February 2009 Bar Examination Sample Answers

DISCLAIMER
These are actual answers to essay questions that were written by applicants during this bar examination. These answers received a high score from the Examiner who wrote the question. The answers are provided to be helpful to applicants in preparing for a future exam, not to be used to appeal a score received on a prior exam. They may be printed and circulated.

Question 1 - Sample Answer #1

1. In determining the rights of Mr. Jones to maintain a fence (with a gate) across the unpaved driveway easement shown on the recorded plat, it is necessary to review the facts around the original conveyance by Mr. Farmer to both Mr. Jones and Mr. Smith. At the time of conveyance in 2007, Mr. Farmer granted an easement to use the paved driveway for ingress and egress by both Jones and Smith. Additionally, at the time of conveyance in 2007, the deeds of both Jones and Smith incorporated by reference the recorded plat that shows the 15 foot driveway easement running across the center of the Jones tract to the Smith tract. The facts further state that the unpaved easement was rarely used by Farmer or his predecessors in title.

I would advise Mr. Jones not to maintain a fence (with a gate) prior to further clarification as based on the facts it is clear that the unpaved driveway is in fact an easement but it is arguable that Mr. Smith is also entitled to use the easement for ingress and egress as the plat was included in his deed as well. The inclusion of the easement in the deed and its subsequent incorporation by reference make the grant to both Jones and Smith. The fact that the unpaved easement was rarely used does not extinguish it. Absent abandonment, merger, release or extinction, the easement, though rarely used will remain. I would need to determine from Mr. Jones the actual placement of the fence and gate and his expectation with regard to the use of this driveway by Smith before indicating that he should proceed with it. If for instance, he plans to give Smith a key to the gate and that they both use it, however, since Mr. Smith has already demanded its removal this does not appear to be the case. However, if he intends to have exclusive use of the easement and the fence and gate I would advise that he not proceed as Smith is not amenable (which he is not on the facts) Jones would not have a unilateral right to cut off another easement holder's right. Since there in fact was an easement, there remains an easement (rarely used) and by incorporation in both deeds. Mr. Smith has been using the paved driveway but his non use of the unpaved driveway would not extinguish his rights where he has one. Absent additional evidence I advise that Jones take no action before consulting Mr. Smith again since he has already requested that it be removed.

2. In determining whether Jones may maintain a fence around the area adjacent to his property (Old Post Road area) I would need to review the order of conveyance between Farmer, Jones and the County. From the facts it appears as if Farmer had given a right of way deed to the county to the area of Old Post Road and the area adjacent to Jones' tract (and the area under examination).

The facts state that this grant was given prior to the sale to Jones. Since the grant of the right of way was given to the county, Jones was never entitled to this area of land as a part of his conveyance. Since the sale to Jones, the County has decided to close the road; however, their right of way is maintained and Jones may not obstruct it. Absent a showing of ownership of this area of land by Jones, he is not entitled to fence off this area and may become liable for trespass if he continues. Absent a tolling of a statutory period to secure title to the area by adverse possession he has no rights in the area and I would advise him to remove the fence to avoid liability on trespass grounds. Since the county has demanded its removal I would advise Jones to do so.

3. Subprime Bank after duly executing a note and security deed, which contained a power of sale has a right to attempt to collect its monies on the note through enforcement of the security deed. In order for Subprime Bank to collect it must initiate foreclosure proceedings and recover the proceeds of the sale which is expected to be $150,000. Subprime Bank would still be entitled to its full recovery of the amount outstanding, $199,000, and may seek a deficiency judgment from Smith. The decline in the value of the collateral is a risk incident to the property market and is mitigated by also executing a note which would bind the borrower for recovery of the full amount. In this case, Subprime Bank may foreclose and recover the majority of the loan, however, the deficiency of $49,000 may be hard to recover if Smith is judgment proof. The Bank would be entitled to the judgment and could then seek to enforce it against Smith and recover the full loan.

Question 1 - Sample Answer #2

1. Mr. Jones will not be able to maintain the fence across the unpaved driveway. The issue in this case is whether Mr. Jones can stop Mr. Smith from using the driveway because Mr. Smith has a better way for ingress/egress.

Under Georgia law, an easement can be granted by implication or by express grant. The easement should meet all the deed requirements and it should be filed with the county records office. An easement is a property interest in land and is presumed to last forever unless it is destroyed by merger, abandonment or lack of necessity. Here, Mr. Smith was granted his easement by an express grant from Mr. Farmer. Both Mr. Smith and Mr. Jones had actual notice of the easement. Mr. Smith had a valid property interest in the easement. Mr. Jones will likely argue that Mr. Smith also had an easement on farmer tract that would allow access to the Smith property. However, Mr. Smith is not obligated to terminate or release the easement on the Jones property because he has an easement on the Farmer property. If Smith's easement arose by necessity - meaning he had no way to get to his land, then the grant of the Farmer property easement would terminate the Jones property easement, but this is not the case. Smith has an express grant for the easement that meets all the requirements for it to be valid.

Therefore, Jones will have to remove the fence.

1. Mr. Jones will not be able to maintain a fence around the area of Old Post Road. From the facts, Mr. Jones does not own the property nor has he been granted any interest in the property. It

appears that Mr. Jones is trespassing by having his fence on the property. Mr. Jones has no legal right to be on the Old Post Road property so he must remove the fence.

2. Subprime Bank (Bank) can foreclose on the property or not foreclose and sue Mr. Jones for breach of the loan contract. First, the Bank could foreclose on the property. In this case there is an acceleration clause in the contract. Acceleration clauses are enforceable in GA. With the acceleration clause, Mr. Jones would have to pay the entire amount due on the note before the foreclosure proceedings start. In this case, Jones would have to pay $199,000 because of the acceleration clause. If the Bank forecloses, there will be a $49,000 deficiency because the property is now worth only $150,000. In this case, the Bank could sue Mr. Jones for the deficiency.

3. The second option would be for the bank to not foreclose and to sue Mr. Jones for breach of contract. This may be a better choice because the property is worth less than the value loaned against Jones. The lien would be filed with the clerk of court.

Conclusion, Two choices for Bank, foreclose or sue for breach of contract. Also, non judicial foreclosures are ok in GA, so private sale is ok.

Question 1 - Sample Answer #3

1. Mr. Jones may not maintain a fence (with a gate) across the unpaved driveway easement.

An easement is a non-possessory interest in land, given to a person to rightfully use the land. Any excessive use or use that denies other's with a right to use an easement will be in violation of the easement.

Mr. Jones was given a right to use the unpaved driveway for ingress and egress in his deed to his tract of land. The easement was given so that he could get to the main roads. Mr. Jones building a fence with a gate would be excessive use of the easement by denying others with rights to use the land (easement).

In addition, an easement cannot be extinguished by non-use. Here, the facts show that Mr. Farmer, Mr. Smith, and Mr. Jones do not use the unpaved driveway easement. Non-use does not give Mr. Jones the right to construct a fence with a gate.

Therefore, Mr. Jones, you should not construct a fence and a gate across the unpaved driveway because it will be excessive use of your easement and would violate the easement expressed in the deed from Mr. Farmer to you.

2. Mr. Jones may not maintain a fence around the area thereof "Old Post Road" due to the rights held by the county by deed.

A deed given to someone with proper execution and delivery will hold title to the property of the said deed. The owner of said property held by the deed can dispose of the land at will or "close off"

meaning the holder of the title of land can decide whether to use or not use their land by right.

Mr. Jones cannot maintain a fence around the property of the Old Post Road because he does not hold the title to the property. A deed was given (executed) and delivered by Mr. Farmer to the county years before Mr. Jones purchased his tract. Because Mr. Jones does not hold the property he cannot maintain a fence on the county's property. Mr. Jones will be trespassing and liable to the county for any damages of his trespass if he maintains a fence on their property. Therefore, Mr. Jones should not put a fence around the "Old Post Road."

