February 2008 Bar Examination Sample Answers

DISCLAIMER
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Essay #1
Sample Answer #1

a. The testimony of Mom as to what Angel told her requires Mom to be on the stand. This evidence would be hearsay. Hearsay is generally excluded and has no probative value in Georgia even if admitted in error. For hearsay to be allowed, it must come in under an exception. Mom could try to get this in under the presence sense impression doctrine since Angel said "it hurt", thus was in the present. Another consideration is whether Angel is competent to testify which would go to the trustworthiness of Angel's statement even if it was not offered as hearsay. To be competent, a witness needs to understand what he is testifying about. However, in abuse cases of children, children are almost always deemed competent to testify about acts or effects. There is a catch all exception for hearsay which says that if the hearsay has indication of trustworthiness, the declarant is unavailable, and is more probative than anything else that can be offered it can be admitted. Given that this is a child abuse case, the hearsay will probably be admitted.

b. Dr. Kildare's testimony would be that of an expert. Experts can testify as long as qualified and are testifying about something with their field and are basing their opinions on information normally used by such experts to base opinions on . Experts are not allowed testify as to the facts to be determined in the case, meaning that the expert can not basically do the jury's job for it. This would probably keep Dr. Kildare from testifying that "Angel was sexually abused by Daddy." However, he may testify as to what is generally evidence of sexual abuse and if such evidence was prevalent.

c. Medical records are the only self-authenticating business record in Georgia. Thus, as long as the hospital records are shown to have been in proper custody at all times and made as custom by the hospital the records will be admitted. The fact that Nurse Crockett is not available to authenticate their contents will not keep them from being admitted. There could be an objection about this was a communication to a hospital, so under the physician-patient privilege, for diagnosis. Given the case is about child abuse, the court will probably admit it over objections because the child's best interest needs to be served and Angel would technically hold the privilege.

d. Dr. Feelgood testimony is that of an expert so the same rules apply as apply to Dr. Kildare testimony. Dr. Feelgood's testimony of "showed no symptoms or indications of having been sexually abused" will probably be admitted because unlike Dr. Kildare's testimony they do not form an opinion on the fact to be decided but merely go to the evidence of the fact. There could be an objection based on the fact that this is a patient-psychiatrist relationship

but Angel would technically hold the privilege.

e. Dr. Welby's testimony is also that of an expert so those rules apply. Dr. Welby's testimony seems to meet those rules. The question here concerns self-incrimination and privilege of patient-psychologist relationship. Generally, privilege of patient-psychologist relationship is one of the most closely guarded privileges. However, the exception is when the examination is from a court order.

f. Dr. Welby's testimony about Mom falls under the same analysis as the testimony about Dad. The concern here would be whether after beginning treatment and counseling thus becoming a stronger patient-psychologist relationship could information gained from those situations be used. The court would probably be more hesitant to allow that testimony in but would allow the testimony from the initial court ordered examination.

   Also, doctors and psychologist generally would be liable to the patient if they divulged privileged information. There is an exception for when the information is subpoenaed by the court.

   Also, Georgia allows a more limited scope of who is qualified to conduct evaluations for court proceedings.

Essay 1
Sample Answer 2.
(disclaimer)

a. The parties seek to offer testimony of Mom as to what Angel told her. This is a statement of present, then existing physical condition and would be admissible as exception to hearsay under the 'res gestae" exceptions theory in Georgia. Opposing counsel would object as hearsay but this is likely to be admissible if reliable and trustworthy. It was made contemporaneously and meets the strict temporal requirements of the exception, unavailability by infancy in immaterial.

b. The parties seek to offer Dr. Kilgare's testimony concerning his examination and opinion that "Angel had been sexually abused by Daddy". Dr. Kilgare's opinion will be admissible in the case to the extent this opinion is sufficiently offered as an expert opinion. The question tells us that we are to presume is qualified and that Daubert standards are met. Dr. Kilgare is a family physician and thus potentially has knowledge as to the potential causes of sexual abuse of children. In Georgia, this opinion is one that is not properly within the purview of lay testimony and therefore may assist the trier of fact so long as it is shown to be reliable and based on sufficient expert training, knowledge or experience. Dr. Kilgare actually examined, evaluated and "treated" Angel, and as such, he has sufficient factual information upon which to opine that the redness and swelling was caused by sexual abuse. Opposing counsel will likely object that there is insufficient foundation for the opinion as to WHO caused the redness or swelling without additional information. If Dr. Kilgare intends to rely upon the statements made to him by Angel about her Daddy's secret as a basis for his opinion, such statements would be admissible over a hearsay objection as they were made for the purposes of medical diagnosis and treatment (so long as the doctor verifies). In Georgia, statements and past physical condition made for the purpose of medical diagnosis

and treatment are exceptions to the rule against hearsay and included within the spectrum of "res gestae" exceptions if proven to be reliable (unavailability of the Dr. is immaterial with respect to the admissibility of such statements). (It is also noteworthy that there is no patient-physician privilege in Georgia).

c. In Georgia, business records made in the regular course of business, if it was the regular practice to do so, at or near the time of entry which have sufficient indicia of reliability will be admissible as an exception to hearsay. The hospital records fall within this category based on the facts presented. In Georgia, for this exception to apply, personal knowledge of entry of the record is not required. Although the question indicates that Nurse Crocket is deceased and made the entry, lack of personal knowledge will not bar the admission of the record as hearsay. Further, unavailability of the witness at trial is immaterial with respect to these records. However, it should be noted that Georgia is very strict on admission of double hearsay. To that end, the statement "Mommy hurt me" may be redacted from the medical records admitted on the grounds of hearsay if sufficient indicia of reliability are not presented. Opposing counsel will likely object on these grounds. In determining the admissibility of these records, the court will also note that medical records are self-authenticating in Georgia (as opposed to standard business records) and that Nurse Crocket would not be required to be present at trial to authenticate the record. In addition to the above, the statement "Mommy hurt me" may be deemed admissible over a hearsay objection on the grounds that it is a.....

d. Dr. Feelgood's testimony and opinion that Angel showed no signs of being abused could potentially be admissible as a valid, reliable expert opinion at trial. However, in Georgia, there exists a psychiatrist/patient privilege that is virtually absolute. Because the opinion itself appears to be based on information he obtained after actually treating and examining her, the mother's attorney will object that the opinion is inadmissible pursuant to the privilege. The other attorney will likely fire back that Dr. Feelgood is a psychologist and that the privilege in Georgia does not apply in the same way as it would under the federal rules. The strict Georgia standard may not protect communications to a psychologist. Of course, the opinion may still be admissible if founded on sufficient information that is admissible.

e. In Georgia, in civil cases, character evidence is inadmissible to show propensity. Importantly, the opinion testimony is not a proper method of admitting character admissible (even where it admissible) or for impeachment purposes (only reputation). Additionally, since the Court ordered the dad sua sponte to visit Dr. Welby, although he is a psychiatrist, courts sometimes hold that there is not a privilege in Georgia for information provided to such a treater when ordered by court (as opposed to otherwise).

f. Dr. Welby's opinion that mom could have caused the injury may be inadmissible for the reasons stated in b/d above. His diagnosis of her may be admissible if not privileged and materially relevant to the case.

Essay # 2
Sample Answer # 1.
(disclaimer)

1. The court of appeals is likely to overturn the trial court's decision to award sole legal and

physical custody to Mary, although it will be close. Issues of child custody will not be overturned unless the trial court has abused its discretion. When determining how to award custody, a trial court must look to the best interests of the child as the determining factor. In this case, the facts state that both Mary and John are fit and equally capable parents. This would lead to the conclusion that joint custody is appropriate. However, the facts also state that Mary and John are unable to communicate with each other. Accordingly, the court likely concluded that any joint custody arrangement would be difficult to enforce and would not be in the best interest of the child because the parents would likely fight over the matter. However, it appears that John is certainly qualified to have joint custody; he is a doctor with his own business and great yearly earnings. Mary, on the other hand, has not worked outside the home and her working capacity is diminished due to a disability. Thus, it is likely that she will have a hard time earning enough money to support Joan. In addition, Joan is a very young child that would certainly benefit from having both of her parents in her life through her formative years. Under these circumstances, it would appear that the best interests of Joan would be fulfilled by awarding joint legal and physical custody to John and Mary.

