July 2000 Bar Examination Sample Answers

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Question 1. - Sample Answer 1.

The First Amendment to the federal constitution protects citizens from a variety of government interferences with their speech, especially on political issues. The Fourteenth Amendment has been interpreted to prohibit state interference with speech protected by the First. Since the Georgia Department of Revenue's Director's actions are challenged, the First Amendment is applicable.

While the state cannot directly prohibit political speech by private actors (Brandenburg), it cannot condition the benefits of a state job on the non-exercise of those private speech rights either (Sherbert v. Vernel). To the extent that the Director's actions penalized Smith for exercising his First Amendment freedoms by denying him the benefit of a state job, the Director has infringed on Smith's protected rights. The critical issue, though, is whether the Director's order infringed on Smith's private (and thus protected) speech or applied only to statements Smith was to make in the course of his duties as a state official. Since the state has inherent authority to control the content of speech made in its behalf by its agents, there is no First Amendment violation when the state forbids certain speech by agents, compels speech by agents, or conditions the benefits of employment on complying with those orders.

Smith was entirely within his rights to explain his concerns in meetings and memoranda to the Director, and was probably obligated to do so in his capacity as Chief of the Lottery Division and responsible for designing games and serving their fair operation. However, his duties as spokesman for the lottery and the responsibility of ensuring public confidence on the lottery as a part of his spokesmen duties also meant that he has an obligation to obey the orders of his master under principles of agency law. Accordingly, the Director can control his speech to the public and to the appointed Board that oversees gaming operations. This speech is thus official speech of the Department and totally subject to the Department's control, so no violation of the First Amendment will lie for any regulation of that speech.

The Director's order is unclear on the facts, and may sweep wider than controlling Smith's official speech on behalf of the Board. To the extent it ordered him to promote the change in his private capacity, including seeking to exploit his private role as a figure of stature in the national gaming industry, the Director's order swept too broadly. Any negative employment action taken against Smith for violation of the order's attempt to regulate private speech then runs afoul of the First Amendment, and a 1983 action for damages lies.

If the order is construed as a reasonable time-place-and-manner restriction on Smith's private

speech that does not unduly infringe on his right to speech in his private capacity, the order can be construed as valid. Reasonable regulations of protected speech do not violate the First Amendment when the government asserts a valid non-contentrelated justification for the restriction and the restriction leaves open to the speaker sufficient channels of private speech. Here, even the order's regulation of certain private speech might be construed as reasonable to the extent that it seeks to avoid Smith's private speech as being regarded as official statements of the Department. For example, the Director could forbid Smith trying to make a "private" statement in a context infused with his official capacity, such as during testimony or other statements to the Board when Smith was called upon as spokesman. Trying to separate the roles there would be difficult, and the Board may regulate his attempted private speech there to avoid confusion as long as it left open other avenues for purely private speech.

The director's actions in terminating Smith, thus, violate his First Amendment rights only to the extent the Director punished Smith for making purely private statements about his own views when made in a purely private capacity.

Defendants cannot assert qualified immunity for their actions if such assertion would work to immunize them from judgment for an otherwise forbidden action. The First Amendment, as supreme law, trumps Georgia's official acts qualified immunity to the extent the First Amendment regulates the official's actions. The official's assertions here appear aimed at invoking their power to control the employees working in high decision-making positions in state government, where the state has plenary authority over employment decisions, or alternatively to seek protection in the "pleasure of the director" terms of Smith's employment. As matters of state law, these assertions are completely valid. However, they cannot protect what the First Amendment itself forbids. Because the First Amendment principles discussed above are narrowly drawn in this context to protect only purely private speech outside the authority of the state to regulate, there will not likely be a conflict between the defendant's immunity to govern public actions and the plaintiff s constitutional claim.

Question 1. - Sample Answer 2.

Smith's refusal to obey the Director's order was not protected by the First Amendment. The issue is whether the First Amendment protects public employees' rights to speak on a matter of public concern.

The First Amendment protects citizens' rights to free speech. These provisions are made applicable to the states by the Fourteenth Amendment which prohibits states from making laws that deny citizens their fundamental rights. The First Amendment right to free speech in a fundamental right. Public employees enjoy First Amendment protections in the workplace. Here, Smith was employed by the Lottery Division of a state department. The State of Georgia cannot restrict Smith's right to speech in the workplace.