3. Subprime Banking may proceed to foreclosure on Mr. Smith's property due to failure to pay on his note to the bank.

Mortgage, security deed, has the right to foreclose on a security interest that has failed to make agreed upon payments.

Subprime Bank can institute immediate actions of foreclosure on Mr. Smith's property for failure to make his payments on the loan to Subprime Bank. If Mr. Smith can come up with the $199,000.00, attorney fees and other such interests, based on the acceleration clause in the security deed between Mr. Smith and Subprime Bank, Mr. Smith would have the "right to redemption" for his property.

Subprime Bank must sell the property at a convenient, open, sale giving notice to Mr. Smith and any others who hold security interests on the land. Subprime Bank can sell the property and then use the proceeds to pay the debt owned by Mr. Smith to satisfy the lien the bank was given by Mr. Smith.

The private power of sale provision will also uphold the sale for the bank to sell this property to extinguish their lien.

If the sale proceeds do not satisfy the lien on the property, Subprime can try to recover the difference from Mr. Smith.

Subprime Bank can hold a deficiency lien over Mr. Smith. This deficiency lien can be paid off by Mr. Smith or by the sell of any other properties he may hold.

Subprime Bank would have to go through the courts to retain a deficiency judgment lien over Mr. Smith.

Therefore, Subprime Bank has the right to foreclose on Mr. Smith's property to satisfy their lien and seek a deficiency judgment.

Question 2 - Sample Answer #1

Memorandum

To: Senior Partner

From: Applicant

Re: Samantha's Last Will & Testament

1. Larry's Bequest

As "Kitty" is a cat, it is highly unconventional to devise property to an animal. However, animals can be the beneficiary of a testate gift provided that there is someone to effectively oversee such a thing. To hold otherwise would reek of impropriety under public policy. With that said, Larry will receive Kitty under the Will. As to the funds for Kitty's care (assuming Larry is up to such maintenance), the 100k will be placed into a constructive trust, the corpus of which will be used to provide for Kitty as stated in the Will. Larry will be the trustee charged with properly administrating the funds on Kitty's behalf (although sounding quite odd, Kitty could be construed as the beneficiary). So long as Larry does not frustrate the purpose of this trust, he will continue with such administration of the trust, being allowed to take a reasonable fee from corpus for his efforts.

2. Aunt Clara

It is a stretch to argue for Clara under this Will. Since she was not living with Samantha at the time of death, nor with Samantha prior to hospitalization, Clara will need to make a good argument that she was her primary caregiver. Under the facts, it seems as though this was not exactly the case. If she can establish with the court that she was the primary caregiver, then she shall take her General Bequest free and clear. However, if the court is not so inclined to agree, then the General Gift will be consumed by the residuary.

3. Save All Black Cats (Save All)

Charitable beneficiaries are permissible as a matter of public policy. However, the issue here is that the Will seems to name both Save All and Tabitha as beneficiaries of the residuary estate. Thus, it will be important to look to the four corners of the document in search of satisfying the testator's intent. Under the language of the Will, Save All will take the monetary funds left in the estate. To carry out this intention, a proper definition of monetary funds is necessary. It seems likely that "monetary" has a meaning most closely with that of cash. Thus, unless the court determines otherwise, it is likely that Save All is entitled to all the cash within the bank accounts the testator may have left for probate.

As for the claims against Larry, Save All could argue that it is in a better position to carry out the testator's intent. However, this claim will fail because the language of the will expressly shows that Samantha wanted Larry to handle the care of Kitty. Only with evidence that Larry is a cat-hater or cat-abuser will Save All bolster its argument. As for the claim against Tabitha, Save All will argue that any taking by Tabitha will go against Samantha's intentions that Save All is entitled to the monetary residuary of the estate. However, in the absence of any evidence to the contrary, the

court will most likely construction and interpretation of the Will to provide for Tabitha, since Tabitha is her biological daughter, to whom court's give much leeway in construction and executive of Wills.

Against Aunt Clara, Save All will argue that Aunt Clara was not the primary caregiver of Samantha. On this point, Save All will have a pretty good argument. If it does convince the court of this position, then Save All will likely get the cash proceeds that would have otherwise been given to Clara. However, in light of the enormity of this estate, the court will likely look favorably to the family member, which description Clara certainly fits, and especially in light of her willingness to spend at least some time with Samantha prior to her death. (Under the facts, it seems as though Clara's services were not really even needed to begin with, which will cripple Save All's argument somewhat.)

4. Tabitha's Claims

Tabitha's claims will first rest in the Life Insurance Policy, under which she will likely claim due to her relationship to Samantha on the table of consanguinity. (1st Lineal Descendant is a pretty good position under the laws of distribution when conflict arises.) Tabitha will argue that "monetary funds" was an illusory term in that it did not provide much direction as to how the estate was to be administered. With great risk of Tabitha being disinherited if the court were to hold otherwise, she will have good argument that she is at the very least entitled to the Life Insurance policy. On that same line of reasoning, she will be able to reason that all stocks, bonds, and other investments were not intended to be "monetary funds" since they were not in the form of cash. Although they could certainly be converted into cash, so could other things such as real estate and personal property (of which there is an absence thereof in the estate). Thus, Tabitha's argument will rest in the fact that she will be disinherited if the court gives everything to Save All, which would undoubtedly be against the public policy of the great State of Georgia.

The only hurdle I see is an argument that Save All could present amounting to the following: if Samantha wanted Tabitha to take under the Will, she would have expressly named specific items for her. Furthermore, since Samantha is now an adult (over 17), to any Year's support otherwise provided for spouses and minor children under the Statutory laws of Georgia.

Question 2 - Sample Answer #2

Memorandum

To: Senior Partner

From: Applicant

Re: Estate of Samantha

(1) Larry will be able to keep Kitty and may be a trustee under an honorary trust created for the benefit of Kitty. A Will can devise items of property through specific or general bequests. A bequest

is specific if it specifically names items of property to be bequeathed. Specific bequests will take precedence over general bequests. Here, the bequest of Kitty is specific because Kitty is a specific chattel and was bequeathed to Larry.

Under property law, domestic animals, no matter how beloved, are personal property chattels and thus cannot own property or be devised property under a Will. Because Kitty is chattel, Kitty takes nothing under Samantha's will.

A bequest can also take the form of creating a trust. A trust is a method of holding property whereby the settler (the person creating the trust-this person is the testator for purposes of trusts created by Wills) grants title to a trustee for the benefit of a beneficiary. The trustee holds the legal title to the property and the beneficiary holds legal title. In order to create a trust, there must be intent, an identifiable trust res (or property), trustee, writing, and identifiable beneficiaries. Beneficiaries can be either private individuals or private trusts or charitable purposes for charitable trusts. Although it seems like Samantha created a trust with respect to the gift of money to Larry because the Will was a writing, there was intent to create a trust, the trust res was the $100,000 and the trustee was Larry, a trust in fact was not created because the trustee is on his honor to enforce the trust. Here, because Kitty was the beneficiary, the $100,000 trust is an honorary trust and Larry has the option to act as trustee under that trust.