2. The court did not err in including the income from his professional corporation and capital gains from sale of stocks in its child support calculation. In Georgia, the amount of child support that a non-custodial parent should provide to the custodial parent is determined through the use of a sliding scale that takes into account many factors, including yearly income, gains from stocks, the child's relationship with each parent, the parent's ability to pay, etc. In this case, John is the sole stockholder in his professional corporation. Even though he only chooses to draw a salary of $20,000 per month, the corporation has retained earnings of $5,000 a month. If John chose to, he could distribute this money as well. The tax scheme of a corporation also makes it evident that John is paying taxes on his retained income. Accordingly, it should be included in any calculation of his yearly salary. Furthermore, the capital gains from the sale of stocks was rightfully included because it is his money that has been earned by John and is available to him for the support and well-being of Joan.

3. The appeal's court will likely affirm the decision to award the home as lump sum alimony payment. There are two separate issues at play here that John appears to be confusing: equitable distribution and alimony. Georgia courts utilize equitable distribution to determine who should get what property upon divorce. Under the equitable distribution scheme, property that was separate prior to marriage, such as John's home, and that remains separate property, will remain with the original owner at divorce. Property that is bought with marital assets or that gains value as a result of marital work is considered marital property. Here, John was the original owner of the home and thus he would normally retain ownership upon any equitable distribution of the marital property. (Note, however, that any increase in value of the home is likely to be considered marital property and subject to distribution). Regardless, the court has determined that Mary is entitled to the home as a significant lump-sum alimony payment. Under the circumstances, this would appear fair. Alimony is a payment from one former spouse to the other in order to support that spouse in the coming years. Courts take into account many factors, including: age, health, education, ability to earn, length of marriage, etc. Here the facts state that John is a doctor and has a thriving medical practice. Mary, however, has not worked outside the home and her working capacity is diminished due to a disability. Accordingly, it would appear as though Mary is less likely to earn great sums of money in the future and would thus be entitled to a large alimony payment from John. In fact, this lump-sum payment may be

beneficial to John in that he is not subject to continuing payments over a long period of time and may use the alimony payment as a tax offset against his salary and capital gains in 2008.

4. The court of appeals will likely overturn the trial court's decision to award Mary the full money market account, although again it is a close question. As discussed above, Georgia utilizes an equitable distribution method of dividing assets upon divorce. Here, Mary's parents have sent both John and Mary a yearly gift of $20,000, which they deposited into a joint money market account. Normally, gifts, bequests, or devices to an individual are considered separate property. Thus each gift would be separate property of John and Mary. In this case, however, the facts state that Mary's parents testified that the entire amount ($40,000/year) was intended as a gift to Mary individually, and was only done in the manner specified to avoid certain tax consequences. This is insufficient to rebut the presumption that the money is a gift and each individual's separate property.

5. When a court tries a case without a jury, it must make certain findings of facts and conclusions of law. Normally, the court will have each side submit proposed findings of fact and conclusions of law and then, after hearing all of the facts and evidence, issues its own findings based on the evidence presented to it. In this case, this did not happen. Accordingly, John is left in the dark about why the court came to the conclusions it did. It is likely that the court of appeals would remand the case so that the trial court could issue the appropriate findings of facts and conclusions of the law. Remand, rather than reversal or a new trial, would be the most appropriate remedy under the circumstances.

Essay # 2
Sample Answer # 2.
(disclaimer)

1. Custody of Joan

   On these facts, it appears the judge may have abused his discretion. The facts state that the parties are equally fit and equally capable parents. Thus no grounds are given for the judge's award of sole legal and physical custody to Mary. While the trial court is given discretion in determining how to award custody, no grounds are indicated on these facts. Termination of John's legal custody rights should be based on a stronger showing of lack of fitness (eg unfit parent). This decision should be overturned.

2. John's Income

   The trial court will not be overturned. The judge is not limited in considering a parties declared income when determining child support. The judge may consider other sources of assets and income. Here, because John had complete control over the professional corporation (he is the sole shareholder) and has unfettered access to its assets. In addition, the court should also consider the gains as income. John's gains are income to him, reportable to the IRS and the state, and should be considered in determining child support.

3. John is correct in so far as the house is not marital property, thus if it were awarded to Mary during the division of assets it would be error. However, the house is being awarded as lump

sum alimony, which does not come from the divided assets, but from John's. Because John's assets include the house, the court can award it to Mary in equity. (Note: While it is unclear whether John requested or wanted a jury trial, he was entitled to a jury trial on the issue of alimony).

4. The award of the money market account

   The trial court erred when awarding the money market account to Mary. Because this is an equitable action, unclean hands is available as a defense. Here, because Mary and her parents classified the $120,000 delivered to the account as separate gifts in order to avoid tax payments (to avoid an obligation to the government), they cannot now come into court and plead this as justification for the equitable award of the entire $120,000 as separate property. They cannot use fraud as a reason to receive benefits in equity.

5. Findings of fact

   Here the action is an equitable one and therefore the court is given wide latitude in dividing the assets based on the court's idea of fairness. No findings of fact are necessary in equitable division of property.

Essay # 2
Sample Answer # 3.
(disclaimer)

1. The court of appeal should uphold the lower courts ruling. An appeals court reviewing the decision of a Superior Court regarding a decision about the parental custody of the child should give deference to the trial courts' decision as the fact-finder, having had the advantage of being present when evidence was presented and better able to determine the credibility of witness testimony and the best interest of the child.

   Here, the facts do not present us with much information regarding evidence that the lower court considered. A court determining custody in the case of a child under 11 should consider parenting ability, adjustment concerns, physical and mental disability of parents and child, and the best interest of the child along with similar concerns. Here, the evidence suggests that John might be a fit parent and Mary may have some diminished capacity due to a disability. Nonetheless, the lower court may have determined that stability in home environment or neighborhood should be paramount.

   Legal and physical custody are two separate legal rights. Legal custody refers to the right of a parent to make legal decisions affecting a child's welfare. Physical custody refers to the actual presence of the child in the home and under the care of the parent. A court may grant one or the other or both to a single parent or award joint custody. Absent a showing that the lower court clearly erred in its decision, its decision should be upheld.

2. The court acted properly in considering John's income from his corporation and stocks. At issue is whether John's corporations income should be imparted to him and whether his capital gains constitute income for purposes of child support obligation.

The court may consider all sources of income in determining child support obligation. John may argue that corporate profits are not his own. Corporations are separate legal entities from their shareholders. But where a corporation is merely the alter ego of a shareholder, a court may look beyond the corporate identity if the privilege of incorporation is being abused.

Here, John is the single shareholder in a corporation. Moreover, the corporations sole purpose appears to be the functioning of John's medical practice and to shield John from liability for negligence occurring in the performance of his patients. John is paid a salary, a retirement benefit, and is the sole party to collect on corporate profits. The court should consider this income.

The capital gains should also be considered as income if the court believes that they represent a parent's ability to support a child. Here, John actively trades his stocks. They are not passively managed or locked up in a retirement account. John regularly sells the stocks earning a profit.

3. Property divided upon divorce may be separate, marital, or a combination of both. Property that a party brings to a marriage is generally considered separate and remains with the party on divorce. The facts do not provide for this, but if the house has increased in value during the marriage, Mary may be entitled to part of the house as marital property.

   A court, however, may award a party alimony after reviewing facts related to the marriage such as reasons for divorce, conduct, education, income, disability, child custody, and other factors. Alimony may be awarded in a lump sum payment.

   The court may have decided that Mary's disability, custody of the child, diminished capacity to work made the house proper for a lump sum alimony payment. The decision should be upheld.

4. As discussed above, upon divorce property may be separate, marital, or a combination of both. Gifts given to a particular spouse during the marriage are considered separate property.

   Here, the money was given to Mary and John, half to each. Though Mary's parents say their intent was to give it all to Mary, their purpose was for tax evasion. The lower court should not enforce gifts made for tax evasion as against matter of public policy. The Appellate court should consider the funds in the money market account as marital property and reverse the lower courts decision as to this issue.

