddler would not be able to take title to the land free and clear of the rights of the prior purchasers, the Jones.

There is no evidence that any party has filed a deed yet. If Meddler somehow proves that he did not have notice at the time of purchase, it will be a race to the filing office (clerk of superior court of the county in which the real property is located). As, if Meddler did not have notice, the rights in the property as between the Jones and Meddler will be determined by the first to file. The only claim that Meddler would seemingly have against the Jones would be if they actually physically "threw" him off of the property - in which case they may have committed batter up on him (unwelcome physical contact), but that is outside the scope of Meddler's immediate action.

3. Jones' defense to Meddler and the merits of their counterclaim against Meddler.

As discussed in Section 2, the Jones seemingly have a valid defense to Meddler's claim to quiet title (which, if done properly, he brought in Superior Court in the county in which the real property is located) as they were prior purchasers and Meddler was seemingly on notice of their rights. These same facts support a likelihood that the Jones will succeed on their counterclaim that the property is rightfully theirs. However, as discussed in Section 2, if Meddler can prove no notice, which seems unlikely, the winner may be determined by the first one to get to the filing office.

The Jones may also strengthen their claim to the property under the equitable doctrine of constructive trust. This doctrine is used by a Superior Court when the title to something is in the hands of one other than the one who provided consideration for the title. Applying this doctrine to the Joneses dealings with Sam, the Jones likely would have been entitled to a constructive trust over the deed when finished paying Sam the consideration for the property. If this were true, Sam would have no rights in the deed except to maintain it for the Jones. And, as one cannot convey greater title than he holds, Sam may have been powerless to convey anything more than obligations under a constructive trust to Meddler. All things considered, it appears that the Jones have valid defenses to Meddler's claim and also have a valid counterclaim against Meddler. Now someone needs to get to suing Sam.

MPT 1 - Sample Answer 1.
(disclaimer)

Memo to Ms. Levine:

You asked me to research potential causes of action against Ann Remick & Don Anderson. This memorandum summarizes my findings:

1. Breach of contract Claim Against Ann Remick

The Franklin Civil Code requires that agreements authorizing brokers for compensation or commission for the purchase of sale of real estate are unenforceable unless they are (1) in writing and (2) signed by the party charged. In this case, the initial listing agreement was executed on November 10, 2006 and terminated on January 8, 2007. Both Ann Remick and Tamara Shea were aware of this. Ms. Shea encountered a potential buyer January 10, 2007, but knew that her contract with Ms. Remick had expired. Thus, she contacted Ms. Remick in an attempt to extend the contract for a longer period. Ms. Remick orally agreed to extend the contract and Ms. Shea sent a confirmation letter on January 10, 2007. The letter extended the contract to February 7, 2007. This writing satisfies the first element under the Statute of Frauds.

Unfortunately, for Ms. Shea, Ms. Remick (the party charged) never executed the agreement. Thus, it fails the second requirement to satisfy the Statute of Frauds. These facts are very similar to those in Phillips. In Phillips, a real estate broker sued his client for breach of contract alleging that an exchange of letters comprised a written agreement for commission. The court, however, held that since the letters were only from the broker to the client and not the client to the broker that they were not "signed" by the charged party. Therefore, under those facts it is very unlikely that Ms. Shea could sustain an action against Ms. Remick for breach of contract.

2. Tortious Interference Claims

In Mather, the court noted that a plaintiff who believes that she has a contract but who recognizes that the trier of fact might conclude otherwise, might bring two separate tort actions: (1) Interference with economic advantage and (2) Interference with contractual relations.

2(a). Interference with Contractual Relations Against Don Anderson

A claim for interference with contractual relations requires that a plaintiff allege: (1) a valid and enforceable contract, (2) the defendant's knowledge of the existing contract, (3) intentional and improper acts on the part of the defendant to disrupt the contact, (4) actual disruption of the relationship, and (5) economic harm to the plaintiff proximately caused by the defendant's acts. The crux of this cause of action against Mr. Anderson relies on whether or not there is a valid and enforceable contract. As discussed in Section 1 of this memo, there is not a valid and enforceable agreement because it fails to satisfy the statute of frauds as required by Franklin Civil Code 1500. Therefore, a cause of action against Mr. Anderson cannot be sustained. (Mather)