(2) Aunt Clara should receive the bequest under the Will. When interpreting a valid will, Georgia courts will look to the testator's intent as the polestar of interpretation. In addition, courts will look to the four corners of the Will. When a Will contains a conditional bequest, courts will not enforce the bequest unless all necessary conditions have been satisfied. These are the conditions precedent to the enforcement of the bequest. Here Samantha's Will contained a specific conditional bequest. In order for Clara to take under the Will, Clara had to fulfill the conditions precedent of living in the same household as Samantha OR acting as primary caregiver. It is clear from the face of the Will and the four corners of the Will that Samantha's intent was that Clara should get the bequest by fulfilling either of those conditions. Although Clara was not living with Samantha, the evidence points to the conclusion that Clara was Samantha's primary caregiver because she helped Samantha around the house and took her to medical appointments. In addition, there is no evidence that anyone else was a caregiver for Samantha, which would point to Clara being the primary caregiver.

(3) Save All Black Cats (SABC) is a proper beneficiary because it is a charity. Although a testator cannot devise gifts to chattels, testators can devise their property to charities. Assuming SABC is a charity, then it is a proper beneficiary.

Larry: SABC could argue the trust is an honorary trust as described above and could request that a court impose a resulting trust on the funds. A resulting trust is an equitable remedy whereby the trust res goes back to the estate of the settler. Here, if a court imposed a resulting trust, the $100,000 would go back to Samantha's estate.

Clara: SABC could argue that the conditions to Clara's bequest were not met, as further described above.

Tabitha: SABC could argue that Tabitha's claim for support for years is too late as described below and that Samantha's intent was to devise all money including investments, life insurance, and the CDs to SABC as a specific gift.

(4) First, Tabitha could claim that as the residuary beneficiary, she would be entitled to any non-monetary items not otherwise bequeathed. The residuary beneficiary of a will takes whatever has not been specifically granted in the rest of the will. Tabitha could argue that the bequest to Save All Black Cats was a specific bequest of money only and not other types of property such as investments or the proceeds of life insurance policy and that as the residuary beneficiary, Tabitha is entitled to all such non-monetary bequests.

Tabitha could also claim years' support or argue in favor of a constructive trust. Under Georgia law, a minor child or a spouse can always claim years' support regardless of whether the estate passes through intestacy or testacy. A claim of years' support can be up to the entire estate and will be granted unless objected to. In addition, a claim for years support takes precedence over all other grants through the Will, other than any secured debt. Tabitha was a minor when Samantha died and because Samantha has no debts, Tabitha's claims for years' support could be for the entire estate and would be granted if no objection was made. The problem with this claim is that Samantha died in 2006 and it is now 2009. A claim for years' support has to be made within the year of the testator's death. Because Tabitha did not make her claim within the allotted time, it is unlikely to succeed.

If Save All Black Cats is awarded all of Samantha's money, including investments and insurance proceeds, Tabitha could then argue for a constructive trust. A constructive trust is an equitable remedy that will be imposed on the court to avoid unjust enrichment. Tabitha could argue that Save All Black Cats was unjustly enriched when they took all of the money without Tabitha being able to make her claim for years' support.

Question 2 - Sample Answer #3

1: The bequest to Larry is a specific bequest. Larry will receive Kitty and the $100,000 bequest only if Larry agrees to accept responsibility of caring for Kitty. Kitty is not the actual recipient of the money. Once Kitty and the money are received, Larry may only use the money to take care of Kitty, if needed. The $100,000 is essentially taken as a constructive trust. Once Kitty passes away, the constructive trust is terminated and any remaining funds belong to Larry, to use as he wishes. An argument could be made that any funds remaining on Kitty's death would revert to the estate, however, the gift was to Larry directly, not to Larry while he takes care of Kitty.

2: Aunt Clara should receive the $75,000 bequest of cash as Aunt Clara fulfilled the requirement that she be acting as the primary caregiver of Samantha before Samantha's death. The facts suggest that Aunt Clara was performing many of the functions of a primary caregiver. She accompanied Samantha to her medical appointments, she helped with the housekeeping, she stayed with Samantha when Samantha didn't feel well. The meal delivery service should not

negate the fact that Aunt Clara was the primary caregiver.

If Aunt Clara does not receive her bequest, it will go to Save All Black Cats. If the bequest to Aunt Clara fails, the funds will go back into the estate and be distributed in accordance with the remaining provisions of the will. In this situation, "all remaining funds" are to be given to Save All Black Cats.

3: A testator may bequeath property to a charitable organization. As long as Save All Black Cats is a valid charitable organization, it is a proper beneficiary. Save All Black Cats would argue that the bequest to Larry should fail since it was really a bequest to a pet, rather than to a valid devisee. The charity would argue that Aunt Clara's actions did not rise to the level of "primary caregiver" and therefore the gift to Aunt Clara should fail. Since both of these gifts are designated as cash gifts, if the gift fails, the money goes back into the estate and becomes "remaining monetary funds" that go to Save All Black Cats. Against Tabitha, the charity would argue that all of the remaining property of the estate was monetary funds (including cash, investments, bonds, certificates of deposit and life insurance proceeds, since the estate was the named beneficiary), and therefore go to Save All Black Cats, leaving no non-monetary assets to go to Tabitha.

4: First, Tabitha will have the right to claim a year's support, as she was Samantha's minor child at the time of Samantha's death. She has 3 years from the date of death to make this claim. The fact that she is now 17 will therefore not preclude her from claiming a year's support. Arguing against her claim for a year's support is the fact that she does not appear to have been actually receiving support from her mother for some unknown time before her mother's death.

Second, Tabitha may argue that the bequest to Save All Black Cats exceeds the statutory limit on charitable contributions under the Will. In this situation, Samantha may not give more than one-third (I think) of the first $200,000 of her estate to a charity. However, the statutory restriction will not apply to amounts over $200,000.

Third, Tabitha should argue that the investments, bonds and certificates of deposit were monetary funds, such that they would be distributed to Save All the Black Cats under the Will. I do not believe that she will have this argument for the cash and the proceeds of the life insurance policy.

In this situation, it appears that Tabitha would be best served to find a way to invalidate the Will, in which case she would take the entire estate as the only heir. She could attempt this by arguing that her mother did not have the capacity needed to make a Will. However, the facts are insufficient to determine whether this argument will have any merit.

Question 3 - Sample Answer #1

1. Elder will be able to stop the logging of the trees on an emergency basis using a Temporary Restraining Order (TRO).

A TRO must be requested by a person to the superior court. A TRO can be issued by a judge of the Superior Court on an ex parte (one party only) or adversarial (two or more parties) basis.

However, a TRO is an equitable remedy which is not granted as a matter of right, but is addressed to the sound discretion of the Court. A temporary restraining order may issue when the party requesting the order shows that he/she will suffer 1) an irreparable injury if the order is not issued; 2) that the threatened injury outweighs the potential harm if the order is issued; and 3) that there will be a substantial likelihood of success on the merits.

In this case, Elder will likely be able to obtain a TRO because he has satisfied all three elements above. Specifically, Elder will show that if the TRO is not issued and Bunyan is allowed to go onto the land and sever or clear cut all timber, he will not get the benefit of his bargain under the contract. Specifically, the area is a heavily wooded 50-acre tract of land. Therefore, it is likely that a Court find that Elder has no adequate remedy at law. It is not possible for Elder to spontaneously regrow trees and other foliage on the 50-acre tract of land spontaneously. It will take years, perhaps even a lifetime to regrow trees on the land, due to the nature of tree growth rate.

Further, Elder will have no trouble showing that the threated injury outweighs the potential harm if the order is issued. The threatened injury is that Elder will get land which he is under contract to buy and which includes all standing timber without any timber on the land at all. On the other hand, the potential harm if the TRO is issued is that Crook will not be able to sever trees from the property for at least thirty (30) days, the time frame which a TRO generally lasts.

Finally, there is substantial likelihood of success on the merits because it appears that the contract was validly executed. If indeed it was validly executed, then Elder will likely win on the merits of his claim for injunctive relief to stop Bunyan from cutting the trees and specifically enforcing the terms on the land contract.