5. The trial court need not make findings of fact separate from the divorce agreement itself. Superior Court has exclusive jurisdiction over diverse action and is a court of record. A reviewing court may reverse the record to determine whether a lower court decision should be upheld, reversed, or a remand issued. Whether or not John can understand the basis of the courts decision is not grounds for appeal.

Essay # 3
Sample Answer # 1

(disclaimer)

1. Tort claims against Paul and Gravel Plus

a) Paul and Gravel Plus may be sued jointly and severally for negligence. Paul may be sued for his negligent failure to properly secure the large load of gravel. Gravel Plus may be sued under a theory of respondeat superior due to Paul's negligence.

An employer will be vicariously liable for the negligent acts of its employee action within the scope of his employment. Paul, the driver of the Gravel Plus truck, is presumably a Gravel Plus employee. If Paul is not a Gravel Plus employee, or is merely an independent contractor, then Gravel Plus may not be subject to vicarious liability. An independent contractor typically gets paid by the job (rather than salary), is under his own control (not that of his employer), and works regular hours dictated by employer (rather than hours of his choice). Here, although the facts are not clear, it appears that Paul is acting as an employee. He is working normal hours and he calls his boss immediately after the accident. We do not know his pay schedule. It should be noted that Gravel Plus may cross claim against Paul for indemnity.

Diane may bring a claim in negligence and so too may Paul, through his representative. Georgia has a survival statute, which allows tort claims to survive the death of the victim and be brought by the decedents representative.

To prevail in claim for negligence, a plaintiff must show that defendant owed her (I) a duty; (ii) that defendant breached that duty; (iii) that the defendant's actions were the actual and proximate causes of plaintiff's injury; and (iv) damages. Here, Paul had a duty of care, to act in a similar manner as a reasonable truck driver carrying gravel would. A reasonable truck driver would properly secure a large load of gravel because it is foreseeable that unsecured gravel could cause injury. Paul will be in breach of this duty by not properly securing the gravel.

Plaintiffs will not have to prove duty and breach if they can prove negligence per se via violation of statute. Paul may also be in violation of local, city or state ordinances requiring objects being carried by commercial vehicles to be properly secured. If so, Paul will be negligent per se, and duty and breach will be satisfied so long as plaintiff can show that she is among the class of people to be protected (other motorists to be protected from flying objects improperly secured) and the class of harm to be protected (injury to other motorists is improperly secured items become unsecured).

Causation must also be proven. Actual causation, or but for causation, exists where "but for" the defendant's negligent acts, there would have been no injury. Here, plaintiff would show that, but for Paul's negligence, Jack would not have gone into shock, Diane would not have been knocked unconscious, and Jack would not have bled to death.

Proximate cause, or legal cause, limits defendant liability where the harm caused was not foreseeable. Here it is foreseeable that a motorist would be speeding and have to swerve to avoid loose gravel, and run into another vehicle. Such an accident could lead to injury and death as it did here. Therefore, there is actual and proximate causation.

Damages are clearly shown, because Diane was knocked unconscious and injured and Jack died.

It should be noted that once negligence is proven, a defendant is liable for all injuries of the plaintiff. Defendant takes the plaintiff as he finds him. This is where the so called “eggshell skull” plaintiff will recover. In other words, Paul takes Jack as he finds him, bleeding and in need of medical help. Defendant will owe general damages including pain and suffering, and special damages including medical bills and lost income.

(b) A wrongful death action may be brought by a surviving spouse on behalf of her husband. Wrongful death requires a showing of negligence on the part of the defendant that caused the decedents death. Negligence and causation were described above.

Wrongful death carries damages for the value of a person’s life, including present value of future earnings and loss of consortium, as well as pain and suffering before death.

2. Defenses

Defendants may claim contributory negligence as a defense to negligence actions. Contributory negligence is not a complete bar to recovery, because Georgia as adopted a particular comparative negligence statute. Unless the plaintiff is more negligent than the defendant, in which case plaintiff’s negligence will be a complete bar, plaintiff’s claim will be reduced by the percentage of her negligence.

Here, Diane was driving very fast when the accident occurred. We do not know that she was speeding. It is probably that she was speeding by the fact that she was worried Jack was losing blood and by the fact she had activated her emergency lights. We do know, however, that she dangerously accelerated through an intersection when a light was about to turn red. Given that we don’t know she was speeding and we don’t know that she ran a red light, contributory negligence may be very low or hard to prove.

Defendants may also assert last clear chance. P had last clear chance to avoid the accident by slowing for the light. Where P has last clear chance, D will not be held liable for his negligence.

Defendants may also argue that there was no proximate cause because Jack would have died anyway; that his death was not foreseeable. This is not a winner.

3. Rescue Liability

The general rule is that there is no duty to rescue. Under that rule, Paul would have had no rescue liability for calling his boss after the accident rather than providing aid to Jack and Diane. However, where a defendant puts plaintiff in peril, there exists an exception to the no duty to rescue rule. Here, Paul arguably caused the peril by dropping gravel in an intersection which brought about the plaintiffs’ accident. By causing the peril, Paul would be under an affirmation duty to rescue. Gravel Plus will be liable under vicarious liability.

Essay # 3

Sample Answer # 2

(disclaimer)

(1)Diane may bring an action against Paul based on negligence in his failure to adequately secure his cargo. To prevail on a negligence claim, Plaintiff must show she was owed a duty, that duty was breached, and the breach was both the actual and proximate cause of her injuries. All

drives owe a duty of care to their fellow drivers and pedestrians. Paul, as a professional driver of industrial trucks would be held to an even higher standard of care in the operation of his vehicle, including loading and unloading. The facts indicate Paul was negligent in loading the gravel which caused the gravel to spill in the road. (However, in a case such as this negligence could probably be imputed to Paul through res ipsa loquiter). The negligent loading of the gravel caused it to spill in the road which necessitated Diane's swerving, as such, it was the actual cause of her accident. Without the gravel in the road, Diane would not have swerved. The negligence in loading the gravel is the proximate cause of the accident as well. There is nothing in the facts to indicate willful or malicious conduct which would give rise to a claim for punitive damages. An accident on the road is a foreseeable consequence of negligence in loading a truck. Diane was injured in the accident, so she should recover damages necessary to make her whole, including pain and suffering as well as damages for lost income. Jack's estate could also bring a negligence action which would proceed along the same analysis as Diane's.

Gravel Plus may be liable on the theory of respondeat superior. Respondeat superior will impute negligence to an employer where an employee acts negligently while performing acts within the scope of his employment. Respondeat superior will not apply while the defendant employee is on a "detour", but will apply when the employee is on a "mere frolic". The facts indicate nothing to suggest that Paul was not acting within the scope of his employment other than to say that the accident took place on Saturday, which is not a typical work day. He is driving a truck with gravel in it for a gravel company, so absent a showing otherwise, it would seem he is within the scope of his employment which will subject Gravel Plus to liability in regard to claims by Diane and by Jack's estate. Gravel Plus could also be liable in their own right if they were negligent in hiring Paul. There is nothing in the facts to indicate anything which would put Gravel Plus on notice of Paul's negligent character (such as multiple speeding tickets, DUI, etc.) So it would seem Gravel Plus will only be likely for imputed negligence.

As Jack's husband, Diane could bring a wrongful death action for the loss of her husband. She would recover damages for loss of consortium and services, as well as Jack's projected future salary discounted to present day. Wrongful death actions do not include punitive damages as they are, by nature, somewhat punitive.

Diane could also bring an action for negligent infliction of emotional distress. Negligent infliction of emotional distress is recoverable when a party suffers grave emotional damages at the sight of extensive harm to a loved one while in his presence. In Georgia, recovery for negligent infliction of emotional distress requires that the Plaintiff also be injured in the same occurrence. However, Diane's claim would fail since she was knocked unconscious at the time of the crash and did not witness her husband's suffering.