However, public employees do not have unlimited rights to speech merely because they are employed by the State. The State is permitted to restrict speech that interferes with its employees' ability to do their jobs. Here, Smith was employed as the "official lottery spokesman." His job was to communicate with the media and the public or behalf of the Lottery Division. Consequently, Smith's speech could interfere with his ability to do his job. Here, it is not clear whether Smith's negative comments did in fact interfere with his ability to do his job as the Gaming revisions were approved. Nonetheless, the Director acted permissibly when he instructed

Smith to refrain from communicating his personal views and instead present the Lottery Division's position.

Public employers cannot restrict their employees from commenting on a matter of public concern. The rationale is that the public has a right to be informed of the functioning of the government. State employees are in the best position to communicate such information. Thus, a public employer violates the First Amendment by restricting speech regarding public concerns. Here, the operation of the lottery is a matter of public concern because it is funded with the

public's dollars and its proceeds are used for public purposes such as public education. A lower level employee in the Lottery Division would be permitted to comment on the lottery given its status as a matter of public concern.

This analysis does not apply to a high ranking official who serves at the pleasure of the Director and the Board. These entities can restrict the speech Smith engages in his official capacity . Here, the Board employed Smith to serve as a liaison between the Lottery Division and the public. He speaks at their direction.

A different case would present if Smith had written a letter to the editor of a newspaper in his personal capacity. The First Amendment would prevent the State from retaliating against Smith for his personal speech.

2. Qualified immunity is available to defendants. Sovereign immunity protects the State from being sued. Thus, individual officers of the State are sued instead for the actions they took on behalf of the State. These officers are not personally liable if they were acting in their official capacity. If we did not provide immunity, no one would be willing to take these jobs.

Lower ranking employees of the State are immune for actions taken at the direction of their supervisors. However, officials who perform discretionary functions are only eligible for qualified immunity. This means they will be immune for actions taken in their official capacity pursuant to a policy or custom. If they deviate from their official duties and abuse the discretion, their job provides to deny citizens of their fundamental rights, they will be held personally liable. Here, the Defendants appeared to be acting in their official capacity when they instructed Smith not to communicate his personal views. We need more facts to confirm whether this was part of Defendants' jobs. If it was, Defendants will not be liable for carrying out their duties properly and qualified immunity will protect them. Even if Defendants' conduct violated Smith's First

Amendment rights, Defendants will not be personally liable unless their conduct deviated from Department policy or custom.

Question 1. - Sample Answer 3.

1. Issue: Was Smith's First Amendment right to speech violated because he refused to obey the Director's order? Rule: A public employee who work for the government does not give up his First Amendment rights by virtue of accepting public employment. However, public employees do not have an absolute First Amendment right to speech either. The Supreme Court of the US has articulated a two-prong test to determine whether or not a public employee's First Amendment right to speech has been violated. First, the Court must determine whether or not the speech in question encompasses a matter of public or private concern. If the speech is on a private matter,

the analysis stops and public employee receives no constitutional protection. However, speech that touches upon a matter of public concern must be then analyzed under the second prong. Under the second prong, the Court needs to balance the rights of the individual to assert his First Amendment rights and the government's need to run efficient operations. Part of the analysis in determining whether or not speech is public or private is to evaluate whether the employee is speaking in the capacity of a private citizen which would indicate public concern or if an employee is speaking of purely internal matters of the office (not related to governmental corruptions) such as internal griping/interoffice complaining.

In the case at bar, Smith appears to be a public employee. He is the Chief of the Georgia Lottery Division hired by the government. Thus, he does not have an unlimited right to speech.

Under the first prong, we must determine if his speech encompassed a matter of public or private concern. The facts seem to indicate that his speech detailed matters of public concern although his speech may have included some matters of internal concern. His speech being of public concern is bolstered because of the media attention his comments received. He enjoyed national prominence, was in the news, and meetings on this subject where attended by the public

because the public takes interest in the lottery. Therefore, since his speech was on a public matter, we move to the second prong test and balance Smith's rights and the governments rights to run an efficient service to the public.