Note that if the TRO is issued ex parte, Crook would have 5 days from the date of its issuance to object to the TRO.

In light of the circumstances, Elder will likely be granted a TRO.

2. Elder will seek both a Preliminary Injunction and will file a Lis Pendens on the Property.

A preliminary injunction is similar to a TRO and has the same elements, however, it maintains the status quo of the parties from the time the complaint or petition is filed (and a hearing on the injunction can be maintained), until the time of final judgment. It is always adversarial.

A lis pendens is filed with a complaint or thereafter and would establish a cloud on the title, alerting others that the property is subject to litigation. A lis pendens is filed with the Clerk of the Superior Court and must set forth an address and description of the property, the names of the parties, and the nature of the dispute. Generally, a bond must also be executed by the party seeking the lis pendens prior to its issuance in an amount set by the Clerk of the Superior Court. A properly filed lis pendens puts all other potential buyers on constructive notice (record notice) that the property is subject to litigation, and thus no subsequent buyer is a bona fide purchaser.

3. Elder will be able to force Crook to honor the Sales Contract through an action for Specific Performance of the Contract.

Specific performance, like injunctive relief and TRO's, in an equitable remedy which is available to a party at the sound discretion of the Court. Specific Performance as a remedy to a contract requires a showing that 1) a valid contract exists; 2) all conditions have been performed; 3) no adequate remedy at law exists; 4) the decree is enforceable; 5) mutual of remedies exists; and 6) no valid defenses.

Here, Elder will show that he has a validly executed contract for the sale of the 50-acre tract in North Georgia. He will show that the purchase price is listed, the parties to the contract, a description of the property, and that the contract was signed by both parties. Next he will show that all conditions have been performed whereupon he has paid the $50,000 in earnest money as required by the contract, and that he stands ready, willing and able to purchase the property. Next, Elder will show that the piece of land he seeks to purchase is unique in that it is a 50-acre tract in North Georgia on a mountain and overlooking a stream and valley. Because land is considered unique, the court would likely find that Elder has no adequate remedy at law (i.e., no award of money damages at law will put him in the position he would have been in had the contract been performed). However, Crook will argue that rescission is the proper remedy, seeking to put the parties in their pre-contract positions.

Next, Elder will show that the decree is enforceable, again, because he stands ready, willing and able to close on the property on the date of closing. Elder will also show that mutuality of remedy exists because Crook could likewise seek specific performance of the contract if Elder himself were in breach. Further, under the doctrine of equitable conversion, once a contract for sale of land is executed, the purchaser is the equitable owner of the land, and the seller is the equitable owner of the purchase price in the contract. Finally, there appear to be no valid defenses in this case. However, Crook may put for evidence that Elder has "unclean hands" (wrongdoing of the party seeking specific performance) or should be precluded from specific performance because of laches (unreasonable delay and prejudice to the other party). However, the facts appear to state no basis for such defense in equity.

Due to the facts, Elder will likely prevail in Specific Performance.

Question 3 - Sample Answer #2

1. To stop the logging of the trees while Crook is in Europe, Elder may seek to obtain a temporary restraining order (TRO). Elder would have to file a petition in Superior Court since in Georgia it has jurisdiction over cases requesting an equitable remedy. Venue would be proper in the county in which the land is located. A TRO is essentially a court order that prohibits a party from performing a certain act. Here, the TRO must be served upon Bunyan since he is the person to be enjoined. As with all equitable remedies, a TRO is discretionary. However, the court will not exercise its discretion to issue the TRO unless Elder can show that a failure to do so would cause irreparable harm, that he is likely to win on the merits, and that any burden on the person so enjoined does not exceed the immediacy of the emergency. The facts state that Bunyan is acting at the request of Crook, so Crook has given him agency. Elder must also post a bond with the court in the event that

he does not ultimately prevail. Bunyan may base his request for a TRO on the fact that he has a contract executed between himself and Crook with an "adequate description" of the property, and that the facts indicate that his interest in the land includes all standing timber. Therefore, it is likely that he will succeed on the merits of his claim. If the contract includes timber and Crook supposedly hired Bunyan to cut the timber before closing, it is likely that this amounts to breach of contract. Bunyan will have a strong argument that the harm is irreparable because cutting down trees is an irreversible process. At a minimum, new trees can be planted in place of harvested trees, but they will take years to grow to the height of the trees harvested. Lastly, Elder can argue that the burden imposed on Crook is not heavy since, at most, he would only be delayed in harvesting the trees in the case that he ultimately prevails. A TRO is effective for 10 days but may be extended. It will be important to serve the TRO on Bunyan since a person without knowledge of a TRO may not be held in contempt under the Due Process Clause of the Constitution. In addition, Elder may seek to obtain a TRO in regard to Crook's real estate agent if he, as an agent for Crook, exercises any authority of Bunyan (if this is the case, Bunyan would be a sub-agent). Since Crook is in Europe when the TRO would be requested, the proceeding would be ex parte. Elder will be under a duty to disclose to the court all information beneficial to Crook. However, Bunyan would not be able to show a likelihood of succeeding on the merits if the contract for sale of the land did not satisfy the statute of frauds (discussed in 3 below).

2. After Crook returns, Elder may seek a preliminary injunction to prevent Crook (or his agents) from cutting down the trees on the property. A preliminary injunction is similar to a TRO except that it has a longer duration, usually until the underlying dispute is resolved (here, whether Crook has the right to harvest the trees). To obtain a preliminary injunction a party must petition the Superior Court (as discussed in 1. above). The court will have discretion to grant the request if Elder can show that he has a reasonable likelihood of succeeding on the merits, he would suffer substantial harm, and that issuing the injunction would be equitable considering the burdens imposed on Crook and the possible harm that Elder could potentially face. However, if the statute of frauds renders the contract unenforceable then the court will not conclude that Elder is likely to succeed on the merits of his breach of contract action (discussed in 3. below).

3. Sales Contract

Elder may seek the equitable remedy of specific performance to force Crook to honor the sales contract. Specific performance can be sought when a valid contract exists, it is feasible for the court to remedy the situation, there is no adequate remedy at law, and there are not defenses.

Here, a valid contract likely exists. A contract for the sale of an interest in land is subject to the statute of frauds, which requires: (1) writing; (2) signature of the party to be bound; (3) adequate description of the land; (4) description of the parties; and (5) purchase price.

Here, we are told that the "contract states" so the writing requirement is met. Also, we are told that the contract contains an adequate description of the property. However, we are not told whether Elder signed the contract, and if so, whether the contract also included a purchase price and identification of the parties. It is likely safe to assume that the parties are identified because the facts state that the contract is between Elder and Crook. However, a purchase price must be included as well. If these requirements were not met then the statute of frauds was not satisfied. As

a result, the agreement between Elder and Crook would not be enforceable. There is an exception to the statute of frauds in Georgia if the purchaser of land has paid part of the purchase price and is in possession of the property. Here, we are told that Elder has paid part of the purchase price - $50,000, but we are not told whether he is in possession of the property yet.

Assuming that the statute of frauds is satisfied and/or the above exception applies, the additional elements of specific performance must be proved. The inability to obtain an adequate remedy at law exists in a real estate transaction because real property is considered "unique." As a result, money damages at law would be insufficient to compensate. Elder could argue that granting specific performance would be feasible for the court since the land is located in Georgia (the court clearly has jurisdiction over it) and Crook is a land developer in Georgia as well. It is unlikely that their defenses. . .

Question 3 - Sample Answer #3

1. To Stop Logging on an Emergency Basis -

To immediately stop logging on the property described in the sales contract, Elder may seek equitable relief in the form of a Temporary Restraining Order (TRO). To be successful in obtaining equitable relief, a party must first show that no legal remedy exists and equitable relief is feasible. Legal remedies consist of monetary relief.