(2) The best defense Paul and Gravel Plus would have is that of contributory negligence. Georgia's comparative negligence statute provides that Plaintiff may recover if she is less at fault than the defendant. In this instance, since Gravel Plus may be liable for imputed negligence, Gravel Plus and Paul will be jointly and severably liable for the damage they have caused. As such, Diane's negligence will be weighted against the aggregate of the negligence of Gravel Plus and Paul. Unquestionably, under the facts, Diane was somewhat negligent for speeding up to go through a yellow light, yet she may be judged by a more forgiving standard. Since her husband was seriously injured and relying on Diane to seek prompt medical assistance, Diane is judged not

by the reasonably prudent person standard but by a standard of a prudent person acting in an emergency.

Paul and Gravel Plus may attempt to raise a defense to Jack that either 1) the accident was not the actual cause of Jack's death, or 2) they cannot be liable for Jack's death because he was already wounded at the time of the accident. Neither defense is good under the facts. First, the facts indicate that Jack's cut was not life threatening. Secondly, the tortfeasors take their victim as they find them. Liability still attached for a more serious injury than would normally occur from a particular type of negligence which would have not caused such a severe injury were it not for a plaintiff's debilitated condition.

(3) Paul is liable for calling Gravel Plus instead of assisting the victims. Normally there is no duty to render aid or assistance to victims in peril. However, there are a number of exceptions. The applicable exception here is that a party is under an affirmative duty to aid another party where the original party is the party responsible for placing the second party in peril. Here, Paul's negligence caused Diane to swerve which caused the wreck. He had an affirmative duty to render aid, but did not do so. Gravel Plus will not be liable for Paul's failure to aid Jack and Diane. After the accident, Paul is probably acting outside the scope of his employment. Even though he called his employer, Paul was not hired by Gravel Plus to assist accident victims or to deal with any other emergency situation.

Essay # 3

Sample Answer # 3

(disclaimer)

This is a case of simple tort law. In Georgia, to prove a claim for tort, a plaintiff must prove that (1) the Defendant had a duty to the plaintiff, (2) the Defendant breached that duty, (3) that the plaintiff's injuries have been actually caused by the defendant, and (4) such breach was the proximate cause of plaintiff's injuries. The plaintiff must further prove that they were a foreseeable plaintiff, although that is usually part of 1.

1. Claims against Paul and Gravel Plus ("Gravel Plus" or "GP")
    a. Jack's estate (through his executrix, most likely Diane) has a claim against Paul for his failure to properly secure the load of Gravel. This claim for would for pain and suffering damages associated with the accident. In order to prove the claim, the estate will have to prove that Paul had a duty to plaintiff. Here as a driver of a truck on the public roads, Paul owes a duty to all other users of the public roads to act in such a way as to avoid causing a dangerous condition. Here, Paul failed to properly secure his cargo thereby causing Jack to go into shock and not be able to assist himself. Paul caused the injury to Jack through his breach of duty. Jack's pain and suffering from the auto accident is a direct result of negligence by Paul to properly secure the gravel load. Gravel Plus, as the employer of Paul is jointly and severally liable for the acts of its employee through the concept of Respondeat Superior. Under this concept an employer is responsible for the negligent torts of its employees who are acting within the scope of their employment. Here Paul was apparently acting within the scope of his

employment when he failed to properly secure the gravel load and as such Gravel Plus is liable.

b. Diane has a claim against Gravel Plus and Paul for not only her own injuries resulting from the negligence of Paul, but also a wrongful death claim against Paul and Gravel Plus for the death of Jack, Diane's spouse. A tortfeasor takes the victim as he finds him and is responsible for all damages resulting from his negligence unless there has been a superceding intervening act. In this case it doesn't appear that there has been.

c. The owner of the unoccupied car stricken by Diane has a claim against Paul and Gravel Plus for the negligence of Paul in failing to properly secure the gravel. The owner of the unoccupied car is a foreseeable plaintiff in that it is legitimate to expect that there will occasionally be unoccupied vehicles on or about public roads.

2. Defenses of Paul and Gravel Plus
   a. Paul and Gravel Plus will argue that Diane is comparatively negligent in each of the claims above and will attempt to have that negligence attach to her. Here, Diane owed a duty to other drivers on the road, as well as owners of occupied cars, as well as Jack. Diane's very fast driving may be negligent depending on whether the very fast driving was in violation of the speed limit, then it might be deemed negligent per se because violation of a state statute is negligence per se. Diane's driving through the yellow light itself is not negligence, but her accelerating to do so may have violated a state statute about yellow and red traffic lights. The essence of Paul and Gravel Plus' argument is that "but for" the negligence of Diane in her fast driving and speeding through a yellow light that none of the damages would have occurred. Georgia, however, is a comparative negligence state and it will be up to the trier of fact to allocate fault amongst all tortfeasors, If Diane is found to be more than 50% liable then all of her claims will be estopped and she will get no recovery because it will be deemed that she is most at fault. Here they may try to argue assumption of the risk by Diane and/or Jack's for her own reckless driving (and Jack's apparent acceptance thereof), however, that should also be covered under the comparative negligence from able. Finally, Paul and GP will argue intervening or superseding cause, but that argument will most likely fail as that is typically applied to a post negligence cause, and Paul and GPs negligence arose after Diane's negligence. The fact of the swerving was not further negligence by Diane, it was an attempt to avoid the negligence of Paul and GP.

   b. In the case of "Unoccupied Car v. Paul and Gravel Plus", Paul and GP will most likely implead Diane to make sure that she is responsible for her portion of the damages against the unoccupied car. Unoccupied car should be able to recover against all of Paul, Gravel Plus, and Diane.

   c. In the case of Jack's estate, Paul and GP will argue that Jack is equally liable for the negligence of Diane under the close family member theory of imputed negligence. Here, Jack was in a position to persuade Diane not to be so negligent, and as such her negligence may by imputed to Jack. Thus, the comparative negligence application will be made in this case as well.

3. Paul and GP liability for Call

Paul and GP may have further liability for the wrongful death of Jack and the Pain and Suffering of Diane for Paul's failure to offer assistance to Jack and Diane after the accident. Whenever someone creates a condition through their own actions they have a duty to attempt to aid the persons who are damaged through such dangerous condition. Because Paul negligently created this dangerous condition it is likely that he will be held to have owed a duty of assistance to Jack and Diane for failing to come to their aid. Again, GP will have the same Respondeat Superior liability it had above, however, it may have its own direct liability because of the fact that it is deemed to have created the dangerous condition (through Paul's negligence), so GP should have encouraged its agent, Paul, to go to the aid of Jack and Diane. A simple check on them would have revealed that Diane was unconscious and Jack was likely in shock. Paul should have given this information to emergency dispatch which may have helped save Jack's life if the ambulance could have arrived sooner.

Essay # 4

Sample Answer # 1

(disclaimer)

1. Substantive Due Process

   This doctrine applied to the states by the 14th amendment serves to protect people's fundamental rights. The fundamental rights are the right to vote, right to travel (interstate) and the right to privacy (marriage, abortion, contraception, intimate sexual relations, etc..) If any of these fundamental rights is infringed upon the regulation or statute is subject to strict scrutiny and must be narrowly tailored to serve a compelling government interest. Any other right is subject to rational basis review and will be upheld if its reasonably related to a legitimate government interest.

   First, Olde Towne (OT) can argue that as a corporation, Resort Hotel, Inc. (RH) is not protected as having fundamental rights.

   Second, OT can argue that its ordinance contains provisions for developers to apply for variances if they have excessive construction plans. RH has not applied for the variance yet so, there has not been a final resolution of the issue. No federal court would hear the case because not all state remedies have been fulfilled.

   Third, under rational basis review the ordinance will likely stand because the city has demonstrated its legitimate interest in maintaining its infrastructure systems and its historic skyline. Courts almost never strike down laws under rational basis review.

2. RH and Federal Court

   The court will likely abstain from hearing the case until all steps are followed by RH. A federal court will abstain from hearing a case until all procedures under state or local law have been fulfilled. As stated earlier, RH had the opportunity to apply for a variance from OT. If this variance is then denied, the federal court may hear the case, unless they feel there are sufficient independent state law grounds for review.

   Since a "taking" involves federal law this could arise under federal question jurisdiction to

take it to federal court.