2(b). Interference with Economic Advantage Against Don Anderson

In contrast to a claim for interference with contractual relations, the cause of action for interference with economic advantage assumes that a contract has not yet been formed. Mather For example, it applies in cases in which a relationship is based on pending negotiations or in which a contract is unenforceable because it does not satisfy the statute of frauds. Mather In Mather, the Franklin Court of Appeal set forth the elements required to establish such a claim: (1) an economic relationship between the plaintiff and a third party containing the probability of future economic benefit to the plaintiff, (2) the defendant's knowledge of the existence of the relationship, (3) intentional interference and improper acts on the part of the defendant to disrupt the relationship, (4) actual disruption of the relationship, and (5) economic harm to the plaintiff

proximately caused by the defendant's acts.

The most promising aspect of this action is that no written contract need exist. Under the first element, Don Anderson knew that Ms. Shea & Ms. Remick had an economic relationship that would result in a 10% commission benefit to Ms. Shea if the sale had gone through as originally offered. This is evidenced by the fact that Mr. Anderson asked Ms. Shea specifically about her compensation on the sale. Mr. Anderson knew of the relationship between Ms. Shea & Ms. Remick as Mr. Anderson submitted the offer and received the reduction via Ms. Shea.

Furthermore, Mr. Anderson intentionally and improperly interfered with the relationship between Ms. Shea & Ms. Remick by advising Ms. Remick that Ms. Shea was untrustworthy and that they could "cut her out" of the deal and eliminate the commission. This also is in compliance with the intentional and improper requirements of Downey. This is because Mr. Anderson knew that his actions to a degree of substantial certainty would harm Ms. Shea economically. Moreover, he knew that the contract would have been otherwise performed absent his action. For example, when he received the reduction he was neither surprised nor upset. Downey

His actions also satisfy the fourth element in that his conduct disrupted the relationship (in fact it ended it) between Ms. Shea and Ms. Remick. And finally, his actions were the proximate cause of Ms. Shea losing out on her commission. This is evident that Ms. Remick decided to deal directly with Mr. Anderson as a result of his actions. Thus, it is very likely that we can establish a case for interference with economic advantage against Mr. Anderson.

In conclusion, I recommend filing a cause of action against Mr. Anderson for interference with economic advantage. However, we should not file the breach of contract claim against Ms. Remick or the other interference claim against Mr. Anderson.

MPT 1 - Sample Answer 2.
(disclaimer)

Although Shea probably cannot maintain a cause of action against Remick for breach of contract, she can probably maintain a cause of action against Anderson for intentional interference with prospective economic advantage.

I. Shea probably cannot maintain a cause of action against Remick for breach of contract because the writing extending the Listing Agreement was not subscribed by Remick.

Section 1500 of the Franklin Civil Code requires that an agreement that authorizes or employs a broker, for compensation or a commission, to procure a purchaser or seller of real estate must be in writing and subscribed by the party to be charged. In Mathers v. Bowen, the Franklin Court of Appeal held that his requirement embodies two separate principal requirements: (1) the writing shows the authority of the broker to act for the party to be charged; and (2) the writing is subscribed (signed) by or on behalf of the party to be charged. Once these two requirements are met, extrinsic evidence is admissible to provide additional terms or to explain any ambiguities or the circumstances at the time the contract was made. Mathers

The original Listing Agreement between Shea and Remick satisfied these requirements. The agreement was in writing and stated that Shea had exclusive authority to sell Remick's property at the listing price of $225,000 and that her authority was to last for 60 days, up to and including, January 8, 2007. Furthermore, the agreement was signed by Remick, the party to be charged.

The subsequent agreement in which Remick agreed to reduce the sale prince contained in the Listing Agreement to $200,000 was also in writing and signed by Remick. However, the agreement in which Remick purportedly agreed to extend Shea's authority for another 30 days, up to and including February 7, 2007, was not signed by Remick. This agreement seeks to change the authority granted to Shea by the original Listing Agreement. It does more than provide additional terms or explain ambiguities or the circumstances at the time of contracting. Therefore, it was probably required under the Franklin Civil Code to be in writing and to be signed by Remick. Because it was not signed by Remick, it is probably invalid and cannot extend the Listing Agreement period. In addition, the voicemail from Remick agreeing to extend the Listing Agreement period is probably not admissible because it is extrinsic evidence being used to contradict an essential term of the original Listing Agreement. The agreement was not ambiguous as to the duration of Shea's authority - it specifically stated that her authority would only last until January 8, 2007. The extension agreement and the voicemail from Remick also do not explain the circumstances surrounding the making of the contract - both attempt to explain circumstances more than two months after the making of the contract.