The Court may use a variety of factors under this prong which includes evaluating how the speech impacts interoffice relationships, how disruptive the speech is on the efficient operations of the agency, and if the speech conveys a detrimental image of the agency to the public at large. That is not an exclusive list but factors that can be evaluated. The Court will not find for the government lightly, but the Court does look at it if the speech is of core First Amendment speech rights of public concern (i.e., political speech). In this case, Smith's First Amendment rights were not violated when he was terminated after refusing to obey the Director's order. Under the balancing test, Smith's speech is not of core First Amendment speech which does not preclude protection under the First Amendment, but is an important factor in the balancing test. Smith's speech appears to have a detrimental effect on the efficient operations of the agency. His speech does not support the policy of the agency. Although not completely clear, the facts do not seem to indicate that the agency was engaged in wrongdoing, but more perhaps guilty of not using the most astute business judgment in its operations. As the Chief of the Lottery Division, Smith holds much power in the public perception of the agency and public support is vital to the success of a State's lottery business.

If Smith portrays a negative image, this could be detrimental in light of his position and national exposure, the balancing test does not require actual impairment of agency operations at discharge but can terminate a public employee if there is strong indication of disruption in the future. Thus, Smith's rights were not violated when he was terminated after notice (verbal) and with discharge by a hearing.

2. There is no immunity for the defendants. The government may assert immunity in such actions such as a tort case, but not for a violation of a fundamental right.

Smith's speech First Amendment right is fundamental thus the government or their officials could not escape liability if they were found to violate Smith's First and/or Fourteenth Amendment rights.

Question 2. - Sample Answer 1.
(disclaimer)

1. This issue involves whether Georgia must grant Full Faith Credit to a sister state's judgment/foreclosure action. A state must grant Full Faith & Credit to another state's judgment if it was a final action of the merits and there was proper jurisdiction. Florida has jurisdiction, in rem, over property, but the action was not final because of the remaining deficiency action that stemmed from the foreclosure. Therefore, Georgia does not have to recognize FL foreclosure action.

Furthermore, this is a choice of law issue when deciding whether Florida Bank must comply with Georgia law. There are three approaches to choice of law questions: The first Rest. (vested rights approach); 2nd Rest. (most significant relationship); and governmental interest approach. Under the 1st Rest. you must characterize the actions substantive area of law, apply choice of law rule to get jurisdiction.

Here, under 1st Rest., the area of law is contract, that is a loan agreement not performed by the parties. Therefore, for contracts you can look to the place of execution or the place of performance. Here, we are dealing with a breach that occurred in GA -so under 1st Rest GA law would be applied. Under the Second Restatement you look at significant connecting factors (relationship, domicile, place of injury) and various policy notions to determine which state has the most significant relationship. Here, the property is in FL, the Smiths are domiciled in GA, the closing was in GA, payments sent to FL. It could definitely go either way in deciding which state has most significant relationship.

The Third Approach, governmental interest, assumes to apply the law of the forum state. Then, decide whether true or false conflict exists. Here, there is a true conflict because both FL and GA have competing interests. Then court reconsiders policies underlying state policies to determine which law to apply. Here, the court would probably apply Georgia law. The question here is about land, and all approaches generally look to the situs to determine the law to apply. However, the action towards the land has already been taken, the deficiency judgment is a personal action against the Smiths. In fact, it is a contract action. As such, viewing all three polices, the court would probably apply Georgia law but might decide under one of the approaches to apply Florida law. If the court applies Georgia law, then the bank must comply with Georgia law regarding when a deficiency judgment is allowed and the Bank's claim would be barred for noncompliance. If the courts followed an approach which applied Florida law, the Bank could sue for a deficiency judgment in Georgia.

2. Again, this is a choice of law question. However, you must first characterize statutes of limitations as substantive or procedural. If procedural, then the court will apply forum state law-Georgia law and the SOL is two years. If the statute of limitations is substantive, then you do the choice of law analysis under the Three Approaches stated in question 1. Under the 1st Rest., substantive area is contract, breach of loan agreement, therefore look to place of performance because this is where breach occurred (GA is where Smiths lived & signed K & were to send payments). Under the 2nd Rest. look to connecting factors: domicile, place of injury, where the relationship occurred & where conduct occurred. Then apply policy principles such as: forum state

relevant policy, policy re contract law, parties, expectations, would application of a certain State's law and in the uniformity, certainty & predictability of result and, finally, can the forum state's law be applied with ease. Looking at these factors, it would be a close call on whether a court would apply. This would be important because applying Florida law, the bank missed the SOL. Applying Georgia law, the bank would be able to file in time to recover deficiency judgment.

The Third approach, government interest, would likely yield that the court should apply Georgia Law. Additionally, courts will be wary, and include in their analysis, that if Florida law is applied, bank will not be able to recover for their deficiency judgment at all. Therefore, courts will most likely apply Georgia law based on the approaches mentioned above.