3. "Taking"
   A taking is when the government does something to your property that may leave no economically viable use or decrease its value. A per se taking requiring just compensation is when the government's action leaves no economically viable use to the property, thereby rendering it worthless. Just compensation would be the reasonable value to the owner of the property.

   But if the govt's action leaves at least one economically viable use then the court will apply a balancing test of (I) the social goals sought to be promoted by the gov't against (ii) the dimunition in value of the property and (iii) the owner's reasonable expectations regarding the property.

   In this case, this ordinance does not take all economically viable use of the property. RH can still build a four story hotel with 20 rooms per story. Therefore, the balancing test will be applied.

   First, OT has significant social goals to be promoted. It is the oldest city in the state, it has many historical buildings in existence and "the prettiest skyline in the state" and 8 story hotel would greatly change this skyline as the tallest building in the city. Also, the strain on infrastructure is critical for the city because the huge hotel would be the last development. There would not be much diminution in value because the building is a dilapidated two story warehouse.

   The reasonable expectations of the owner, were that he should have been investigating the actions of the city and the hearings. Especially due to the fact that no other building in the city was that high. So it would have been reasonable for the owner to investigate its ability to build.

   In light of these facts, the city's actions would not amount to a taking.

4. Equal Protection Violation
   Applies strict scrutiny to suspect classes (race & alienage) intermediate scrutiny to quasi-suspect classes (legitimacy & gender) and rational basis review to anything else.

   This as a property would be subject to rational basis review and the city's legitimate interest in maintaining infrastructure & historical consistency would prevail.

   And in addition, the five-story building is on the outskirts, which does not affect the skyline. And its only one story higher than the ordinance, so it's not a significant difference. Even further, the city cannot constitutionally pass laws that retroactively punish behavior.

   So this would not pass muster as an Equal Protection Violation.

Essay # 4
Sample Answer # 2
(disclaimer)

1. The city should make the factual argument that studies have been done to verify that the ordinance is not arbitrary & capricious exercise of police power. Further, the city should argue that police power is broadly construed. Therefore, the city is justified in determining that the city's infrastructure will not be able to maintain a development the size of that planned by Resort Hotel.

2. Resort Hotel, Inc. cannot immediately bring a claim in Federal Court to invalidate the ordinance on the grounds that the ordinance is a "taking". The problem that Resort Hotel, Inc. faces is the issues of ripeness. Ripeness means that an issue is ready to be brought to court. Here, Resort Hotel has not shown that a taking without just compensation has taken place. For there to be a taking, the property must be without all economic value. Here, the facts do not suggest that Resort Hotel is being deprived of all the economic value of the property. They may not be able to use the property in the manner they had planned. However, this is not how a court defines "taking". Further, the city ordinance provides that developers may apply for variances if their construction plans provide for additional infrastructure. Here, the facts do not show that Resort Hotel, Inc. has attempted to avail itself of this option. Additionally, state law provides the possibility of an inverse condemnation action to obtain just compensation for an alleged taking. Again, the facts do not indicate that Resort Hotel, Inc. has availed itself of this avenue of relief either. Therefore, the court will likely hold that this issue is not ripe for review.

3. If the above issue is allowed to come before a federal court, the court will have to determine whether a "taking" has taken place. A "taking" is where the property owner is deprived of ALL economic value of the property. Here, Olde Towne should argue that the property purchased by Resort Hotel, Inc. has not been deprived of ALL of its value. Although Resort Hotel, Inc. may not be able to use the property in the manner they intended when it was purchased, this is not considered a taking. Further, the ordinance allows developers to apply for variances if additional infrastructure is provided. Therefore, the property still can be used. Resort Hotel, Inc. will not have to make accommodations for additional infrastructure to support its development.

4. As for equal protection, Olde Towne should argue that Rational Basis should be applied. Olde Towne should argue that Resort Hotel is not a suspect class (Race, Alienage) or quasi suspect (gender, age, etc.). Therefore, strict scrutiny or intermediate scrutiny will not apply. Vendor Rational Basis, Resort Hotel Inc. will have to show that there is no rational basis for the ordinance, Here, Olde Towne only has to show that the ordinance is to protect the current infrastructure from being overloaded. Further, the assisted living facility is good for public policy. It has also been in Olde Towne since the 30s & the current infrastructure can support it.

Essay # 4
Sample Answer # 3
(disclaimer)

1. If Resort Hotel, Inc. (RHI) makes a claim that the ordinance is arbitrary and capricious, the city will have several responses. Factually, the zoning ordinance serves a legitimate purpose,

in keeping infrastructure concurrent and preserving property values, as well as the aesthetic of the town, Legally, it is long established that municipalities have the power to adopt and enforce reasonable zoning ordinances. Further, the "arbitrary and capricious" argument sounds like an administrative standard, and the facts state that all procedural questions have been resolved, such as notice and opportunity for objection to the enactment of the ordinance. Further, there has been no final administrative decision until RHI asks for a variance.

2. To bring a claim in Federal Court, there must be, among others, a Federal question of law, standing, and ripeness. Here, the opportunity exists for RHI to apply for a variance, if they can provide additional infrastructure. There is no Federal question of taking until at least RHI exhausts that avenue of recourse. There is no due process of violation if a remedy still exists for RHI. As, on the facts RHI has not applied for a variance from the city. RHI probably lacks standing to sue for a taking, and the issue lacks ripeness, as the city has not yet even denied RHI a variance. Further, the appeal of an administrative decision, such as a variance, would likely not jump right to Federal court, but rather up the ladder of state courts, before it became a Federal question of law, as Georgia has an "inverse condemnation" statute which must be addressed at the state level.

3. A "taking" at the Federal level would involve depriving a property owner of all or substantially all economic value of property. Here, Olde Towne is not depriving RHI of all or substantially all economic benefits, because 1) the opportunity to obtain a variance exists, albeit at a higher cost than simple conformance to the ordinance; 2) RHI can still develop the property and make more than reasonable economic use of it – a four story condo/hotel, with 20 units per floor, is hardly a total deprivation; 3) local governments have the specific authority to enact reasonable zoning ordinances (Enclid, Coastal Council). Mere regulation is not a taking, as RHI still retains value. Additionally, RHI bought the property with full knowledge and notice of the ordinance, a factual, if not legal persuasion.

4. RHI is not a protected or suspect class. For an equal protection claim, RHI must prove discriminating conduct against a class. In this case, developers of new beach front property are not being discriminated against; they are simply being regulated, a power well within the city's right and discretion. The issue of the five story assisted living facility is irrelevant; it would be unconstitutional to retroactively apply an ordinance to an existing facility and force the facility to obtain a variance or remove the top floor. The assisted living facility existed before the ordinance was passed, and therefore, will be "grandfathered" in as a legal non-conforming use. This puts the facility in an entirely different class than RHI. RHI would somehow have to prove that they city selectively discriminated against granting variances to new developers of 4+ story beach front housing, a standard unlikely to be met. Further, RHI has not yet even been denied permission to build. The opportunity fro a variance still exists. For the purposes of the ordinance, the facility is also only a thirty (30) unit development; RHI has the ability to construct an 80 unit building. Further evidence that the situation of the assisted living facility is in no way comparable to the alleged discrimination of RHI.

MPT 1
Sample Answer # 1
(disclaimer)

Memorandum

In re Velocity Park

In order to determine the effectiveness of the proposed waiver, as well as any changes, it is important to take into consideration the statutory and other judicial (case law) considerations. Regarding the issue of a minor's ability to bind himself to the waiver, there is a statute on point. Regarding the requirements for a valid waiver, there are two cases on point in this jurisdiction (Franklin) and one case from Columbia that could provide some guidance.

I. Will a waiver be enforceable if signed only by a minor

Franklin Statute 41(b)(1) states, in pertinent part, that "the contact of a minor may be disaffirmed by the minor himself…" The statute is clear that a minor will not be banned by any contract he signs on his own behalf, unless he later ratifies that contract upon reaching majority.

It is important to note, however, that 41(b)(3) states that this rule "shall not apply to contracts made on behalf of a minor by the ….parent or guardian."

Thus, any contract, or in this case the waiver, must be signed by the parent or guardian of the minor to have any chance of being legally binding.