Here, monetary relief (legal remedy) would be insufficient to address the potential injury to Elder. Elder specifically sought out this piece of land with its heavily wooded appearance. Simply providing compensation for the trees would not sufficiently address the damages arising from this particular tract of land, chosen based upon its specific physical characteristics. The monetary value alone would be both difficult to calculate and insufficient to redress the potential injuries. Further, equitable relief appears to be the most feasible way to avoid this loss. Accordingly, an equitable remedy would be proper.

All 3 requests for equitable relief should be filed in the Superior Court of the Georgia county in which the land is located. Superior courts in Georgia have exclusive jurisdiction over cases involving equitable relief.

To immediately stop the logging, Elder should request a TRO. TRO's are forms of equitable relief designed to prevent the occurrence of some imminent action or harm. To be successful, Elder will need to provide a specific description of the imminent irreparable harm that will occur if Crook's cutting is allowed to take place. With a TRO, no prior notice to the other party or hearing is required based on the immediate, urgent nature of the request. Further, if granted, the TRO will enjoin the cutting of the trees temporarily by Crook or Crook's agents. Following the issuance of a TRO to prevent logging, Elder will have to seek an injunction to permanently prevent the logging. Along with the request for the TRO, Elder will have to establish that he will likely win on the merits of the future injunction.

2. To Stop Logging After Crook's Return -

To stop the logging after Crook's return from Europe, Elder must seek a permanent injunction. Again, this would meet the requirements for equitable relief as set forth in section 1 above and be enforceable against Crook.

The permanent injunction will have to be filed in the Superior Court as well, for the same reasons as required for the TRO.

The permanent injunction will require both prior notice to Crook and a hearing with all parties present. At the hearing the court will hear argument from both sides and may choose to permanently enjoin Crook and his agents from removing the trees. In deciding the injunction, the court will consider the burden of enforcement on the court.

3. To Force Crook to Honor the Sales Contract -

Crook and Elder appear to have entered into a valid contract for the sale of land, subject to common law contract rules and in a writing compliant with the Statute of Frauds. To compel Crook to honor the contract, Elder must seek the equitable remedy of specific performance.

As with the TRO and the permanent injunction, the equitable action for specific performance would be filed in the Superior Court of the county where the land is located. The Superior court would have exclusive jurisdiction over the equitable remedy sought.

Specific performance of a contract is generally granted only when the contract is for the sale of some unique or original item, the loss of which cannot be compensated by the legal remedy of monetary damages. Courts have held individual tracts of land to be unique, each different from the other, and thus worthy of specific performance.

Given the unique nature of the land involved, Elder would be able to request specific performance of the contract by Crook. This would likely be the most appropriate remedy and a court would likely grant specific performance of the contract in favor of Elder.

With respect to the TRO and the injunction, these forms of relief would be enforceable against Crook and all agents and employees of Crook (likely to include Bunyan as he was going to act on behalf of Crook). Specific performance of the contract can only be granted against Crook, as the other party to the contract.

Question 4 - Sample Answer #1

1) Jones' motion to dismiss for lack of personal jurisdiction in Fulton County should be denied. Georgia courts have personal jurisdiction over a person through presence in the jurisdiction or over non-residents of the state through the Georgia long arm statute. Here, Jones is a resident of Florida. The Georgia long arm statute only provides for specific jurisdiction; it does not allow general jurisdiction over non-residents. The long arm statute allows jurisdiction over non-residents

under three sections: 1) the defendant transacts any business within the state of Georgia; 2) the defendant committed a tort from within the state of Georgia; 3) the defendant committed a tort of which the injury occurred in Georgia; 4) the defendant has property which is the subject of the cause of action in Georgia; and 5) the domestic relations section. Here, the Fulton County Superior Court has personal jurisdiction under section 1 of the Georgia long arm statute. The Georgia courts have broadly interpreted the meaning of "transacts any business" in the state. Here, Jones is transacting business in the state by setting up a private school in Fulton County. Setting up a private school means buying or leasing the land, accepting tuition from local students/families, complying with local education laws, contracting locally for employees, teachers, and other services for the school.

However, just because Jones transacts business in the state of Georgia, does not mean that the long arm statute will confer general jurisdiction over Jones; it will only allow for specific jurisdiction, and the Georgia courts use a tripartite test to determine whether the long arm statute will allow for specific jurisdiction. The courts will consider 1) whether the defendant purposefully availed himself upon the state through his activities; 2) whether the cause of action arises out of the contacts; and 3) whether the due process notions of fairness and substantial justice will allow the court to exercise jurisdiction. Here, Jones clearly availed himself with his activities upon the state of Georgia. He is setting up a private school and conducting many activities upon the state of Georgia, and he would expect the courts of Georgia to protect him in a cause of action should he sue in Georgia. Secondly, the cause of action that is the subject matter here does arise out of those activities - specifically setting up a private school in Fulton County. The furniture and computers that are the subject of the contract ship to Fulton County, and Jones has traveled to Atlanta specifically for the delivery and installation of the computers. Lastly, the notions of fairness and justice would allow the Fulton County court jurisdiction over Jones. There should be no surprise to Jones that he might be subject to jurisdiction in a Georgia court given his level of activities and availment with the state, and as already mentioned, he would expect the Georgia courts to serve him justice if he was to sue in the Georgia courts against a Georgia resident.

If Jones wishes to continue to protest personal jurisdiction, he can refuse to show, and allow a default judgment to be entered against him. At that point, Acme, in order to seek relief from Jones, would have to either attach the judgment to any property Jones might have in Georgia or go to Florida and have the judgment entered against Jones there under the full faith and credit clause.

2) Jones' motion to dismiss for lack of venue should be dismissed. Georgia statute provides that venue is proper in the county where the defendant resides or where substantially the activities giving rise to the cause of action arose. Here, the defendant is a non-resident, but the activities giving rise to the cause of action were in Fulton County, and Fulton County would be the proper venue.

Jones may properly remove to the Federal District Court of Georgia (Northern District) if filed within 30 days of the complaint being filed and if the amount in controversy exceeds $75,000.

Jones may also have an argument for forum non conveniens. Under forum non conveniens the court will consider whether there is a more proper venue where the case should be heard based on public and private factors. Some of the public factors include the cost of litigation to the local

taxpayers, the time and burden on the court. It will also consider private factors such as the location of witnesses, the location of the parties and travel, or the location of evidence. Under Georgia statute, Georgia courts can transfer to other Georgia courts under the doctrine of forum non conveniens. If the more convenient forum is a federal court or the court of another state, the Georgia court can then only dismiss the action, allowing the parties to bring the action in the more proper venue.

Question 4 - Sample Answer #2

1) Jones' motion to dismiss for lack of personal jurisdiction should be denied. At issue is whether based on Jones' activity in Georgia, the traditional notions of fairness would be upset if Jones were subject to answer a suit in Georgia. To have personal jurisdiction over an individual, there must be both (1) statutory and (2) constitutional grounds. Jones is being sued in his individual capacity as Chris Jones. As the facts indicate, Jones is a resident of Florida and therefore, would only be subject to personal jurisdiction (with some exceptions) in Georgia if he consented or falls under the long arm statute. The facts do not indicate that Jones consented, therefore to establish the statute requirement of personal jurisdiction, we must look to the GA long arm statute. The long arm statute, in part, provides that an individual can be subject to personal jurisdiction in Georgia if he transacts business in the state. Here, Jones formed a private school in Fulton County, Georgia. He took steps to further this "business" by ordering equipment to make a state of the art computer lab at the school. Although it is arguable whether a private school should be considered a business and it is not known from the facts whether Jones was authorized to conduct this business, it is likely that these facts would lead to a conclusion that he transacted business in the state and therefore falls under the GA long arm statute. However, the statute is not enough. There must be "minimum contacts" in the state related to Jones' "business" activity in order to deny his motion for dismissal for lack of personal jurisdiction ("PJ"). The minimum contacts falls under the constitutional requirement of the PJ test. There are many factors to establish minimum contacts, including fairness & reasonableness & purposeful availment. The facts indicate that Jones voluntarily & purposefully availed himself of jurisdiction in Georgia. By establishing a private school here, he cannot argue that it is unforeseeable, unreasonable, or unfair that he became subject to the jurisdiction of Georgia. For these reasons, Jones' motion to dismiss for lack of PJ should be denied.