Question 2. - Sample Answer 2.

1. The Sunshine Bank of Florida is not barred from pursuing a deficiency judgement against the Smiths for failure to comply with Georgia law. The issue is whether or not the law of Florida or of Georgia will be applied.

In deciding a question under conflict of laws, it is first necessary to decide whether the issue in question is procedural or substantive in question. If it is procedural, the forum state will typically apply its own laws. However, if the law in question is substantive in nature; i.e., it is outcome determinative, then further analysis needs to be done. Here, the issue is clearly not procedural, but substantive . Therefore, additional analysis needs to be done to determine if the Georgia or Florida law applies.

There are three types of analysis that courts can use: the 1st Restatement "vested rights" approach; the 2nd restatement; "substantial connection" approach; or the government interest approach. Under the "vested rights" approach, the law of the forum where the right vests will be applied. Under the 2nd restatement, the law of the forum with the most substantial connection to the material facts of the case will be applied. Under the government interest approach, the court will usually apply the law of its own forum, because that is considered to be the forum with the greatest interest in the outcome of the case. Georgia follows the vested rights approach of the 1st Restatement.

In order to determine the proper outcome under the vested rights approach, it is also necessary to determine what substantive area of law is involved, such as contract or tort.

This was initially a contract relating to the purchase of land, and under the vested rights approach, the location of the land would determine the proper forum. However, the contract involved here was not between the buyer and seller of the land, but between the buyer of the land and the secured party who loaned the buyer the necessary funds and secured the loan with the real property. The secured party's rights arose not from anything directly related to the purchase of the land, but instead from their rights of foreclosure due to the failure of the debtor to make payments. Therefore, it is necessary to further analyze the facts to see if a different result occurs.

When a contract right is in issue, under the vested rights approach it is necessary to determine if the issue relates to formation of the contract or to performance under the contract. Here, the Smiths failed to make payments on the mortgage note. Although time and manner of payment

can be seen as both an issue of contract formation (did the contract include sufficient terms as to payment method and time) and an issue of contract performance, here it seems more adequate to consider it an issue of performance, because there is no claim that the contract as entered was insufficient as to these terms. The issue is only the Smith's failure to perform, i.e., to pay. Therefore, the place where the contract was entered is not determinative, but instead it is the place of performance. The Smiths were required to send their payments to the Bank's Florida offices; therefore, that is the place of performance for the Smiths. There is no information concerning the Bank's place of performance (i. e., where the Bank sent the money), but we cannot assume that it was to the Smiths. Even though the loan was foreclosed in Georgia, and therefore likely that the Bank "performed" there, it is the Bank's vested rights that the Court should be concerned with, and the Bank's right to foreclose vested in Florida when the Smiths failed to perform their duty under the contract.

Because under the vested rights approach the Georgia court would likely apply Florida law, due to the Smith's failure to make payments, and possibly also due to the property being located in Florida, Sunshine Bank is not barred from pursuing a deficiency judgment against the Smiths for failure to comply with OCGA 44-14-161a.

2. The Statute of Limitations of Florida will likely apply in the action. The issue is whether or not a statute of limitations issue is considered procedural or substantive. Because a statute of limitations issue can be outcome determinative (i.e., it can decide the case, including dismissal), Georgia courts treat statue of limitations issue as substantive. Under the vested rights approach as discussed supra in number 1, the court would probably determine that Florida's statute of limitations should be applied. The Bank's rights vested due to the Smith's failure to "perform" in Florida.

There does not appear to be any other reason to apply the law of Georgia. Also, Georgia courts (and all other states) are interested in protecting the rights of their citizens and not disadvantaging them by the court's choice of law decision. Here, applying Florida's law results in the statute having run and the action thus being untimely; if the Georgia statute were applied, it would not. The Bank should not benefit from having its home forum's law applied in the first instance, and then Georgia's in the second, where there is no evidence to support a different outcome. Florida's Statute of limitations should apply, and the action should be dismissed (absent equitable reasons to the contrary).

Question 2. - Sample Answer 3.

1) No, Sunshine Bank of Florida is not barred from pursuing a deficiency judgment against the Smiths. This is a conflicts of law question. There is no jurisdiction problem because the Bank brought suit in the county where the Smiths reside, so there is no personem jurisdiction. However, the property was in Florida and the Bank where the Smiths took out a mortgage was in Florida, so the Bank would like Florida law to apply.