Therefore, since Shea's authority under the Listing Agreement expired on January 8, 2007, she no longer had the exclusive right to sell Remick's property and receive a commission. Thus, by accepting Anderson's offer, Remick did not breach the contract because the contractual relationship had ended.

II. Shea can probably maintain a cause of action against Anderson for interference with a prospective economic advantage because Anderson knew about her relationship with Remick and took steps to intentionally and improperly interfere with that relationship.

In Mathers, the court noted the difference between the torts of "intentional interference with a prospective economic advantage" and "intentional interference with contractual relation." The latter requires the existence of a valid and enforceable contract, whereas the former does not. Even though these torts are separate, the court explained, they both may be brought by a plaintiff who "believes that she has a contract but who recognizes that the trier of fact might conclude otherwise." Thus, Shea could bring causes of action against Anderson for both torts, but, if the court determines that no contract existed between her and Remick, she can only collect damages for intentional interference with a prospective economic advantage.

In Mathers, the court identified the following elements of the tort of intentional interference with a prospective economic advantage: (1) an economic relationship between the plaintiff and a 3rd party containing the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the existence of the relationship; (3) intentional and improper acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the defendant's acts.

The court in Downey & Co. v. Sierra Growers held that a defendant has knowledge of an economic relationship when he had actual knowledge of the existence of the relationship or knowledge of the facts and circumstances that would lead a reasonable person to believe in the

existence of the relationship. The court also defined intentional interference as that interference occurring when the actor desires to bring it about or knows that it is certain or substantially certain to occur as a result of his action. Finally, the court defined improper conduct as showing bad motive or bad conduct.

There was clearly an economic relationship between Shea and Remick in which Shea expected to benefit. Furthermore, Anderson knew about this relationship, as evidenced by his conversations with Shea. By entering a contract with Remick without the participation of Shea, he intended to act in a way that would deprive Shea of her commission and sought to achieve a lower purchasing price for himself. This last fact is evidence of his improper conduct. Because his actions caused a disruption of the relationship between Shea and Remick and because Shea was harmed by this disruption, Shea probably has a cause of action against Anderson for intentional interference with a prospective economic advantage.

Shea probably does not have a cause of action against Anderson for intentional interference with a contractual relationship because there was no longer a valid contract between her and Remick. Should the trier of fact find otherwise, however, the elements of this tort are the same as those for intentional interference with a prospective economic advantage, with the exception of the first element.

MPT 1 - Sample Answer 3.

(disclaimer)

1. To determine whether Shea can maintain a breach of contract claim against Remick, one must determine if there was a valid contract (K) between Shea and Remick. Under Franklin Civil Code §1500, an agreement that authorizes or employs a broker for compensation or a commission to procure a purchaser or seller of real estate is unenforceable if not in writing and subscribed by the party to be charged. Shea had a written agreement signed by both Shea and Remick for 60 days, up until the 8th of January 2007. When this offer to buy the property occurred, it was after January 8th. In fact the buyer, Anderson, did not contact Shea until after the 8th of January, on January 10th. While Shea did get verbal agreement from Remick to extend their listing agreement, there was no writing signed by Remick, the person to be charged. Shea sent a letter to Remick, but it was only signed by Shea, never by Remick. Thus, there was no written agreement satisfying the Franklin statute for an enforceable agreement. Additionally, the court in Mather v. Bowen (Bowen) said there had to be a writing and it must be subscribed by the party to be charged. The court was discussing the same statute and section as in the instant issue. The court said extrinsic evidence could be brought in to explain ambiguities but only if the two previous requirements were met. While the phone call to Remick could be used as extrinsic evidence, it could only be used if the writing requirements were first met, according to the court in Bowen. Thus, Shea probably cannot maintain a breach of contract action against Remick.