II. Will proposed waiver protect velocity?

The Schmidt case laid out the basic requirements for an enforceable waiver. First, the language cannot be over broad, but must clearly, unambiguously, and unmistakenly inform the signor of what is being waived. Second, the waiver form must alert the signor to the nature of what is being waived. Also noted in the Land case is the issue of disparity of bargaining power; greater disparity making it more likely to be held unenforceable.

The Land Case goes on to state that a waiver encompassing reckless and intentional conduct will not be upheld.

In view of the applicable law, the proposed waiver would not protect velocity. First, the language of the waiver is overbroad and uses wording that fails to alert the signor of the types of injury that are possible. It is also too complex and filled with "legalese" that would not be appropriate for a layman contract.

Second, the waiver would probably be invalidated because, like the invalid waivers in land and Schmidt it is part of a different document. Additionally, the lettering/font in this waiver is smaller than the rest of the document, which seems to diminish its importance.

Finally, although not dispositive, the circumstances in which the waiver would be signed is indicative of a disparity in bargaining power because they would be handed out where the skate boarders pay their fee and then collected by the cashier, it appears they are given no time to review and question the document.

As written, the waiver would not be valid.

III. What revisions would improve the waiver

a. A parent should be required to sign for all minors. Pursuant to the statute, if a parent does not sign the waiver will be subject to disaffirmance by the minor.

b. The wording should be changed to address specific harm likely to be suffered and should limit the waiver to avoid disclaiming liability for reckless or intentional behavior. Paragraph 1 should include language such as " I understand that skateboarding is dangerous due to the nature of the sport and the possibility of items being dropped on the skating surface. I agree that Velocity is not liable for any injuries I suffer due to accidents, negligence of third parties, or its own negligence.

c. The waiver form should be a separate document with a large font title such as "WAIVER OF LIABILITY". Important provisions should be bold faced.

d. Signors should be given ample time to read and question the document.

e. If the park can take steps toward its partnership with the city, the Holum case makes it seem more likely that waivers would be upheld. Although from a neighboring jurisdiction, it showed substantial difference to community oriented activity; and that sentiment is likely to be shared by local courts.

If Velocity follows this recommendation, its waiver has a good chance of being enf.

MPT 1
Sample Answer # 2
(disclaimer)

(1) Will the proposed waiver protect Velocity Park?

The proposed waiver likely will not protect Velocity Park as Mr. Oliver intends. For a waiver to be effective, three requirements must be met: (1) the language of the waiver must be clear and not over broad, (2) the waiver taken as a whole "must alert the signor to the nature and significance of what is being signed." Lund. Courts will also consider the relative bargaining positions of the parties and construe ambiguities against the party seeking to obtain a waiver. Lund. For waivers

by minors, the waiver should additionally be “made on behalf of a minor by the minor’s parent or guardian;” otherwise, the minor may disaffirm the contract. 41(b)(1)-(3).

The proposed waiver suffers from several flaws. First, the language of the waiver, including phrases such as “participation in a sport”, “condition in a park,” “any actions of velocity part,” etc are ambiguous. In Lund, the court noted that the phrase “inherent risks in skiing” was too ambiguous to clearly inform the person of rights being waived.

The language is also over broad. Because waivers are construed against the party obtaining it, waivers for intentional acts violate public policy in their entirety. Lund. Quoting R2d 195. Here, the proposed waiver releases “all legal liability” for “any actions of Velocity Park,” (which would include intentional acts), both for the skateboarder and the skateboarder’s heirs and assigns (cf. Holum, where for a parent to release their claims the parent signed a waiver). And, the waiver seeks to void liability not only for Velocity Park, but also for all third parties. These provisions taken alone would probably void the entire waiver.

Also, the language of the waiver should more clearly indicate that it is a waiver. The proposed waiver does not include a header or title drawing the reader’s attention to the fact that it is actually a waiver, in contrast with proper waivers. Lund. The waiver also lacks signature lines on each page, or perhaps even beside each paragraph that significantly waives liability. Accordingly, a party signing the waiver may not appreciate the content of the waiver. Moreover, the waiver uses smaller font than the rest of the document, without capitals or bold to draw attention to particular portions of significance. See Lund.

The waiver also may fail because it is incorporated into a single document along with general information about Velocity Park. It therefore does not clearly call attention to seriousness of the signature. See Holum.

Although the Holum court upheld a waiver that did not use any capitals, Holum was decided in a neighboring jurisdiction and is therefore not binding in Franklin. Holum is also further distinguished as applying to non-profit situations, whereas Mr. Oliver will be charging admission for profit. Rather than run the risk that a Franklin court would rely on these distinguishing characteristics, the proposed waiver should be amended.

Regarding the bargaining power of the parties, Velocity Park appears to have most of the power: Velocity is the only park in the area, a large portion of their business will be from minors, the minor may have to sign the form while standing in line with others waiting (see Lund), and the terms may not be explained to the minor (indeed, Mr. Oliver indicates many would not read it). The proposed waiver should be amended to address the concerns.

The proposed waiver also would only be signed by a minor, and therefore could be disaffirmed in accordance with 41(b)(1)-(2).

(2) Suggested revisions

I have prepared the following list of suggested revisions to bring the waiver into compliance with the public policy considerations set forth in Holum. Notably, the Holum decision involved enforceability by a minor for a harm to her parent, rather than a child's injuries.

- The waiver should be on a separate document and clearly titled "WAIVER, RELEASE, AND EXCLUPATORY AGREEMENT."
- The waiver should be signed by a parent and not just a minor. The parent and child should be asked if he or she have any questions before signing. A separate entrance line be used for people coming to the park a first time to avoid the feeling of being rushed. The parent and child's waiver can be kept on file. Waivers may only cover certain areas (e..g. beginner).
- Signatures should be required for each page.
- The waiver should address liability from all anticipated sources, such as choking hazards related to selling food within the park. The waiver could include language that "I agree to eat food and drinks within a designated area of the skate park and not enter the ramp area with any such food and drinks. I UNDERSTAND NO MEDICAL STAFF WILL BE PRESENT on site."
- The waiver should specifically reference Velocity's negligence, such as: "I agree to ASSUME ALL LIABILITY FOR MYSELF, WITH REGARD TO NEGLIGENT ACTIONS PERFORMED OR NOT, BY VELOCITY PARK. I understand, DEBRIS, INCLUDING TWIGS, ROCKS AND THE LIKE may be present in the park and WAIVE LIABILITY." References to "any and all" liability should be replaced with "negligence," as waivers for intentional or reckless behavior will not be upheld.
- The waiver should require wearing wrist guards and closed toe shoes.
- Include language "I agree NOT TO ENTER an area occupied by ANOTHER SKATEBOARDER until the area is clear," to avoid collisions.

(3) Enforceability against a minor

Waivers signed only by a minor will not be enforceable against the minor because he or she will have the right to disaffirm the contract. 41(b)(1).

Once the minor reaches the age of majority, however, a waiver signed only by a minor may be enforceable where the minor expressly or implicitly ratifies the contract. 41(b)(2). Therefore, although the contract may not be enforceable while a minor, if the minor reaches the age of majority and signs a new waiver (express), or continues to use the skate park (arguably implied ratification), the waiver may be enforceable thereafter.

MPT 1
Sample Answer # 3
(disclaimer)

To: Denna Hall
From: Applicant
Re: Liability Waiver for Velocity Park
Date: Feb 26, 2008

MEMORANDUM

Specific revisions
Design
Layout
Enforceability by minors

This memorandum is in response to whether the proposed waiver brought in by Zeke Oliver will protect Velocity Park from liabilities for injuries occurring at the skate park.

