July 2010 Bar Examination Sample Answers

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Question 1 - Sample Answer # 1

1.a. Because Joe devised his real property to Cora and Harold "for and during their natural lives," his will gave to Cora and Harold a life estate in that property. As such, each has an undivided interest in all three properties Joe owned. An interest is presumed to be a tenancy in common unless the testator indicates otherwise; a will does not create a joint tenancy unless specific words inform the administrator that both parties are to own the property jointly, with rights of survivorship. Here, though the actual right of survivorship is not mentioned, Joe's will likely gave Cora and Harold a joint tenancy in his real property; the property is to be owned "jointly" and it will not expire until both are deceased. Under those terms, a joint tenancy is proper.

b. Because Joe required his real property to transfer to Richard and Jane upon the death of both Cora and Harold, they have a vested remainder in all three properties Joe owned. A remainder is created when an interest is created in someone other than the grantee who will naturally inherit the bequest. As Richard and Jane are certain to inherit the real property, this is a remainder. A vested remainder is created when all requirements for inheritance have been met. As there are no unmet requirements here, the remainder is vested.

c. Cora and Harold owe Richard and Jane a fiduciary duty of loyalty and care not to commit waste on the real property. A life tenant is required to keep real property in reasonable repair and not to allow the property value to drop due to active conduct or inattentiveness. Moreover, a life tenant must not commit ameliorative waste by conducting activities that increase the value of real property unless change conditions have made the property entirely valueless without allowing for those activities. Cora and Harold also owe Richard and Jane a fiduciary duty of loyalty and care, according to the terms of Joe's will, to sell the property only for their support and maintenance. Failure to abide by the terms of the will results in a breach of that fiduciary duty (akin to a trust relationship whereby Cora and Harold are holding the property in trust for Richard and Jane with the discretion to invade the property for their own support and maintenance).

2.a. Cora' death will have no effect on the lease. As joint tenants of the 500-acre tract (as stated above), Cora and Harold were entitled to use the property (other than selling the property) for their

own benefit. The lease arrangement required Larner would be required to pay rent to both, while both were still alive, with the proceeds to be split among them. Once Cora died, under the right of survivorship, Harold (who died after Cora) had singular ownership of the property and was entitled to the entire rent. However, Harold is still bound by the lease.

b. Cora's death will have no effect on the deed to secure a debt. A deed to secure a debt is used whenever a property owner transfers that interest in property to a third party in exchange for money and that third party is required to retransfer the property to the owner upon repayment. In Georgia, a deed to secure a debt is treated similarly to a mortgage (i.e. an equitable mortgage). Moreover, Georgia is a lien theory state, where a mortgage only transfers an equitable interest in land; a deed to secure a debt will not sever a joint tenancy. Accordingly, once Cora died, Harold would still be bound by the terms of the agreement. Even if the deed severed the joint tenancy, the mortgage would be good as to Harold's interest.

3.a. Harold's death will extinguish the lease. After Cora died, Harold was the sole life tenant of the property. A life tenant cannot grant to another more of an interest than the life tenant currently has. Harold had a life estate in the 500-acre tract, nothing more. As such, he cannot grant a lease to a tenant that will survive the expiration of his interest (i.e. after his death). Once Harold died, the property transferred to Richard and Jane, and Larner would have no more interest in the land.

b. Harold's death will extinguish the deed to secure a debt. As the sole life tenant (as stated above), Harold could not encumber the property for longer than his own life. As such, under the express terms of a deed to secure a debt, a Harold could only transfer to Bank the interest Harold owned in the property (i.e. a life estate). Once Harold died and the life estate expired, Bank would have no further interest in the property, and Richard and Jane would take it free of Harold's obligation to repay the $50,000 debt owed.