2) Defendant Jones' motion to dismiss for lack of venue should also be denied. At issue is whether Jones' entering into the contract and conducting activity in Atlanta, GA was sufficient to establish venue in Fulton County. As a general rule in Georgia, venue will lay where the defendant resides. However, this rule applies to GA residents. For non residents, there are multiple variations of the law to establish venue. The applicable law to this matter states that venue may lay where the defendant entered the contract if there is a substantial amount of business transacted in that county by the defendant. Here, the contract was arguably entered into in Atlanta, GA. The facts aren't clear, but the facts state that after months of phone calls and written correspondence, Jones and Adams agreed to delivery of the equipment in Atlanta, GA. If this indicates that the contract was entered into in Atlanta, then venue is proper because a substantial part of Jones' business is

conducted in Atlanta. The school, which is his sole "business" in the state of GA, is located in Atlanta (which is located in Fulton County). Therefore venue is proper in Fulton County. Nevertheless, if the facts indicate that the contract was not entered into in Atlanta, but was rather entered into in Columbus, Jones may have a valid claim that venue is not proper.

Nevertheless, even if this court should find that venue is proper, the court should probably dismiss the case, without prejudice, under the doctrine of forum non conveniens ("FNC"). Under the doctrine of FNC, a judge may dismiss a case if another venue would be proper and more convenient. Here, although the equipment was delivered in Atlanta, GA (and the contract was possibly entered there as well) many of the activities surrounding the transaction took place in Columbus, SC. The plaintiff is in South Carolina, many of the witnesses would likely be located there and the evidence regarding the transaction would likely be there as well. As a result, venue in Columbus would likely be more convenient to the parties and if dismissing without prejudice would not substantially harm Jones or Acme, the court could decide to do so under the doctrine of ("FNC").

Question 4 - Sample Answer #3

1: Judge should deny Jones' motion to dismiss for lack of personal jurisdiction. Issue is whether Jones had sufficient minimum contacts with the state. For personal jurisdiction, you must satisfy both statutory and constitutional requirements. Under statutory, there must be a statute that causes personal jurisdiction. The statute that Jones would fall under in Georgia is the Long Arm Statute for nonresident. Defendant can be reached by transacting business in Georgia; committed a tort in Georgia; using, owning and possession of realty in Georgia or being part of an action for alimony, child support, etc. Jones was transacting business in Georgia. One transacts business in Georgia by having an office, signing, negotiating or performing a contract in Georgia, or places good into the stream of commerce for resale in Georgia. Jones performed a contract with Georgia making him reachable under the Long Arm Statute. He traveled to Atlanta for delivery of the computers and accepted the computers completing the contract. Therefore, he meets the statutory requirement.

Personal Jurisdiction also has a constitutional requirement. Issue here is whether Jones had sufficient minimum contacts with the forum state. Constitutional requirement states that there must be sufficient minimum contact between defendant and forum state that does not offend traditional notions of fair play and substantial justice. There also must be notice to defendant.

Here there is sufficient minimum contacts between Jones and the state of Georgia. Must look to see if Jones purposefully availed himself. Jones planned to create a private school in Fulton County, Georgia. He met with Acme in Georgia to fulfill the contract regarding this school. Since the equipment was going to be used at the school in Georgia, Jones should have expected to be hauled into Georgia courts if there was a breach of contract. He allowed himself to also be privileged to receive the benefits of the state of Georgia and ran his business for profit there. There is purposeful availment and fair justice. Jones received notice as he filed an answer to the suit and did not challenge service of process.

Therefore, Jones meets both statutory and constitutional requirements for personal jurisdiction and his motion should be denied.

2: Jones motion to dismiss for lack of venue should also be denied. Issue is whether Fulton County constitutes proper venue. Venue is proper where defendant resides or where a substantial part of act occurred. For contracts venue under the Long Arm Statute is where substantial part of the contract took place. Here the delivery of the computer and acceptance which consists the main part took place in Fulton County, Georgia. Therefore, Fulton County, Georgia is proper venue.

MPT 1 - Sample Answer #1

Motion to disqualify:

On its motion seeking the disqualification of the Amberg firm, the Collins Law Firm asserts that the document inadvertently or unauthorizedly disclosed was attorney-client privileged material, that Amberg violated an ethical obligation by not notifying Collins of the receipt of the letter, by examining the letter and by not abiding by Collin's instructions and that, therefore, Amberg's disqualification is the only appropriate remedy.

I. Phoenix's Document is Protected by the Attorney-Client Privilege

The document the Amberg Firm received was a letter from Phoenix's then president to the company's attorney, Horvitz, seeking legal advice. This clearly falls within the meaning of an attorney-client privileged document. Furthermore, Ms. Ravel herself has admitted that the letter is attorney-client privileged material and that she recognized it was on its face.

II. Merits of Collin's Assertion that Amberg has Violated an Ethical Obligation

While the Collins Firm contends that the document falls under FRPC 4.4 because they mistakenly believe the letter was inadvertently sent, the letter, as an unauthorized disclosure is not under the purview of 4.4 nor any other Rule of Professional Conduct. 4.4 Comer Nevertheless, the Supreme Court of Franklin has addressed the issue of unauthorized disclosures in Mead vs. Conley Machinery. The Court in Mead held that in cases of unauthorized disclosure, the receiving attorney should review the document only to the extent necessary to determine how to proceed, notify the opposing attorney, and either abide by the opposing attorney's instructions or refrain from using the document until a court disposed of the matter. Mead Most importantly for the Amberg Firm, however, is the fact that the Franklin Supreme Court has declined to adopt a rule imposing any ethical obligation in cases of unauthorized disclosure.

Here, the Amberg Law Firm received an unauthorized document, presumably from a disgruntled employee, that turned out to be a smoking gun. Under Mead, Ms. Ravel as the receiving attorney had an obligation to notify the opposing attorney as soon as she determined that the document was privileged. Ms. Ravel received the letter on February 2, 2009, and opposing counsel found out of the disclosure that same day although not through her notification. Furthermore, she may have

also violated the Mead standard by not returning the letter as directed by the Collins Law Firm. The standard in Mead reads "either follow adversary attorney's instructions" or "refrain from using the material until a definite resolution" by the court. Here, it does not seem from Ms. Ravel's statements that Amberg sought any direction from the court as to how to proceed regarding the letter. There is, however, some evidence that Amberg lawyers were already discussing ways to integrate the letter at trial before the Collins Firm found out.

While the court might find that Amberg violated the Mead standard, it does not amount to the violation of an ethical obligation since the court has not chosen to impose any ethical obligation in cases of unauthorized disclosure such as the current case.