To determine which law is applied, we consider the First Restatement, Second Restatement, and Governmental Interest. Because we are in Georgia, most likely the court will use the First Restatement approach. Under this approach, we must look at the kind of action it is and choose the choice of law. This is a deficiency judgment in connection with foreclosure, so we will look at the situs of the property for our choice of law. This means we would use Florida law because the property is located in Florida.

Under the Second Restatement, we look at where the substantial connections are. In this case we would also look at the situs of the property and maybe where the injury occurred. The property is in Florida and the deficiency occurred in Florida, so we would apply Florida law in this case.

Under the Governmental Interest approach there is a presumption in favor of the forum state, which is Georgia. Then, we consider whether there is a true conflict or a false conflict. There is a true conflict in this case because Georgia and Florida laws are different. Then we consider whether both states have an interest. Florida has an interest because the property and Bank were located there. The deficiency occurred there. Georgia does not really have an interest because the Smiths only reside in Georgia and none of the injury occurred there. Therefore, in this case I think Florida law would apply under governmental interest as well.

Therefore, Florida law would be used for the substantive issues in this case.

2.) The statute of limitations of Florida would apply in this action. To determine whether something applies you must know whether it is substantive or procedural. If it is substantive then the state law of the other state will apply. If it is procedural, then Georgia law will apply. Statute of limitations is considered a substantive law, and therefore we would apply Florida law. In this case, the Florida statute of limitations is one year.

Question 3. - Sample Answer 1.

(disclaimer)

(A) Inventor will not be liable to Buyer for breach of contract for three reasons. First, inventor's proposed acceptance actually consisted of a counteroffer which the Buyer did not accept. An offer creates within the offeree the power of acceptance. This means that the offeree may either accept or reject the offer, but the offeree may not change the offer or condition its acceptance on additional terms supplied by the offeree. When the offeree attempts to accept an offer but conditions the acceptance on additional terms, his attempted acceptance constitutes a counteroffer. The original offeror may now either accept or reject the counteroffer.

Here, the inventor conditioned his acceptance on the Buyer paying his tuition expenses as they come due. This constituted a counteroffer. The Buyer now held the power of acceptance with regard to the counteroffer. However, the Buyer failed to pay the tuition payments. In so doing, he rejected the counteroffer. Alternatively, his inaction resulted in the offer lapsing. In any event, a valid contract was never formed between the Buyer and Inventor. Therefore, Inventor may not be held liable to Buyer for breach of contract.

Second, any alleged contract formed between Buyer and Inventor is void due to operation of the statute of frauds. The statute of frauds states that contracts which may not be performed within one year must be in writing.

Here, the contract was entered into in April 1999, but it was not to be performed until June 2000 or thereafter. As such it is a contract that will not be performed within one year, and the statute of frauds applies. Because the contract was not in writing, the contract is void, and Inventor will not be liable for breach of contract.

Finally, Inventor will not be liable for breach of contract because Buyer's promise was illusory. An illusory promise is one in which the promisor has not actually obligated himself to do anything.

Here, the Buyer promised to pay Inventor $2,000,000 on June 1, "or as soon thereafter as Buyer can raise the money." It is conceivable that Buyer would never raise the money. If he didn't, he would not have to pay under the contract. Because the Buyer's promise is illusory, Inventor will not be liable for breach of contract.

(B) If Buyer paid for Inventor's tuition expenses, the arguments outlined above would be affected. First, if Buyer paid Inventor's tuition, he will probably be deemed to have accepted Inventor's counteroffer. Absent any other defenses, this would create a valid, legally binding contract between Buyer and Inventor, the breach of which would result in contractual liability to either party.

Second, if the Buyer paid Inventor's tuition expenses, this would constitute part performance under the contract. When a contract violates the statute of frauds, part performance under the contract will take the contract out of the statute of frauds and make it enforceable.

Here, the payment of tuition by Buyer would constitute part performance. As such, Inventor would no longer be able to raise the statute of frauds as a defense and Inventor would be liable to Buyer for any breach of the contract.

Finally, the fact that Buyer did in fact pay Inventor's tuition does not alter the fact that the contract is illusory. Although the Buyer has begun performance, it is evident that the tuition payments do not equal nor will they equal the contract price of $2,000,000. Thus, Buyer is still under no obligation to pay the contract price if he is unable to raise the money. Therefore, although the fact that Buyer has paid the tuition expenses changes the counteroffer and statute of frauds defenses, the contract is still illusory and therefore not enforceable. However, Buyer will be able to recover any tuition expenses paid to inventor in restitution.