4. Richard and Jane are entitled to the money in John's account at Harold's death. By the terms of Joe's will, Cora and Harold were entitled only to sell the property only for their support and maintenance. Failure to abide by the terms of that fiduciary duty (as stated above) results in a breach of the fiduciary duty of loyalty and care both Cora and Harold owed to Richard and Jane, entitling Richard and Jane to damages or other equitable remedy. Here, Harold sold the industrial property for $1 million and used only $250,000 for his support and maintenance (i.e. to pay his medical expenses). The remainder was left in a bank account owned by Harold's son, John, for John's sole benefit; though not a direct gift to John, the funds would be treated as such. As a gift to his son does not satisfy the requirements of Joe's will (i.e. that the funds derived from a sale of the property be used for his support and maintenance), Harold is in breach of his fiduciary duty. Pursuant to that breach, Richard and Jane would be entitled to sue Harold's estate for damages they suffered as a proximate cause of the breach (i.e. the loss of $750,000) or to seek an equitable remedy. An equitable remedy would be effective whenever legal damages are insufficient and equity is feasible. Here, legal damages might be insufficient if Harold's estate does not have a sufficient amount of funds, so Richard and Jane could (and would receive) seek a constructive trust

imposed upon the account owned by John.

Question 1 - Sample Answer # 2

1.(a) The first issue is to determine the interests that Cora and Harold obtained via Joe's will given the lack of clarity in the devise. A life estate is the right to own land for the period of one's life. A tenancy in common is a type of land ownership in which joint owners share an undivided interest in land with no right of survivorship. A joint tenancy is a type of land ownership in which tenants share land and have a right of survivorship. Here, it appears that Joe's intent was to provide Cora and Harold with joint life estates with the remainder interest passing to Rich and Janet. Joe's will states that they shall own the property jointly, and upon their death, his real property will pass to Janet and Richard. Thus, Cora and Harold jointly own the personal property until each of them die (life estate w/survivorship that passes to the specified party) and upon death any remaining (unsold property) passes to Richard and Janet.

1.(b) The next issue is to determine the property interests that Richard and Jane posses in Joe's real property. A remainder interest is an interest that will be obtained in the future following the occurrence of some type of event. Rich and Janet jointly own a remainder interest in Joe's real property that they will obtain upon the death of Cora and Harold. Although such land may be sold prior to being subject to their taking, they will have the remainder interest under the terms of the will of any remaining land. Thus Rich and Jane have a remainder interest in the personal property that will become theirs upon the death of Cora and Harold.

1.c. The next issue is to determine the duty owed to by Cora and Harold to Rich and Janet (the "remaindermen"). Typically, life estate tenants have a duty to not create waste on the land. Waste may be permissive (allowed), ameliorative (unless value is added and not opposed by remaindermen), and created by the tenants. Assuming that the terms of the will convey a life estate to Cora and Harold or a life estate pur autrie vie (for the life of another) then they have a duty not to create waste onto the land. Additionally, under the open mines doctrine, if the property is already being used in a particular way at the time of conveyances continuing such activities is not deemed waste. Under the open mines doctrine (and under the generous terms of the will), Cora and Harold have not added waste onto the property by leasing the turpentine business to Robert Larner. Thus, Cora and Harold's duty as tenants would generally be to not create waste onto the land, but given the generous terms of the will, they are however allowed to do whatever necessary for support.

2.a. Next, we must determine the effect of Cora's death on the lease that she and Harold entered into with Robert Larner, given that she has died. When a sole tenant of a life estate enters a lease on the property, such lease ends upon the death of the tenant (because the remaindermen now own the property and cannot be forced to take on the contract). Here, however, Cora and Harold both entered the lease and both own the property jointly. Since Harold was still living at the time of Cora's death and because both parties agreed to the terms, the lease with Lerner will probably be

unaffected by Cora's death. Thus, the lease will still be intact upon Cora's death.

2.b. The next issue is whether Cora's death will impact the deed to secure debt on the property that was entered into by Harold. In general, although tenants may jointly share property, they are only liable for contracts that they personally (or jointly) enter into. The Deed to Secure Debt was executed solely by Harold. If Harold had defaulted on the deed, the Bank would only be able to seek his interest in the land and would then share the land with Cora. Cora did not personally agree to the terms of the deed and cannot be held liable. Since she was not an actual party to the deed, her death will have little impact on it and the agreement will remain intact.