Under Franklin Law waivers, also known as expulpatory clauses, are permitted unless it is contrary to public policy. In Schmit v. Taylor, the Franklin Supreme Court set forth two requirements for an enforceable waiver. First, the language of the waiver cannot be over broad, but clearly, unambiguously, and unmistakenly inform the signor of what is being waived. Thus, a release that is so broad as to be interpreted to shift liability for a tortfeasors conduct under all possible circumstances, including reckless and intentional conduct and for all other possible injuries will not be upheld. The waiver must clear and include language that expressly indicated the guests intent to release the Skate Park from its own negligence. Here, the lack of the word negligence and the ambiguity of terms inherent risk in sports are problematic in the waiver. I would advise that the waiver include the word negligence to release the skate park from negligence. Without this it would seem that the waiver encompasses release from intentional acts which is void and unenforceable under public policy according to restatement of contracts section 95. Further, I would advise that the word sports be replaced with the word skateboarding to prevent the waiver from being overbroad. If the waiver does not include the terms negligence and an explanation of the risks inherent to skateboarding, the claims that arise will only contemplate the risks at the time of signing between the park and the guests. This would leave the park open to huge liability. As such, the terms of the waiver explaining liability from injuries due to equipment failure and conditions in the park are appropriate.

Second, viewed in its entirety, the waiver form itself must alert the nature and the significance of what is being signed. More importantly in our situation, release forms that serve two purposes and those that are conspicuously labeled as waivers have been held to be insufficient to alert the signer that he is waiving liability for other parties negligence as well as his own. Here, the waiver includes three different parts. I would advise that the waiver be a separate document on its own. The Rules and the privacy agreement at the end distract from the significance of what the guest is fully aware of and what they are signing. The waiver should be a separate document to avoid A separate signature should be required as well at the end of the waiver.

Additionally, the substantial disparity in bargaining powers between the parties is considered. This factor alone, however, will not render the waiver void under public policy. This factor looks to the facts surrounding the execution of the waiver. Factors which surround the execution include 1)

if the waiver was pointed out to the guest, 2) if its terms were explained to him, 3) a discussion of risks of injuries purported in the form, and 4) whether or not the guest has an opportunity to negotiate regarding the standard waiver in the form. From the interview with Mr. Oliver, it seems that skater inherently understand the risks of the sport. However, it would be advised that as guests are signing the waiver the above factors should be mentioned to each by the staff at the cash register, and discussed further if guests request to do so. Pressure to sign the form might arise as guest will be eager to enter into the park and start their activities so it should also be advised that this should be prevented by the addition of staff or prior reading the waiver on the website.

Lastly, a waiver signed by only a minor is not enforceable unless its for necessaries under the Franklin statute. I would advise that the waiver should be signed by both the parent and the minor in this instance. This would effectuate that the minor is bound to the waiver. In Holum, the courts found that activities that are in the realm of non profit organizations, will support a parents waiver of a childs claim. Although the admission fee would be in question in this matter as the park is planning to charge ten dollars per guest, this sum might seem a small fee by some courts. Moreover, the client intends on not charging in the future which would also bolster his non profit purpose to provide outdoor activities to children.

MPT 2

Sample Answer #1
(disclaimer)

Issue: Can the FRSA be grounds to quash the subpoena issued against Lisa Peel?
Yes

The subpoena directing Lisa Peel should be quashed on the grounds that it violates the Franklin Reporter Shield Act (FRSA). The FRSA prohibits courts from compelling reporters to disclose the source of "any information or unpublished material..." FRSA 902. The purpose of the Act is to "safeguard the media's ability to gather news and promote the free flow of information to the public by prohibiting courts from compelling reporters to disclose unpublished news sources or information received from such sources." §900.

First, the district attorney (DA) will argue that Ms. Peel is not a reporter for the purposes of the Act. In order to fall under the protection of the Act, one must be a "reporter" who is regularly engaged in the collecting, writing or editing news for publication through a news medium." FRSA §901. The Franklin Court of Appeal has already decided a case closely on point to Ms. Peel's case, finding that a newspaper photographer was, for the purposes of the statute, a reporter protected under the shield law. To prove that one is a "reporter" for the purposes of the FRSA, one must show that she had "an intent at the inception of the newsgathering process to disseminate investigative news to the public." In re Bellows (Franklin Ct, Appeal 2005). Ms. Peel engaged in each of the enumerated activities referenced in the FRSA: she collected information and investigated for her article, wrote it, and edited her article for her blog. She is "regularly engaged" in these activities, since she updates her blog once a week on Fridays with information from meetings, makes calls to officials for interviews, and analyzes such information on her blog.

This case can be distinguished from Hovery v. Fellenz, where the reporters happened upon a crime on their way home from work without intent to disseminate the news to the public. Ms. Peel sought out and investigated sources and information for her articles, with the primary purpose of discovering information to publish on her blog. No where in the Act does it require that renumeration be shown to prove that she was a professional reporter. Nevertheless, Ms. Peel receives income from the ads which have sponsor her blog. Moreover, the statute enumerates "community antenna television services," which are traditionally not for profit.

Second, the DA will argue that Ms. Peel did not publish her work through a "news medium" as required under the Act. The statute defines "news medium" as "any newspaper, magazine or other similar medium issued at regular intervals and having general circulation." Ms. Peel's blog fits into this definition. The Court will likely use the statutory construction principles outlined in Lane, which stated that where the language of an Act is ambiguous, courts can look to external aid to interpret the statute. Lane v. Tichenor (2003). In this case, the American Heritage Dictionary defines "circulation" as "the condition of being passed about and widely known," and "publish" as "to bring to public attention, to announce." Ms. Peel's blog falls into both of these definitions, since her blog is well known in the community for announcements to the extent that is has come to the attention of the DA. Ms. Peel's blog is regularly circulated. Although only 9% of the community has registered with the blog, the site has been visited 15,000 times. The Court in Bellows found that the newspaper at issue with a daily circulation with more than 100,000 readers constituted a news medium. Given the amount of people who look at her site regularly, her blog should be considered news media. As asserted in America Today, blogs are steadily replacing newspapers as public sources of information, and therefore should fall under the definition of the statute.

The Court in Lane v. Tichenor stated that where "general words follow particular and specific words in a statute, the general words must be construed to include only things of the same general kind as those indicated by the particular and specific words." Just as the statute in Lane included a list which was neither exhaustive nor exclusive, the FRSA uses terms such as "other" and "similar" to indicate that their list should not be read to be exhausted. The Court then found that the words "recreational purpose" followed by "other similar activities" referred to activities that shared in common the outdoors, nature, and natural settings. Therefore, it ruled that hayrides fell into this category even though it was not enumerated specifically in statute.

In this case, Ms. Peel's blog falls under the tem "other similar medium." The statute generally refers to news medium, followed by a list of specific kinds of news media. Although blogs are not explicitly listed, the list of news media examples are not limited to print media, but include radio and television. Viewed in all, the list indicated a category where dissemination of information to the public is the purpose of the medium. Moreover, the list includes medium such as television, whose sole purpose is not limited to newsworthy information – television is often the medium for advertisements and entertainment. Hence, if the district attorney attempts to argue that Ms. Peel's blog is not newsworthy all the time since she includes personal information on her blog, Ms. Peel can argue that not all of the enumerated news media examples are solely for the purpose of newsworthy items.

Finally, the very purpose of the FRSA is to protect reporters from being forced to reveal their sources to encourage the free flow of information to the public. Ms. Peel pointed out that she is essentially the only source of information that revealed the story that she published and presents the only alternate point of view from the single daily paper in the community. Revealing her confidential sources would defer sources from coming forward in the future, and defeat the purpose of the Act.

MPT 2

Sample Answer # 2
(disclaimer)

MEMORANDUM

TO: Henry Black
FROM: Applicant
RE: Peel Subpoena
DATE: February 26, 2008

After reviewing the relevant authority, it is my opinion that the Franklin Reporter Shield Act (FRSA) will apply to Ms. Peel and her blog. My conclusion is based on current case law as well as the rules of statutory construction. I base my findings on the In Re Bellows and Lane v. Tichenor. The key issues to focus on when determining whether the statute is applicable are the intended meanings of the term "reporter" and "news medium" in the FRSA.

Definition of Reporter

In Bellows the court discussed the test utilized when determining whether one would be deemed a reporter. The court indicated that the focus should be on the "intent at the inception of the newsgathering process to disseminate investigative news to the public." Ms. Peel clearly has satisfied this burden. While her blog does contain extraneous portions (i.e. gardening tips and personal photos), there is an intention on her part to accurately investigate, uncover, and publish newsworthy information on her blog. Although this was not the initial purpose of the blog, it does appear to be one of the primary goals now. Therefore, I believe she should be classified as a reporter.