2. To show whether Shea can maintain a claim for interference with contractual relations, there must be a valid existing and enforceable contract, as stated by the court in Bowen. As stated earlier, it will be difficult for Shea to prove there was a valid existing enforceable K with Remick. Their first existing valid and enforceable K ended on January 8th and this interference that is

alleged happened after that date. The alleged K between Shea and Remick after January 8th was in writing but not signed by the party to be charged, Remick. However, Shea could still bring this action along with an action for interference with prospective economic advantage against Anderson, if Shea believes she has a K but the trier of fact might conclude otherwise. (Bowen) This can be done if there are facts in doubt and Shea's exact legal rights are no completely known by Shea or Anderson. The court in Bowen said inconsistent causes of action may be plead. But, if there is no existing enforceable K, then only a claim for interference with prospective economic advantage may be maintained.

3. The elements to prove either interference with contractual relations or interference with prospective economic advantage are identical, except to prove the former requires an existing legally binding agreement. This is what the court stated in Downey & Co. v. Sierra Growers (Sierra). To determine whether Shea can maintain a claim for interference with prospective economic advantage (IPEA) against Anderson, she must show: (1) an economic relationship between the plaintiff and a third party containing the probability of future economic benefit, (2) the defendant's knowledge of the existence of the relationship, (3) intentional and improper acts on the part of the defendant designed to disrupt the relationship, (4) actual disruption, and (5) economic harm to the plaintiff proximately caused by defendant's acts. (Bowen) No K has to be formed here. (Bowen) There was an economic relationship between Shea and Remick that contained the probability of future economic benefit to Shea. They had a prior agreement in writing, MLS listings by Shea for Remick's property, an oral agreement and a confirmation letter. Through Remick's actions, she consented to Shea showing the property to Anderson, as well. Anderson had knowledge of the relationship, as well. According to Shea she showed Remick's property to Anderson on the morning of January 13th and helped put together the offer. Anderson said he saw the MLS listing, too. Remick also told Shea that Anderson said to bypass Shea. The court in Sierra said that if defendant had actual knowledge of the existence of the relationship or knowledge of facts and circumstances that would lead a reasonable person to believe existence of a relationship and plaintiff's interest, there is knowledge. This element is satisfied. Anderson also had intent and improper acts to disrupt the relationship. Sierra said intent can be shown if the actor desires to bring it about or knows interference is substantially certain to occur.

Remick's statement to Shea shows that Anderson had this intent. Sierra also said impropriety can be established by bad motive or conduct. Anderson's motive was bad, wanting to avoid the commission to buy the house at a lower price. There was an actual disruption, since Remick did not use Shea nor pay Shea which then caused economic harm to Shea proximately caused by Anderson's acts. Thus, it appears that Shea could win against Anderson on a claim for IDEA. All five elements are most likely met and there is no requirement for a valid enforceable contract.

MPT 2 - Sample Answer 1.

(disclaimer)

Dear Ms. Snow,

Glickman's FMLA rights were violated by Phoenix when he returned from his 9 week leave by being demoted from vice president of bicycle marketing to coordinator of bicycle marketing. If this

case is litigated, Phoenix will be held liable for violation of Glickman's FMLA rights for damages and for equitable relief. 29 VSC §2617(a)(1). The amount of lost wages or monetary loss may be doubled unless Phoenix can prove violation was in good faith and believed the act didn't violate FMLA. (Ridley v. Sgh 2001) Here, Phoenix will fail to prove it acted in good faith and didn't violate the rights of Glickman under FMLA.

Glickman was not returned to his equivalent position upon his return. Equivalent position is one equal or substantially similar in conditions of employment 2614(a)(1)(b). The new position must be virtually identical to employee's former position in terms of pay, benefits, working conditions and involve substantially same duties and responsibilities with equivalent skill, effort and authority. Ridley v. Sgn 2001. In Mills v. Teleglne (1998) there was no FMLA violation when employee returned, his new position was the same besides not involving statewide travel and rather just working from central office. In contrast, in Ridley, the court held that the employee wasn't given job equivalent in status & duties to previous position. In Ridley, employee went from days shifts, to return scheduled to evening shifts, and removed managerial duties, which affected the essential functions of employee's status and duties to previous position.

Similarly to Riley, Glickman returned to a position which was not equivalent in status and duties to previous position. Glickman left as a vice president and when he returned was offered position as a coordinator. Just like in Riley, Glickman's salary and benefits didn't change but his duties did. Glickman had to now report to Sue Cohen, his former peer, that was director of another division. Phoenix got rid of Glickman's department completely upon his return. Sue oversees marketing plant he used to make on his own. Sue took over the project he started and all the work he did on the retro bike line and Sue probably will receive the $25,000 bonus Glickman was promised from Phoenix. If this should go to trial, we will seek damages for the bonus not received and given to Sue for Glickman's work on retro bike line. Glickman was vice president in marketing and now as coordinator must report to Sue who was head of accessories division. Obviously, Glickman's return position is not equivalent in his duties and status and is in violation of FMLA.