3.a The next issue is to determine the effect of Harold's death on the lease entered into by both he and Cora. As noted above, when life tenants die, all contracts involving the property end. Cora and Harold only own the property "jointly" for their lives and upon their passing, Rich and Janet take the personal property. Since Cora has already died, Harold's death will end their interest in the land and the contract made by them will end. The lease will end upon Harold's death.

3.b The next issue is to determine the effect of Harold's death on the deed that was entered into solely by him (although he owned the property jointly). As noted above, when a life estate ends, all contracts dealing with the property are concluded. The bank may not seek payment from the new owners of the land. The bank may elect to seek payment from Harold's estate. Thus, Harold's death does not require Rich and Janet to make payments, but such money may be sought from his estate.

4.The last issue is to determine whom may seek the money in Harold's and John's account obtained from the sale of property left by Joe. When property that a party has a remainder interest on is sold, the parties with such interest will have a claim to the funds. Here, Joe left personal property to Harold and Harold elected to sell the property for support. Since the property would have passed to Rich and Janet upon Harold's death, they will have a claim for the proceeds obtained from the sale. In short, the remainder interest in the property that was sold will present Rich and Janet with a strong claim that they should be able to receive the money that Harold received from selling a portion of their future interests.

Question 1 - Sample Answer # 3

Question One

(a) At issue is the property interest devised to Cora and Harold in Joe's will. Under Georgia law, we look to the express language of the devise to determine their property interests. The language "for and during their natural lives" indicates that they have been granted a life estate in Joe's property.

The devise will be a joint tenancy with right of survivorship if they satisfy the four unity requirements of time, title, interest and possession. These requirements are satisfied and therefore they have been granted the life estate as Joint Tenants with right of survivorship.

However, the sale provision language conflicts with the grant of a life estate. However, when reading the grant as a whole, it appears to be the testator's intent to grant a life estate in Cora and Harold with a remainder in his children as discussed below.

(b) As discussed above, look to the language of the devise to determine property interests. The "thereafter" and "per stirpes" language indicate that they have been granted a vested remainder in fee simple absolute. The remainder is vested because there are no contingencies in place that would affect them taking the property. Although the devise satisfies the four unities as discussed above as required for a joint tenancy, the express "per stirpes" language indicates that Joe intended them to hold the property as tenants in common which only requires the unity of possession. The "per stirpes" language indicates that Joe intended the property to pass to Richard and Janet's children as opposed to going completely to the party that survives the other which is the case in a joint tenancy.

(c) Cora and Harold owe Richard and Jane the duty not to commit waste (either permissive or voluntary) on the properties. Broadly defined, waste means to maintain the property for successor's interest.

Question Two

(a) At issue is whether Cora's death would affect the lease to Robert. Cora and Harold held the property as life tenant's with the right of survivorship. Therefore on Cora's death, the life tenancy in the property passed to Harold and continued to have a property interest in the property as a life tenant. Therefore, Robert's lease is unaffected as Harold continues to have a possessory interest in the property as a life tenant.

(b) At issue is whether Cora's death affects Harold's deed to secure debt on the retail property. As discussed above, the life tenancy in all the properties became solely Harold's on the death of Cora. The right of survivorship extinguishes any property rights that Cora's estate might claim. Therefore, her death had no effect on the deed to secure debt.

Question Three

(a) Harold was in possession of a life estate of the leased property on his death. Under Georgia law, the life estate will pass to the remaindermen immediately upon the death of the life tenant.

Therefore the leased property is now owned by Richard and Jane as tenants in common. A life tenant can only transfer whatever interest in property they have. Therefore, the lease was also extinguished upon the death of Harold. Robert has no recourse against Richard or Jane.

(b) As discussed above Richard and Jane now own the property encumbered by the deed to secure debt as tenants in common. A life tenant may only grant a deed to secure debt on whatever interest in the property they have. Therefore, the deed to secure debt was extinguished on the death of Harold. Richard and Jane should take the retail property free of the deed to secure debt. The Bank may have recourse against the estate of Harold.

Question Four

At issue ownership of the funds in Harold's and John's account. The funds in the account came from the sale of the industrial property. The devise specifically permitted Harold to sell the property if necessary for their support and maintenance. As discussed above, the intent of Joe was to create a life estate for Harold in the property. Therefore the contingency sales language should be struck from the grant. Therefore the funds in the account rightfully belong to Richard and Jane. A constructive trust should be placed on the account in their favor. However, John should not be required to refund the $250k because it was spent in furtherance of the testator's intent.