Question 3. - Sample Answer 2.

a. The first issue is whether or not a valid, enforceable K was created between Irving and Buyer. A contract requires an offer, acceptance, and consideration. Here Buyer made an oral offer to Irving, to pay $2 million in cash by June 1, 2000, or as soon thereafter as he could raise the money. However, Irving's acceptance might be considered to be a conditional acceptance. Conditional acceptances add requirements to the original offer and under the mirror image rule of formation of common law contracts, are not valid acceptances. Here, Irving stated that he accepted, but Buyer would need to pay his college expenses, and he added this as a requirement, rather than a request. He seemed to be demanding, rather than bargaining. If this is considered a conditional acceptance, there is no valid acceptance and no contract.

Even if this were considered to be a contract between Irving and Buyer, Irving might have a statute of frauds defense. ("SOF") SOF is evidentiary, and requires that certain contracts must be evidenced by a writing or performance to be enforceable. Contracts not to be performed within one year fall under the statute of frauds. Here, there was no writing as proof of the contract. There was an e-mail acceptance by Irving, but contracts not to be performed within one year require all material terms and to be signed by the party to be charged. Here, the terms of the offer were not mentioned in Irving's e-mail, and Irivng didn't "sign" or even type his name at the

bottom. Since the offer was made in April 1999 for Buyer to pay Irving $2 million on June 1, 2000, this is a contract not to be performed within one year and Irving would have a statute of frauds defense.

Irving might also defend on the grounds that the promise was illusory. Buyer offered to pay $2 million by June 1,2000 "or as soon thereafter as Buyer could raise the money to do so." A court might find that the lack of definite date by which Buyer was to pay was illusory, and therefore not a valid offer.

B. If Buyer paid Irving's college expenses, this might take the contract out of the SOF. Under the SOF, performance is evidence that a contract was formed. If Buyer paid Irving's college expenses up to Jan. 2000 when Irving sold the company, a court might find that this performance satisfied the SOF, even through there was no written contract.

A court might find that there was a valid contract under the detrimental reliance/promissory estoppel theory. This requires that a party to a contract rely to their detriment on the performance of the other party. Here, Irving stated he would accept Buyer's offer if Buyer paid his college expenses as he incurred them until he paid the amount offered in his proposal. Buyer paid Irving's expenses. A court might find that Buyer relied on this and paid to his detriment, and Irving would be estopped from denying the existence of a contract.

Question 3. - Sample Answer 3.

A. Arguments/Defenses on Behalf of Inventor

(1) Apply Common Law on UCC Rules?

The first issue in any breach of contract case is which law should be applied: common law or UCC Article 2. UCC Article 2 applies to the sale of goods. Goods are tangible personal property. Inventor's property was "technology" or an intangible. Therefore, UCC Article 2 does not apply to this case. We must apply common law rules.

(2) Inventor's Response Was a Counteroffer?

Under common law, a counteroffer terminates a prior offer. A counteroffer is found where additional terms are added to the prior offer.

Inventor responded to Buyer's offer with an acceptance but also added an additional term; that Buyer would have to pay Inventor's college expenses.

Therefore, under common law, Inventor made a counteroffer terminating Buyer's prior offer.

(3) Counteroffer Lapses After a Reasonable Time and No Acceptance

Unless specified, any offer, including a counteroffer lapses after a reasonable time. Inventor's counteroffer was regarding the entry of a unilateral contract, to be accepted by Buyer by paying the $2MM purchase price or paying for Inventor's college expenses. Buyer did not pay either amount. Therefore, Buyer did not accept Inventor's counteroffer.

As stated, all offers lapse after a reasonable time and cannot be accepted after such time. Inventor made the counteroffer in April 1999. He did not enter into the new arrangement to sell his technology until January 2000, more than 8 months after Inventor made the counteroffer. Most courts will hold an open-time offer open only for a few months. Therefore, Inventor's counteroffer lapsed.

(4) Buyer's Offer Was an Illusory Promise?

Illusory promises are not offers and cannot be used to form a binding contract. Buyer promised to pay the $2MM by June 1, 2000 or whenever he could raise the money. He might not be able to raise the money for years, but he would argue that his offer was still valid.

In fact, his offer probably was illusory because he was promising a performance that might not occur for a very long time if at all. Inventor should not be subject to such a contingency due to its illusory nature.

(5) Statute of Frauds?