Phoenix asserts it had a legitimate business reason for making the changes. FMLA doesn't give employee absolute right to reinstatement but it confers the right, benefit or position to which employee would've been entitled had he not taken the leave. 2614(a)(3)(b). For legitimate reasons for changing in employment is shown where the month after returning from leave, employee is fired for excessive tardiness and insubordination. Floyd v. Cullen Mfg. 1995. However, in Riley, the relatively brief interval between employee's return from leave and her termination was problematic and didn't result from taking the leave. Riley court held that if employee's employment was "already slated for reduced hours or termination for legitimate business reasons, it's not violated FMLA because adverse employment action is not causally connected to employee taking FMLA leave. Therefore, for a FMLA violation there needs to be that causal connection.

Glickman's demotion to coordinator and report to only Sue whereas before hand he didn't report to anyone. The facts show that only Glickman's division was eliminated and the other five divisions of vice presidents are still there. There is reason to believe that Phoenix took away Glickman's division due to frustration that the new line would be put on hold. Phoenix is quoted in Franklin News on November 24, 2006 before Glickman asked for the additional leave for the baby as "Glickman's contribution is invaluable to creating the Retro and the credit goes to him because of his talent." However, since the article and Phoenix found out about extra leave Phoenix has demonstrated by demoting Glickman to coordinator and to be under Sue for his project which is contrary to the article published. Therefore, Glickman can show that there is a causal connection because the adverse employment decision and his FMLA leave to show his rights are violated.

Phoenix will not be able to show any legitimate business purpose for the demotion because it took away his superior skill and talent and changes in Glickman's position were substantial.

Phoenix also can't rely on FMLA's provision which permits an employer not to reinstate an executive to his former position who is among the highest 10% of employees paid by employer. 2614(b)(2). If employer can show that reinstatement of employee would result in "substantial and grievous economic injury, FMLA permits employer not to reinstate that employee. 2614(b). The key employee exception assess economic impact by considering cost of reinstatement of employee to equivalent position if hiring permanent replacement or leave was unavailable. 29 C.F.R.§825.218(c).

In Jones, employee was absent during budget planning for next year and eligibility of school grants depending on student tests. The school hired a permanent replacement for Jones because substantial staff turnover in preceding 2 years and permanent replacement was preferable. The court looked at the injury that results when restoring Jones to his prior position or equivalent. Jones was among highest 10% paid employees and school proved no funds were available to pay for another position which occurred during budget plan when Jones was gone. Because of school's financial constraints it couldn't restore him to his position because it would create more than minor inconvenience.

However, Phoenix claims Glickman's division was overstaffed and was making changes that management consultants recommended to combine bicycle and accessories marketing divisions for increased profit. In contrast to Jones, this organizational analysis was done 18 months ago and not while Glickman was on leave and it was the first time the consultants suggestions were being followed. In addition, one person is in charge of marketing with a new line coming out. Sue even stated that she was stressed with the added duties. Also, this summer the new line is expected to make its first appearance at the Franklin Bike Expo and bikes will be shipped to Phoenix's dealers worldwide. Phoenix has not shown any financial conditions that show it had to cut back positions due to budget and the line needed a permanent employee to take over while he was gone. Glickman's position was eliminated because of a report from 18 months ago and not during his 9 week leave. Putting Glickman back in a position equivalent to marketing executive would not create a substantial economic hardship to Phoenix. Therefore, Glickman's demotion constitutes a minor inconvenience and costs by Phoenix that Phoenix would experience in the normal course of doing business and doesn't constitute a substantial and grievous economic injury.

Phoenix has violated Glickman's FMLA rights by not having legitimate business reasons for a substantial change in his position and there was no evidence that Phoenix reinstating Glickman would cause substantial and grievous economic injury.

If Glickman is not restored to vice president of bicycle marketing or its equivalent and this matter is litigated, Phoenix will be responsible for wages, salary, benefits, and the $25,000 bonus denied which was promised because he lost it to Sue from the violation of FMLA. Also, an additional amount as liquidated damages to equal sum stated above under 2617, which will include Glickman's employment, reinstatement and promotion.