Question 2 - Sample Answer # 1

1. At issue is what rights a non-biological child has to inherit from a step-parent. Because Xander is Bea's child from a prior marriage he does not have rights in Abe's estate unless Xander is specifically named as a beneficiary under the terms of the will or if Xander inherits through his mother. Xander is not specifically named as a beneficiary under the will so this exception does not apply. However, Xander will take through his mother. Georgia's anti lapse statute provides that a beneficiary in a will which predeceases the testator may take under the will if the beneficiary leaves surviving issue. Because Bea, Xander's mother, died before Abe, she predeceased Abe and generally her interest would have lapsed, however the anti-lapse statute saves her interest under the will (the personal residence and furnishings). The interest in the personal residence will therefore go to Bea's issue-- Xander and Victor. Since Bea died without a will and Abe is dead, Victor and Xander are Bea's only heirs at law under an intestate law. Under Georgia's law of intestate succession surviving issue take equally in the estate. Thus Victor and Xander will share this interest equally.

2. At issue is what rights are held by a child born to a testator after the execution of a valid will and

testament. As stated above, Victor will already take one half of the estate passed through Bea under the anti-lapse statute. Victor will also take a 1/3 portion of the estate. Abe executed the will on June 8, 2007 before Victor was born. Thus absent a contrary intent by the Testator, Victor may take as a pretermitted child. A pretermitted child is one born after a will is executed. Absent contrary intent in the will, Victor will be allowed to share a 1/3 interest in the estate. The will does not specifically say that the bequests are made in the contemplation of future children being born; furthermore, Abe specifically notes in his will that at the time of his will, his children were Zena and Yolanda. Such a statement does not indicate that Abe wrote the will in contemplation of any future children. A pretermitted child has a right to revoke the will to the extent necessary to get an intestate portion of the estate. Thus Victor will also take a 1/3 interest in the estate.

As Abe's minor child, Victor also has a right to demand a year's support through his guardian ad litem. Georgia law provides that a minor child may request, within 2 years of the decedent's death, a year's support. A year's support is available under either testate or intestate succession. The minor may make a request through the probate court where the decedent resided when he died and the amount requested will be provided unless the amount is challenged. Because Victor is a minor (under 18) a guardian ad litem will be appointed to him to act on his behalf in his best interests.

3. Had the will stated that the interest was to Abe's children it may have indicated that Abe intended to include any future children he may have had. Thus in this case, Victor may have been included as a beneficiary for the residue of the estate and the football memorabilia.

4. Yes, Xander is liable to the beneficiaries of the football memorabilia. It appears that Xander has committed larceny. Larceny is the taking and carrying away of the personal property of another with the specific intent of retaining the property. It appears that Xander, knowing that Abe and Bea were dead, decided to steal the memorabilia and sell it to his fraternity brothers. When Abe dies, the property passes to the executor of Abe's estate. Although the executor had not been appointed it was within the power of the executor and only the executor to distribute Abe's estate pursuant to the terms of his will. The executor owes fiduciary duties to the beneficiaries of the will. Once an executor is appointed, the executor may take action against Xander for stealing the memorabilia bequested to Abe's daughters. Xander will be liable to Yolanda and Zena for the items he stole.

Question 2 - Sample Answer # 2

1. Xander has a one-half interest in the gifts bequeathed in Item III (the personal residence and furnishings). At issue is the effect of Bea's death on Abe's bequest. The facts indicate that Bea predeceased Abe. Therefore, she is unable to take under Abe's will. Under Georgia's anti-lapse statute, however, the gift will be saved. Georgia has a very broad anti-lapse statute. It provides that

if a beneficiary dies and is survived by issue, the issue of the beneficiary will take the gift. The only exceptions to this requirement are in cases of divorce and a felonious killing. In those cases, the beneficiary's issue may only take if they are also the testator's issue. Here, Bea died having two children (and did not divorce or kill Abe). Xander and Victor. Therefore, under the anti-lapse statute, Xander is entitled to take Bea's share. Since Bea had two children, Xander and Victor will each take one-half of Abe's personal residence and furnishings.