III. Disqualification of Amberg & Lewis because of Incurable Prejudice

Opposing counsel has correctly asserted that a trial court may, in the exercise of its inherent powers, disqualify an attorney in the interest of justice. Indigo. The court in Mead established six different considerations in determining whether disqualification of an attorney should be considered and it specifically found that violation of the Mead standard discussed in section II above, amounted only to one of the facts and circumstances. The court in Mead balanced through the six factors whether the party whose attorney might be disqualified at the time the disqualification was sought would suffer serious hardship and whether not disqualifying the attorney would create an incurable injustice. As applied, the following factors will be weighed.

1. Amberg, through Ms. Ravel, has admitted she had actual knowledge of the letter's attorney-client privileged status.

2. Amberg failed to notify opposing party promptly - and there is no evidence that they had any plans to notify at all.

3. Amberg recognized the letter as a smoking gun indicating they reviewed the document extensively.

4. The contents of the material (the letter) are significant because they amount to an admission by the opposing party that goes to the heart of the case.

5. It is unclear to what extent the Collins Law Firm is at fault for the unauthorized disclosure. While its speculation that the letter was sent by a disgruntled employee, an argument could be made that if disgruntled employees were likely to have access to such privileged materials there should have been better safeguards to prevent unauthorized disclosures.

6. Perhaps the most important factor for Amberg to address in the determination of disqualification, Biogenesi's would be enormously prejudiced from the disqualification of its attorney. The case is one month away from trial and no other attorney is going to have the time or ability to familiarize him/herself with 6 years of ongoing litigation.

While in Mead the documents in question didn't amount to much useful information & the letter here is a smoking gun, the court may still be able to mitigate any injury to the plaintiff in not disqualifying Amberg by excluding the document and the use of its contents from evidence. As the

court in Mead stated, "in these circumstances disqualification may confer an enormous, and unmerited, strategic advantage to [Phoenix]."

MPT II - Sample Answer #1

2) Ronald v. Department of Motor Vehicles

QUESTIONS PRESENTED:

Did the police officer have reasonable suspicion to stop Ronald?

I. Can the ALJ rely solely on the blood test report to find that Ronald was driving with a prohibited blood-alcohol concentration?

II. Has the DMV met its burden of proving, by a preponderance of the evidence, that Ronald was driving with a prohibited blood-alcohol level?

ARGUMENT

The Officer Did Not Have a Reasonable Suspicion to Stop

The officer did not have a reasonable suspicion (RS) to stop Ronald. RS is necessary under the 4th Amendment for a investigative traffic stop. The Franklin Court of Appeals (CoA) has held that reasonable suspicion for such a stop must be based on the totality of the circumstances known to officer, and that merely weaving within a single lane alone does not give rise to RS. Pratt In Pratt, the DMV argued for a bright line rule that weaving within a single lane is enough for RS, which was roundly rejected by the CoA. In Pratt, the CoA found that weaving within a lane was one factor to consider when assessing the totality of the circumstances for RS. The CoA found, in that case, that the weaving was not a slight deviation, and that Pratt drifted from one side to another, and was viewed canted in the parking lane (noting the designated traffic lane) before the officer began pursuit. The officer in that case also viewed Pratt's weaving "several" of "a few" times over several feet. The officer also noted that the time, 9:30 pm, does lend further credence to the officer's suspicion, due to the hour. Nevertheless, the CoA indicated that it was the totality of these circumstances, and not one circumstance in isolation that led to RS.

In the case at hand, the officer did not have RS based upon the totality of circumstances when compared to the circumstances in Pratt, and thus did not have RS for the stop. First, the officer noted that Ronald was weaving back and forth in her lane, and never crossed into another traffic lane, or the parking lane. Also, the officer had no evidence of speeding. Furthermore, when the officer noticed the weaving, he was following her closely with high beams pointed into her car. There was no indication that Ronald was weaving multiple times over a distance, or that she was doing anything suspicious before he started pursuing her closely with high beams. While the time of night, 1 am, would lead to some greater suspicion, that viewed in conjunction with the officer's actions in following Ronald closely does not lead to RS. Thus, when viewed in totality, the circumstances viewed by the officer are not nearly as severe as those in Pratt, and thus there was

no RS for the stop.

The ALJ Cannot Rely Solely on the Report

The ALJ cannot rely solely on the blood report because the report is hearsay that would not be admissible in a judicial proceeding under an exception to the hearsay rule under the Code. The Franklin Admin. Proc. Act provides that hearsay evidence is admissible in an admin. hearing, and if the hearsay would be admissible in a judicial proceeding under an exception, it would be sufficient to support a finding. If it would not be admissible under an exception, it may only be used to supplement or explain other evidence. Here, the blood test report is clearly hearsay evidence; it is an out of court statement offered to prove the truth of the matter asserted. The only exception to the hearsay rule that might save this report is the public records exception which provides that a report is admissible even through hearsay if it was made by and within the scope of duty of a public employee, the writing was made at or near the time of the act, and the sources of information indicated its trustworthiness. The exception fails on the first and second requirements because the report was not made at or near the time of the act, and it is unclear whether the report was prepared by the proper employee under the law. The report itself indicates that the test was run on December 21 and the report was not made until over a week later on December 29. While this is not quite as long as the month that kept out similar evidence in Schwartz, this certainly is too long to satisfy public records exception. Also, the law requires a blood test be done by a forensic alcohol analyst (121). Here the report is signed by a senior lab technician, not the part required, and is thus unreliable. Thus, the ALJ cannot rely solely on the blood test report, and under Rodriguez should rely on it at all.

The DMV Had Not Met its Burden

The DMV has not met its burden, by a preponderance of the evidence, that Ronald was driving with a prohibited blood-alcohol level. The blood test is not conclusive, and also should not be considered, because under Rodriguez, the CoA refused to allow the DMV to rescue a report where testing was done by an unqualified person, as we have here. Thus, without the report, and when all the evidence is considered, the DMV has failed to meet its burden. In Schwartz, a supplemental blood test along with erratic and dangerous driving, bloodshot eyes, a strong odor of alcohol, unsteady gait, slurred speech, and poor field tests were enough for a preponderance. The evidence is not nearly as strong here. First, the report cannot be used. Also, she was not driving dangerously and only weaved when followed closely by the officer. The officer did not recall smelling alcohol on her breath, and although her eyes appeared bloodshot, she was coming off an 18 hour shift and had just been blinded by high beams. Ronald did admit to having two glasses of wine with a meal, which is not conclusive. Furthermore, all of the evidence regarding her unsteady gait and poor tests are a result of the fact that the test was performed on the side of a busy highway with trucks speeding by, and that the officer did not instruct her to remove her high heels. Because the blood report lacks foundation and the remainder of the evidence is not nearly as strong as Schwartz, the DMV has not met its burden.

MPT II - Sample Answer #2

A. Based on the totality of the circumstances test, Officer Thomson ("Officer") lacked reasonable suspicion to stop Ms. Ronald ("Ronald")

Officer Thompson's traffic stop of Ronald violated her constitutional right because Officer did not have a reasonable suspicion to make the stop. While an officer does not have to probable cause, a traffic stop must be based "on more than an officer's 'inchoate and unparticularized suspicion or hunch." Pratt (citing Terry), Officer "must be able to point to specific and articulable facts which, taken with rational inferences from those facts, reasonably warrant the stop." Id. Franklin does not recognize a bright line rule to determine a reasonable suspicion, rather the determination is "based on the totality of the circumstances." Id.

In this case, there was no reasonable suspicion to make the stop. There is no evidence that Ronald was speeding at the time she was stopped. Her rate of speed was not mentioned in the police report, and Officer testified that he would have wrote in his report if she had in fact been speeding. Officer based his decision for the traffic stop on the fact that she was weaving in her lane and that it was around 1:00 a.m., the time that the bars typically close in Franklin. However, this alone will not provide Officer with enough suspicion to pull Ronald over. As stated in Pratt, weaving within someone's lane will not in itself be sufficient to "give rise to a reasonable suspicion." Id. Officer never stated, either at the hearing or in the police report, how often Ronald was weaving in and out of her lane. All that is known is that over the nearly 1.5 miles in which Officer tailed Ronald, Ronald allegedly weaved in her lane, which is something an innocent driver could do. Based on the totality of the circumstances, there is not enough accumulation of facts that would be sufficient to "give rise to a reasonable suspicion." Id.