Sincerely, Applicant

MPT 2 - Sample Answer 2.
(disclaimer)

MEMO
To: Regina Snow
From: Applicant
Subject: George Glickman v. Phoenix Cycles, Inc.

Dear Ms. Snow,

As you are aware, we have been hired by Mr. Glickman with regard to the above matter. It is clear to our firm that your client, Phoenix Cycles, Inc. has violated Mr. Glickman's FMLA rights by demoting him while on FMLA leave. It is also clear that Phoenix Cycles will be liable for certain damages, including but not limited to, any lost wages, monetary compensation, and liquidated damages. In addition, Phoenix Cycles will be liable, in equity, for the promotion of Mr. Glickman.

The FMLA provides that workers are allowed up to 12 work weeks for placement of adoption and for serious health conditions. FMLA §2612(a)(1). Additionally, Ridley held that an employee makes a case for violation of FMLA rights when he/she establishes (1) he was entitled to FMLA leave, (2) she suffered an adverse employment decision, and (3) there is a caused connection between the leave and the adverse employment action. All of these elements are clearly established.

First, Glickman was initially on leave due to a stroke. This would easily satisfy the "serious health condition" element of the FMLA. The last four weeks (totally 9 weeks - well below the allowed 12 weeks) of leave was due to an adoption proceeding. This proceeding is clearly provided for in FMLA §2612(a)(1)(b). This clearly establishes that Mr. Glickman, an employee of Phoenix Cycles, was entitled to take FMLA leave.

Secondly, we can clearly establish that Mr. Glickman suffered an adverse employment decision. Mr. Glickman's pre-leave duties included being in charge of several marketing projects, supervising market research, monitoring retailers, developing (on his own) new product ideas and conducting product reviews, dealer services and trade shows. Additionally, he had a supervisory role over the marketing assistants. Upon his return, his product line has been given to a less competent employee, he has no subordinates, and he has to run all of his previously genius ideas past a newly promoted peer! See Franklin Business News.

Phoenix Cycles will no doubt cit Mills and claim that Glickman has not been subject to a negative decision because he has the same salary with de minimus changed duties. However, in that case, the only change was mere travel. Here, although the salary has remained the same, his supervisory role, development role, title, and overall position - the essential function of the job - has changed. Ridley. Mills is not a sufficient defense for your client's violation.

Additionally, Phoenix Cycles might claim that they had the right to not hire Mr. Glickman back to his old position because he was in the top 10% of salaried employees. They also will claim that the consultant's recommendation called for the type of consolidation completed. Jones However, Mr. Glickman was not notified of his demotion (as specified in Phoenix Cycles' 12/19/06 letter) when the decision was made [a condition necessary under FMLA §2614(b)(1)(b)]. Additionally,

the consultant recommendation came well before Mr. Glickman's leave, which leads one to believe the decision was made due to his leave. Finally, due to these turn of events, Mr. Glickman will likely miss out on the $25,000 bonus promised by John. Due to the above reasons, we see no issues in proving that Mr. Glickman has been a victim of an adverse employment decision.

Lastly, Mr. Glickman can show a causal connection between his leave and the employment decision. John expressed his severe displeasure when Mr. Glickman requested additional time off for the adoption ("let your wife handle it" and "work is piling up"). As stated previously, the consultant recommendation vastly pre-dated Mr. Glickman's leave. This report is simply being used as a gauge to demote our client. Mr. Glickman was one of the, if not the most, senior executives prior to his leave. There is no other explanation for Mr. Glickman's demotion - his FMLA rights have been violated. Additionally, Phoenix Cycles has no claim under Floyd because our client has not been tardy or insubordinate, and has taken less that the time allotted.

Phoenix also has no claim that Mr. Glickman causes a substantial and grievous burden on the company. . .he was re-hired at his old salary. Phoenix Cycles simply saw fit to demote our client, take his title, reduce his responsibilities, embarrass him by making him report to less competent peers, and generally making his work-life-balance miserable in hopes of his resignation. All of this because our client wanted to adopt a child.