2. As set forth above, as Bea's issue, Victor is entitled to receive ½ of the house and personal belongings under Georgia's anti-lapse statute. Additionally, Victor has a 1/3 interest of the items bequeathed in Item IV. At issue is whether he is entitled to receive a bequest despite the fact that he is not named in Abe's will. Under Georgia law, unless the will specifically contemplates after born children, a child born after the execution of the will is entitled to receive an intestate share. The will is revoked by operation of law to permit the after born child to receive his share. Here, Abe's will does not specifically contemplate after born children. Although the will bequeaths his residuary to his "daughters", there is no language in the will to indicate that he did not wish to provide for future children. Abe executed his will on June 8, 2007 prior to Victor's birth. Since the will did not contemplate after born children, under Georgia law, he is entitled to receive his intestate share. Since Abe had three children and no surviving spouse, his estate would be divided into thirds, and each of his children will receive 1/3 of the residuary. Therefore, the gifts in IV should be distributed as follows: 1/3 to Victor, 1/3 to Zena and 1/3 to Yolanda. Additionally, since he is a minor, Victor may also have a claim for a year's support. A minor is entitled to receive a year's support under a will. Here, the facts indicate that when Bea died, Victor was under two years old. Therefore, as a minor, he has a claim for a year's support. The claim for a year's support must be filed within two years of Abe's death.

If Abe had referred to Zena and Yolanda by name in Item IV, it would not change my answer. There are still no facts to indicate that Abe intended to exclude future children in his will. Yolanda and Zena may argue that language naming them specifically might reflect Abe's intent to ensure that they were the only recipients of the residuary. However, there is nothing to indicate that Abe intended to exclude Victor or any future children. He signed his will seven days after marrying Bea and had Victor 10 months after his marriage. The will merely provides that "at the time of execution of the will" his children were Zena and Yolanda. Because there is no language in the will that provides that the will specifically contemplated any future children, Victor would be entitled to receive his intestate share.

3. If the gift had been to Abe's "children", the distribution of the gift would not be different. In that instance, there would be no issue that the will intended to include after born children. The gift to Abe's children would be to each of his three children, and would include Victor, Yolanda and Zena. They would each receive one third of the residuary which is what they are receiving anyway. Due to the language of the will, Xander might claim an interest in the residuary, however, that claim would fail since Abe specifically set out in Item V the names of his children.

4. Xander is liable to the beneficiaries of the football memorabilia. A person who is not a beneficiary under the will is not entitled to take specific property bequeathed to another party. Xander may argue that he was entitled to the property since he took Bea's interest in the furnishings in Abe's house. However, the gift of the football memorabilia was a specific bequest and Xander was not entitled to claim it as part of the residence. As set forth above, Victor, Zena and Yolanda are each entitled to receive one -third of the residuary. Therefore, Xander is liable to Victor, Zena and Yolanda. He is liable for the fair market value of the property. If the property is worth over $10,000, he is liable to each of them for one third of that amount.

Question 2 - Sample Answer # 3

The first issue is what interest Xander has in Abe's estate. Under the anti-lapse statute in Georgia, when a person who is given a specific bequest in a will dies prior to the testator's death, the bequest is passed to the heirs of the devisee of the specific bequest. In the will, Bea, Abe's wife, was bequeathed the residence and furnishings belonging to Abe. Bea pre-deceased Abe when she was pronounced dead at the scene of the auto accident as Abe lived for a few more days after the accident. Under the anti-lapse statute, Bea's heirs which would be her two sons Xander by her previous marriage and Victor by the marriage to Abe would take Bea's share of the estate in equal shares. Therefore, Xander's interest in Abe's estate is one half of the personal residence and furnishings.