We must also look at the face of the statute itself when trying to ascertain the proper definition of a reporter. The FRSA defines a reporter as "any person regularly engaged in collecting, writing, or editing news for publication through a news medium." The main rule of statutory construction requires us to look at the face of the statute first to garner the intended meaning of terms. If the meaning is ambiguous on the face of the statute, then it is acceptable to give words their plain, ordinary meaning (p. 12). In Bellows 'collecting' was given its dictionary definition to help the court decide whether a photographer came under the heading of a reporter. In our present case, this interpretation is extremely useful. Collecting, according to the Bellows court, meant to bring together, gather, and assemble. That is precisely what Ms. Peel does. She herself has said she attends public meetings, reads documents, and performs investigations in a similar manner as a traditional reporter, She gathers the information with the previously discussed

intent to disseminate it.

When we apply the everyday meaning to a term of a statute, we must ensure that the legislature's intent remains intact. And in our case, it does. The intent is clear on the face of the statute. The FRSA is designed to promote the free flow of information to the public and by allowing Ms. Peel to protect her sources, there is a greater chance others will come forward with information pertaining to matters of public concern.

Definition of News Medium

Ms. Peel's blog constitutes a news medium for purposes of the FRSA. Again, we are allowed to utilize additional sources because the language of the statute is ambiguous. In Lane, the court utilized a canon of statutory interpretation known as ejusdem generis to help clarify the reaches of a statute. The canon states that when general words follow particular specific words in a statute, the general words must be construed to include only things of the same general kind as those indicated by the particular and specific words (p. 15). This canon can be applied to the FRSA's section defining a news medium. The FRSA begins by stating specific mediums such as newspapers and magazines, then proceeds to use the general description of other similar medium issued at regular intervals. It is my opinion that Ms. Peel's blog has the same vital characteristics as a newspaper or magazine. Both mediums involve investigation of matters of public interest. The facts discovered are then compiled, edited, and published at regular intervals for the general public. These are the defining characteristics of all 3 and as such, serves as evidence that the blog should be considered a news medium.

Possible Adverse Arguments

There are a few points that should be noted, which may be raised by opposing counsel. First, in the case of St. Mary's Hospital v Zeus Publishing, the court held that a full page ad revealing illegal activity was not news. Similarly, the Columbia Supreme Court has rejected the argument that defamatory messages posted on a Sports Internet Bulletin constitute news. These two cases are important to note because when one thinks of a blog, one often thinks of a series of internet postings versus something akin to the New York Times. Therefore, opposing counsel may try to argue that Ms. Peel's blog is more like the online bulletin or full page ad than a traditional news source. These two examples can be distinguished from the case at hand. The full page ad was not the result of consistent investigatory work that continually produces newsworthy information and articles for the general public. It was not a medium but rather a one time announcement. The Sports bulletin case dealt with defamatory statements being posted with no particular time intervals specified. There is no evidence that the contents of the online bulletin was the result of work akin to that of an investigative reporter, whose main intent is to disseminate truthful information to the public for their benefit.

One important factor to note is that neither the full page ad nor the Sports bulletin seemed to have set intervals for publication. Opposing counsel may try to argue that this is also the case for Ms. Peel's blog since it is not updated at the same time each week. However, the time frame for the blog's entries (every 7-9 days) is fairly consistent and would probably be able to withstand such an argument.

For the above mentioned reasons, it is my opinion that Ms. Peel should be able to claim the protection of FRSA.

MPT 2
Sample Answer # 3
(disclaimer)

To: Henry Black
From: Applicant
Re: Peel Subpoena
Date: February 26, 2008

Issue

Whether the FRSA may be used to quash a subpoena for a blogger's sources?
Argument and Citation to Authority

I. Burden of Proof

It is the burden of the party claiming the privilege to establish his or her right to its protection. Wehrmann v. Wickesberg. In order for Ms. Peel to claim privilege under the FRSA, it is her burden to show she qualifies for the privilege.

II. The Statute

The FRSA prohibits courts from compelling reporters to disclose unpublished news sources or information received from such sources. The statute defines a "reporter" as any person regularly engaged in collecting, writing, or editing news for publication through a news medium. The statute considers any medium issued at regular intervals and having a general circulation, like a newspaper, to be a "news medium". The plain language of the statute does not address blogging or internet news outlets, therefore, in order to succeed. Ms. Peel must argue that the terms "reporter" and "medium" are so ambiguous that the facts of this case would allow the court to interpret Ms. Peel's status as a blogger is akin to a report, and her blog is a news medium.

A. Ambiguous Language

Ms. Peel's case is unique as similar facts have not been litigated in this jurisdiction before. There is no case directly on point, there are several cases which aid Ms. Peel's argument. Lane v. Tichenor sheds some light on statutory interpretation in this jurisdiction. In Lane, the court held where the language of the statute is unclear, the court may avail itself of external aids to interpret the statute. The Lane court relied on the canons of statutory interpretation. Specifically, the court relied on ejusdem generis, which provides that when general words follow particular and specific words in a statute, the general words must be construed to include only things of the same general kind as those indicated by the particular and specific words. Using this canon, the Lane court determined that hayrides were within the FLRIA because the statutory language indicated that activities promoting the enjoyment of nature were protected. Adopting the logic of that case, to this issue, the terms following "news medium" are newspaper and magazine; the terms

following circulation are radio station and television station. Ms. Peel should argue that terms newspaper and magazine indicate a publishing of news. Additionally, radio stations and television stations are both mediums for broadcasting news. Ms. Peel should argue that her blog both publishes and broadcasts the news as the blog is published to her web page, which is then broadcast over the internet.

Ms. Peel also has a strong argument that her actions fit the role of a reporter. "Reporter status" requires an intent at the inception of the newsgathering process to disseminate investigative news to the public. In re Bellows. The facts indicate that Ms. Peel meets that reporter status requirement. She attends all local meeting and records the minutes for the sole purpose of making them available as news to the townsfolk. Further, the story she published about the superintendent was written to disseminate investigative news to the public about the corruption engaged in by the school board. The court in Bellows also recognized that courts may use a dictionary to determine the plain and ordinary meaning of a word not defined by the statute. The dictionary defines circulation as "dissemination of printed material, especially copies of newspapers or magazines among readers; the number of copies of a publication sold or distributed." Under the plain meaning, Ms. Peel's actions may meet that definition. The blog is published electronically once a week. Further 3,500 townspeople are registered on the blogsite and the site has been visited more than 15,000 times. "Publication" means the communication of information to the public. Ms. Peel may argue her blog communicates valuable community information to the public.

B. Contents of the Blog

Ms. Peel does publish personal information to the blog like family information, but the majority of her blogs contain facts with opinion interjected. She posts her blogs once a week. The blogs usually contain information such as town council agendas, school board information, posted minutes from county meetings, movie reviews and gardening tips. Ms. Peel should argue her blogs contain the same information most town newspapers publish. She may argue her blog performs the role of the newspaper in her small town.

C. D.A.'s Response

The D.A. will likely respond that Ms. Peel is not covered under the FRSA. He will argue the language of the statute does not include bloggers or blogs and Ms. Peel is therefore precluded from asserting the privilege. He may rely on a Columbia case, Hausch v. Vaughan, however that case is persuasive authority and may be distinguished from Ms. Peel's case. The court in Hausch, declined to extend the privilege to derogatory messages posted on an internet bulletin board. The court found the message were unprotected because they were not news and were not published at regular intervals. Ms. Peel's facts are quite different, as she publishes her blog weekly and her blogs do contain news regarding public government meetings.

The D.A. may also argue that blogs are advertisements for local businesses, which pay Ms. Peel to publish her blog as an advertisement. In St. Mary's Hospital v. Zeus Publishing, the court rejected the use of the FRSA to protect the identities of those paying newspaper ads disguised as journalism. Ms. Peel may distinguish her facts from St. Mary's, as her advertisements are small and the advertisers do not pay her much money.

Conclusion

Ms. Peel should succeed in asserting a privilege to revealing her source under FRSA. The court will likely find she was acting as a reporter, her blog is a news medium, and thus she may not be compelled to reveal her source.