Due to his FMLA rights being violated, Mr. Glickman has both damages and equitable relief. Although there doesn't seem to be any lost wages, Mr. Glickman did/will lose the opportunity of monetary benefit. . .the $225,000 bonus he was promised. Section 2617(a)(1)(I) provides for lost "other compensation." Additionally, §2617(a)(1)(iii) provides for doubling that amount as liquidated damages. Therefore, Mr. Glickman will be able to collect $50,000 for your client's violations. In addition, §2617(a)(1)(iii) provides for the equitable relief of "promotion." The facts illustrate that Mr. Glickman is really the brains behind the bike. The Franklin Business News articles hale him as "God-like." He should and will be given Sue's job once litigation is completed. Please discuss with your client and convey our thoughts.

MPT 2 - Sample Answer 3.
(disclaimer)

Dear Ms. Snow,

This letter is concerning the violation of Mr. Glickman's FMLA rights. It has become apparent that after Mr. Glickman returned to work after his nine week FMLA, his job or an equivalent one was not restored. We have determined that you have violated his FMLA rights and we demand reinstatement at an equivalent position or suit will be brought. If suit is brought, Phoenix Bikes will be held liable for damages.

Under FMLA, an employee is entitled to restoration of his original job or an equivalent one after his leave is up. We only have to prove that Mr. Glickman was entitled to his leave, he suffered an adverse employment decision and some causal connection between the two. (Ridley v. Santacroce). This isn't very hard to prove given the situation. As admit is a letter to Mr. Glickman by John Pearsall, CEO of Phoenix Cycles, Mr. Glickman was entitled to leave both for the recovery

of his stroke, 29 U.S.C. §2612(a)(d) and for the adoption of his daughter, 29 U.S.C. §2612(a)(b). Furthermore, upon returning to work after such life changing events, Mr. Glickman was demoted from vice president of bicycle marketing to coordinator of bicycle marketing. Courts have determined that an "equivalent position" must be equal or substantially similar in the conditions of employment. This is determined by looking at the duties, essential functions, and are required to be virtually identical (Ridley). Mr. Glickman's new job of coordinator does not fit as an equivalent. While he may be getting paid similar wages, he has lost some of his privileges, benefits and status, including his authority, responsibility and opportunities for benefits. These are all factors that courts can consider. (Ridley) Before his leave, Mr. Glickman was in charge of a division, he was vice president and had people report to him and stood to get a $25,000 bonus for the launch of a line of bikes that were his creation. Now he is among many in a division, reports to people and has lost his promised bonus. These are far from equivalent positions. Lastly, a causal connection is easily proven. Pearsall, by his own choice, proclaimed to Franklin Business News how wonderful of an employee Mr. Glickman was, and how his talents are important to the company. Further in the same article, Pearsall spoke about Mr. Glickman's return to Phoenix after his recovery and how he is going to be a significant part of the new line. (Nov. 24, 2006) Then after hearing that Mr. Glickman needed another four weeks off for his daughter, Mr. Pearsall's tone change and he was no longer going to be a significant part of the line.

Phoenix has claimed that this has nothing to do with Mr. Glickman's leave, and instead is part of a "legitimate business change." But the "legitimate business change" is nothing more than a facade. It is hard to believe that 18 months after an organizational analysis a company only implemented a few portions of it directly affecting Mr. Glickman and without giving him a chance for an equal position is legitimate especially when he is more qualified to hold it than the person currently. This is clearly not a legitimate business change. Furthermore, hiding behind the highest paid 10% exception will not save Phoenix from this action.

Highly compensated individuals do not have to be reinstated IF their reinstatement would cause "substantial and grievous economic injury." As discussed in the case of Jones v. Oakton School District, while there is no specific test the harm cannot be minor. It is hard to even place an economic injury here, considering that from November 15 to January 18, no permanent replacement was hired, and Mr. Glickman was hired at the same salary rate. An example of a substantial grievous economic injury is having to hire a permanent replacement as in Jones but no replacement was hired here and no economic injury has occurred. Since there is no economic injury to Phoenix, Mr. Glickman was improperly demoted after returning from his FLMA leaves.

Since Mr. Glickman was improperly demoted, if this issue is litigated, under FLMA, Phoenix can be held liable for double Mr. Glickman's monetary loses. Considering that Mr. Glickman was promised a $25,000 bonus before his leave and now that Sue Cowen stands to receive that bonus, Mr. Glickman is entitled to $50,000 liquidated damages minimum, and reinstatement.

Mr. Glickman is willing to accept reinstatement of his old job or one substantially similar, but if he isn't reinstated, we are comfortable litigating this issue.

Applicant