The second issue is what interest Victor has in Abe's estate. The rule regarding the anti-lapse statute from the preceding paragraph is incorporated by reference. Under Georgia law, certain events, namely marriage and the birth of a child, trigger the implied partial revocation of a will where the will was not prepared in anticipation of the event. A child born after the execution of a will not in anticipation of the birth of a child may take either as he/she would had the testator died intestate or if there is a class gift to children, the child will take as part of the class with an equal as the other children. Also under Georgia law, a surviving spouse and minor children are entitled to a year's support from the estate of the deceased spouse/father. A surviving spouse may take the year's support in lieu of a gift under the will but a minor child can take both under the will and the year's support. In this case, as per the anti-lapse statute, Victor will take half of Bea's inheritance under the will. The will, in this case, was not prepared in anticipation of the birth of a child as evidenced by Abe's listing of his children as only two daughters. Victor as a child born after such a will is entitled to either a share of the estate as though by intestacy or as part of a class gift. The term daughters in Item IV is likely to be considered an ambiguous term under the will which the court will need to hear parol evidence to determine whether it was a class gift. If it was intended to be a class gift to Abe's children who were all daughters at the time, then Victor would be entitled to a share of the class gift in an equal portion to the girls. If not intended to be a class gift, then Victor would be entitled to a share as though the estate passed by intestacy. A court would likely find this to be a class gift to Abe's children as his children were daughters at the time as evidenced by Item

V of the will. Victor is also a minor child of Abe and Bea because he was born in April of 2008 and Abe died in November of 2009 making Victor approximately 2 years old and thus Victor would be entitled to year's support in addition to the gifts under the will. Thus, Victor would be entitled to half of the residence and furnishings, a share of the residue and the Georgia memorabilia collection and a year's support.

The third issue is whether the distribution of the residuary and the Georgia memorabilia would be different if Abe had listed the two daughters by name instead of as his children. The rule regarding the implied partial revocation of a will is incorporated herein by reference. When there has been an implied partial revocation by the birth of a child not anticipated in the will, the remedy is to either grant a share to the unmentioned child according to the intestacy laws if there has been no provision for children or to include the child in the class gift to children. In this case, had the bequest in Item IV been to the daughters by name, the bequest would have been a specific devise instead of a class gift. There being no class gift in the will, Victor would have only been entitled to a 1/3 share of the estate just as if Abe had died intestate based on three heirs.

The fourth issue is whether the distribution of Item IV would have been different if it had been worded children instead of daughters. The rule regarding implied partial revocation of a will is incorporated herein by reference. Where a will is plain on its face, no parol evidence will be admitted to determine the meaning of any item of the will. However, where there are patent or latent ambiguities in the will, the court will allow parol evidence to explain the terms of the will. As Item V of the will states that Abe's children are two daughters and Abe was not anticipating any other children, a bequest to his daughters was most likely a bequest to his children. The court would hear parol evidence regarding the intent of the testator but the outcome would not likely have been different if the bequest had been to Abe's children rather than to Abe's daughters.

The fifth issue is whether Xander is liable for his actions in selling the Georgia memorabilia. Conversion is the intentional and substantial deprivation of the use and enjoyment of personal property of another by a tortfeasor. As the property did not belong to Xander, the taking and selling of the Georgia memorabilia to his friends deprived the rightful owners, Abe's daughters, the use and enjoyment of the personal property on a permanent basis. There being a conversion of the property, the rightful owners are entitled to compensation for the taking of the property to be measured by the fair market value of the property and are most likely entitled to punitive damages for the willful commission of this intentional tort which was in reckless disregard for the rights of the true owners.

Question 3 - Sample Answer # 1

1. The issue is whether the oral agreement is enforceable by Willie. This largely depends on whether the oral agreement is considered to be a separate contract or part of the original land sale contract. Parol evidence is not admissible for oral agreements that contradict the terms of a writing; however, the oral agreement here does not contradict the writing. Instead, it adds obligations to the

parties performance. The court, therefore, will look to extrinsic evidence to determine whether the writing is a comprehensive agreement of all of the parties duties and obligations. The absence of a merger clause is not determinative, but could be considered evidence that the contract was not totally integrated. The fact that the written agreement refers to the "car skeleton processing plant" would support Willie's claim that there was a concurrent oral agreement that Barbara would operate a plant. From the facts, therefore, it is likely that a court would find that the written contract was not completely integrated. There might be an issue, however, with the portion of the oral agreement that allows Barbara to purchase as many skeletons as Willie wants to sell. This could constitute a contract for the sale of goods over $500, requiring a writing. However, this is primary purpose of this contract is for the sale of land, and the required portions of the land-sale agreement were in writing. Therefore, the concurrent oral agreement is probably enforceable.