Under common law, a contract that cannot by its terms be performed within one (1) year requires a writing and a signature of the parties to be bound. However, in the case of Buyer's offer, the statute probably does not apply. That contract could have been performed within one year, because Buyer could have paid the $2MM on day one.

(6) Infancy?

No because Inventory was 18.

B. Effect of Buyer Paying College Expenses

If buyer had paid Inventor's college expenses, as explained above, a unilateral contract probably would have been found. This would eliminate the counteroffer and lapse of offer defense. As a result, Inventor may have been found.

However, Buyer's original offer and the primary basis for the contract arguably still is illusory. This may provide grounds to defend Inventor.

In any case, if Buyer pays the expenses, Inventor will have to reimburse under unjust enrichment theory because he received value.

Question 4. - Sample Answer 1.

(disclaimer)

A.(1) The two causes of action I could assert would be a survival action and a wrongful death claim.

In order to prove your case under a survival action you must show that the victim suffered before their death and retained consciousness, which added the victim in experiencing mental and physical pain and suffering. We must show that Dr. Jekyll, Dr. Grimm, and Memorial Hospital had

a duty to provide proper medical attention. The Defendants failed to exhibit ordinary care which breaches this duty, and as a proximate or direct result of Defendant's negligence, the decedent was injured. Lastly, show that Mr. Locksley had damages.

In a wrongful death action, everything states above must again be proven, except victim's consciousness to the pain and suffering before death. In addition, you must show that the victim died as a direct and proximate result of Defendant's negligence. Damages would also consist of her spouses loss of companionship.

The plaintiff of the late Mrs. Locksley's survival action would be Robin Locksley in his capacity as executor of May Locksley's estate. The plaintiff of the wrongful death action would be her surviving spouse Richard Locksley. Said plaintiffs have been dictated according to the Civil Procedure Act of Georgia.

(2) Proper venue pertaining to both actions could be in the county where any of the individual defendants are domiciled. In this case Glynn County, where Dr. Jekyll resides and the county within South Carolina where Dr. Grimm resides. Dr. Grimm could also be subject to the long-arm statute which could subject him to the personal jurisdiction of a Georgia Court. The long-arm statute allows one to be dragged into a Georgia court for a tortious act committed in Georgia.

In cases dealing with a possible corporate entity, Memorial Hospital, you could file suit where the corp. has an office, contracts business or has employees. That would be Richard County.

(3) Also with my Summons and Complaint, an affidavit by an expert must also be filed asserting malpractice on part of the two doctors. However, the affidavit doesn't have to be filed right away. I have 10 days for the filing of my Summons and Complaint to file the affidavit.

(4) My complaint does not have to be specific as to a dollar amount prayed for. However, if I ask for punitive damages, there is a ceiling of $250,000.00. Also, I must prove by clear and convincing evidence that the Defendants acted wilfully or recklessly.

B. (1) I would file a crossclaim between Dr. Jekyll and my client, Dr. Grimm. This crossclaim would be compulsory due to notions of judicial efficiency.

(2) I would have to implead the hospital in as a 3rd party defendant if they were not present initially. Again this would be compulsory due to notions of judicial efficiency, and rights of any party to the action may be prejudiced if the claim isn't asserted.

(3) Dr. Grimm's claim will be filed in the same venue as the Locksley's actions.

(4) Again, an affidavit of an expert must also be filed asserting malpractice on part of the 3rd party defendant and Dr. Grimm.

Question 4. - Sample Answer 2.

A. 1. First , Richard, as the husband of Mrs. Locksley, would file a claim for wrongful death. This claim would be for the loss of consortium and Mrs. Locksley's lost earnings and services. Robin, in his capacity as executor, would file a survival action on behalf of Mrs. Locksley's estate for her suffering shortly before she died. Survival actions must be filed by the representative of the

decedent's estate.

2. The action could be filed in Glynn Country Superior Court, where Dr. Jekyll resides. The Georgia Long Arm statute could be utilized to reach Dr. Grimm and sue him in Glynn county as well.

Section (ii) of the Long Arm statute provides jurisdiction in Georgia over defendants who commit tortious acts in Georgia. Constitutional minimum contacts would be satisfied since Dr. Grimm performed the surgery in Georgia and it was clearly foreseeable that he could be sued in Georgia for negligence arising out of his acts in Georgia.

Since Dr. Jekyll and Dr. Grimm are jointly and severally liable, venue is proper in Glynn county where Dr. Jekyll resides.