B. Since the DMV cannot establish the business record exception to the hearsay rule, the court cannot rely solely on the blood test to find that Ronald was driving under the influence.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at a judicial proceeding, offered in evidence to prove the trust of the matter asserted." Section 1278. An exception is made for business records, which would require the DMV to establish the following in order to get the blood test into evidence:

(1) The test was performed within the scope of employment of the public employee; (2) the results were recorded close in time to the performance of the analysis, and (3) the analysis and results were generally trustworthy." Rodriguez (citing Section 1280). If the court determines that the business record exception was satisfied, the report will be conclusive; however, if such exception cannot be satisfied, the blood test is admissible, but the DMV would have to provide additional evidence. See Schwartz. The report would be applicable "for the purpose of supplementing or explaining other evidence." Id.

The DMV has not been able to establish the elements to the business record exception. Thus, the court cannot rely solely on the blood test to find in favor for the DMV. The business record exception is not satisfied, even though the report may have been signed by Daniel Gans, a forensic alcohol analyst. The report shows that Charlotte Swain, a senior laboratory technician, signed the

document for Mr. Gans. As such, there certainly is more than enough doubt as to whether the DMV was in strict compliance with Section 121, which specifically states that only "forensic alcohol analysts" may perform the analysis. See section 121; Rodriguez. Additionally, similar to the facts in Schwartz, the results were not recorded close enough in time to the performance of the analysis. In Schwartz, the court noted that the report was not made until over a month after the arrest and the blood drawn. In this case, the arrest occurred on December 19, 2008; however, the report was not recorded until December 29, 2008, nearly two weeks later. This length of time directly goes to the trustworthiness of the report. Due to the uncertainty as to who actually performed the test and the length of time in between the recording of the analysis and the actual test, the DMV is unable to establish the business record exception.

C. Based on all of the evidence, the DMV will not be able to prove by the preponderance of the evidence that Ronald was driving with a prohibited blood-alcohol concentration.

According to Section 353(b), the DMV has the burden to establish by a preponderance of the evidence that Ronald was driving when having a .08 blood alcohol level. The DMV will be unable to meet its burden. As stated above, the blood report may not be used to conclusively show that Ronald was in fact impaired; however, the report could be used "for the purpose of supplementing or explaining other evidence." Schwartz. As such, even though the report may note that Ronald was over the limit, Officer's improper actions will prevent the DMV from establishing its burden. As noted by Ronald, Officer was tailgating Ronald as she drove, and was driving with his high beams on. Both of these elements could certainly cause Ronald to weave, and make her appear impaired. Additionally, Officer noted that her eyes appeared blood shot, and that she failed her field sobriety test. However, Ronald had worked an eighteen hour shift, which would result in blood shot eyes. Finally, Ronald was attempting to take the test while wearing high heels, and along a busy highway. These conditions would certainly create an environment which could lead to Ronald appearing intoxicated when she actually was not. In light of the evidence and Officer's improper actions, the DMV will not be able to meet its burden.

MPT II - Sample Answer #3

MEMORANDUM

To: Marvin Anders

From: Applicant

Date: February 24, 2009

Subject: Ronald v. Department of Motor Vehicles

I. The police officer did not have reasonable suspicion to Ms. Ronald because her slight weaving did not constitute enough proof in isolation to justify the traffic stop.

Pratt establishes that in reviewing a traffic stop, the court will use a totality of the circumstances standard. In regard to Ms. Ronald's weaving, the court in Pratt found that the plaintiff was not slightly deviating within his own lane, he majorly deviated several times from center line to outside line and not in the traffic lane. Furthermore, the court recognized late-night as "bar time" and a possible inference of greater likelihood of drunk driving. Police officer used specific and articulable acts coupled with rational inferences to justify reasonable suspicion. The DMV would argue that it is sufficient that her weaving around bar time, coupled with her bloodshot eyes and distracted demeanor provide articulable facts to support reasonable suspicion. Here, Officer Thompson observed her weaving back and forth within her own lane while following her very closely with his high beams on (which would distract any driver). She was not speeding, nor violating any other traffic regulations, or even crossing into any other lanes. While it was "bar time," meaning the time that bars close and there is a higher likelihood of people driving drunk, it is just another factor when there are many people who are simply driving home from work, as Ms. Ronald was. These two facts alone do not constitute sufficient facts to garner reasonable suspicion, especially when the other cases involving stops involve more extreme conduct such as running stop signs and straddling lanes at high speeds. The DMV did not fulfill this totality of the circumstances standard.

The administrative law judge cannot rely solely on the blood test report to find that Ms. Ronald was driving with a prohibited blood-alcohol concentration because the report does not fall under the public records exception and thus may only be used for supplementing or explaining other evidence.

The blood test record does not fulfill all the requirements of the public records hearsay exception. There are three requirements to establish that the blood test report would fall under the public records hearsay exception, including (a) the writing was made by and within the scope of duty of a public employee, (b) the writing was made at or near the time of the act, condition, or event, and (c) the sources of information and method and time of preparation were such as to indicate its trustworthiness. The blood alcohol test results were recorded almost eight days after the testing of Ms. Ronald's blood took place, and is therefore not "made at or near the time of the act." The DMV would likely argue that results in Schwartz that constituted untimely recording was a month after the test, while here it is only 8 days. Regardless, the statute clearly states that the writing must be made "at or near the time" of the test. Eight days is still neither at or near the time of the test. Furthermore, while this finding does not exclude the evidence (since hearsay is still allowed in administrative hearings), it now may only be used for the purpose of supplementing or explaining other evidence. Therefore, Officer Thompson's police report and testimony would need to constitute the primary evidence upon which the blood test record could supplement in order for the DMV to meet its preponderance of the evidence standard.

The DMV has not met its burden because Officer Thompson's vague police report and testimony coupled with the blood test report that lacks proper foundation does not fulfill the preponderance of the evidence standard required.

As established in the previous section, because the blood test record does not fall under the public

records hearsay exception from its untimely recording, it may only support additional and more probative evidence to fulfill the "preponderance of the evidence" standard. However, the only other evidence presented is the testimony of Officer Thompson and his vague police report. Rodriguez shows that a police report which contains only cursory proof of the officer's observations would not constitute sufficiently strong evidence. This is especially pertinent because Rodriguez ran a stop sign and then exhibited clear signs of intoxication, two highly suspicious actions. The DMV would likely argue that Officer Thompson's report was not cursory and exhibited specific and articulable facts regarding Ms. Ronald's actions because of the weaving and time of night. Ms. Ronald's slight weaving within her lane coupled with blood shot eyes (which at 1 am would be likely for an intoxicated or sober person) would not rise to nearly a reasonable suspicion. Mr. Rodriguez clearly violated the law by running the stop sign, while Ms. Ronald exhibited far less suspicious acts. Furthermore, after the stop, Officer Thompson testified that he did not smell alcohol on her breath and she did not violate any traffic regulations. Even Schwartz only proved its standard after the driver exhibited "slurred speech, bloodshot eyes, a strong odor of alcohol, and an unsteady gait." Therefore, because the police report and testimony of the officer was void of detail and the blood test lacked proper foundation from its untimely recording, the evidence presented by the DMV does not meet the necessary quantum of evidence. Rodriguez.