3. Because the wrongful death action and the survival action are both based on an underlying medical malpractice claim, O.C.G.A.§ 9-11-9.1 requires that the Plaintiffs attach to their complaints, an affidavit by an expert detailing the standard of care that was supposed to be followed and how that standard was breached (the negligence of the doctors). The affidavit must be sworn out by an expert in the same general field as the defendants.

4. Another limitation on medical malpractice claims is that the plaintiff, in their complaint can only ask for damages in an amount in excess of $10,000. While they will be able to offer proof of and recover damages greater than $10,000, they can state a figure higher than that in the complaint.

B. 1. Dr. Grimm's claim against Dr. Jekyll would be presented as a cross-claim. Since Dr. Jekyll is already a party to the case, and therefore, does not need to be brought in via impleader or joinder. Cross-claims are asserted against parties on the same side of the proceeding as the claimant. Here, both Dr. Grimm and Dr. Jekyll are defendants, so a cross-claim based on negligence would be appropriate.

2. Dr. Grimm will have to assert his claim against Memorial Hospital via impleader. Impleader is used when a defendant says that if they are liable to plaintiff, then some other party is liable to them either for contribution or indemnification. Dr. Grimm would file an Third-Party Impleader action against Memorial Hospital and the hospital would then be brought into the suit.

3. Venue for Dr. Grimm's claims would still be proper in Glynn County. The cross-claim against Dr. Jekyll would still be proper in Glynn County because Dr. Jekyll is a resident of Glynn County.

The claim against Memorial Hospital would also be proper in Glynn County. An impleaded party cannot object to venue if venue is proper in the underlying suit between plaintiff and defendant.

4. Dr. Grimm's actions against Dr. Jekyll and Memorial Hospital would also be based on medical malpractice. Therefore, he would also have to attach an affidavit of an expert in the same general field as Dr Jekyll to his complaint against Dr. Jekyll. This affidavit must describe the appropriate standard of care and how Dr. Jekyll breached that standard of care.

The Third Party complaint against Memorial Hospital would also have to include and expert affidavit describing how the nurses conduct of her surgery fell below the appropriate standard of care for nurses.

Question 4. - Sample Answer 3.

A. 1. The husband can bring a wrongful death action to recover for the loss of his wife's companionship and support. The measure of damages for a wrongful death action is the full value of the decedent's life. For a wrongful death action, the surviving spouse, then the children, then the parents, then the personal representative–this is the order of preference for plaintiffs.

The son, as executor, can bring a survival claim, which is any claim the decedent could have brought had she survived. Here, the personal representative would be suing under a theory of malpractice.

(2) If the doctors were not being sued on a theory of joint liability, a separate action would have to be brought in each of their counties because that's where proper venue would lie. Proper venue for joint tortfeasors when one is a non-resident is the country of the GA resident. In this case it would be Glynn County.

(3) Because these actions are grounded in professional malpractice, the plaintiff would need to attach an affidavit of a doctor alleging at least one negligent action by the doctor with specifity and must also state the factual basis for the malpractice claim.

4. Under the wrongful death claim, you sue for the full value of the decedent's life, which is determined by the enlightened conscience of an impartial jury. The jury can look at the decedent's activities, community relationships, job, religious beliefs, etc.

Under the survival claim, you sue for the pain and suffering the decedent experienced between the time the malpractice occurred and the time she died. These are general damages so you don't need to plead a specific number. The damages are presumed and the jury will decide their value.

B.(1) Dr. Grimm's claim against Dr. Jekyll is a cross-claim. It arises from the same conduct, transaction or occurrence so it can be heard. A cross-claim is filed naming Dr. Jekyll as the cross-defendant. Dr. Jekyll is served with process.

(2) Dr. Grimm would have to bring Memorial in on a theory of impleader. Because the action arises from the same conduct, transaction or occurrence and it has at least one common question with the main action, it can come in. Dr Grimm files a third party complaint naming Memorial as the third party defendant and serves Memorial with process.

(3) Dr. Grimm's claims must be filed where the main claims are filed. Cross-claims and third party claims should be filed where the main action is.

(4) For the claim against Dr. Jekyll, the complaint must be accompanied by a doctor's affidavit just as the plaintiff's complaint did because he is alleging professional malpractice.

The claim alleging negligence on the part of the nurses is not a claim of professional mal practice so no affidavit is needed.

Other than the transactional relatedness requirements I previously mentioned in B (1) and (2), there are no other requirements.