It is also possible that the oral agreement is a separate contract. In order for a contract to be enforceable, there must be consideration. Georgia uses the benefit/detriment test. If the promisee suffers a detriment, then consideration is present. In the oral agreement, Barbara is agreeing to pay Willie for his goods, as well as operate a plant and allow junk vehicles to remain on the property. Willie agrees to provide car skeletons to her business. Thus, the consideration requirement is satisfied. Additionally, certain agreements must satisfy the statute of frauds writing requirement. Here, the statute of frauds probably does not apply. The contract can be performed within a year; the first part of the contract could be performed more than a year later, but it is possible that it could be performed sooner. Therefore, the contract does not require a writing because of the performance within a year rule. It is possible that the contract is for the sale of good over $500.00 because of the second portion of the agreement. If that is the case, then the contract would have to be in writing to be enforceable.

2. The issue is what remedies would be available for Barbara to enforce the option. Barbara would likely be entitled to specific performance. Specific performance is an extraordinary remedy that requires the parties to perform as agreed under the contract. It is often enforceable in land-sale contracts because real estate is considered unique. Because real estate is unique, money damages are considered insufficient. This is especially the case here; Barbara already owns 20 contiguous acres of the real property. It is unlikely that money damages could properly compensate her for the denial of the purchase of the remaining 30 acres. Therefore, Barbara will be entitled to specific performance.

Barbara could try arguing promissory estoppel if she changed her position in reliance on the promise by Willie that she could purchase the remaining acres. However, this solution is used when a contract is not actually formed but a party changes position in reliance on a promise. Here, it appears that there was in fact a valid contract, so specific performance would be the appropriate remedy.

Barbara could also try to get money damages. She could seek to obtain from Willie the value of the land so that she can purchase comparable land elsewhere. However, this is not her best choice of remedies.

3. The issue is what defenses Willie might have to the claim to enforce the option. Willie could defend on the basis that Barbara committed a material breach. A material breach by one party excuses the performance of another party. However, this defense will probably not succeed because Barbara did perform a major portion of the contract; she paid the purchase price of the land. Willie could also defend by claiming that the oral agreement was a condition precedent to him offering the 10-year option. Courts will generally allow evidence of oral agreements of conditions that must be satisfied before performance is required. However, the facts do not state that Willie conditioned his performance on Barbara's. It is more likely that the court will view the performances as concurrent.

Question 3 - Sample Answer # 2

(1) The oral agreement is probably not enforceable by Willie.

First, Willie (W) must pass the Statute of Frauds (SOF). The SOF provides that no contract within the SOF is enforceable unless it is in writing and signed by the party to be charged. Thus, if the oral contract is within the SOF, it will not be enforceable against Barbara (B).

Provision (a) of the contract does not fall within the SOF. The SOF applies to contracts that cannot be completed in less than a year. Although provision (a) may not be completed for 14 months, it can be completed in 5 months. Thus, it is not within the SOF

Provision (b) probably does not fall within the SOF. Although contracts for the sale of goods of $500 or more must be in writing and signed by the party to be charged, the contract here does not fit that provision. This is a requirements contract, holding that B would purchase "as much as generated by W." Even though the contract would be at $0.50 per pound would almost certainly be greater than $500, the contract does not, of itself, provision the sale of goods of $500 or more. It could be that W produces only $1 worth of goods.

Provision © probably falls within the SOF. Contracts affecting an interest in real property must be in writing and signed by the party to be charged. This contract purports to create an easement for W to keep his junk vehicles on B's property. An easement is a right to use property without ownership. Because this contract would affect B's land and encumber it with an easement, it would be within the SOF.

However, even if the contract were outside of the SOF, it may still be unenforceable. The treatment would depend on when the agreement was made. If the oral agreement was made before the written agreement, the Parol Evidence Rule (PER) may come into play. The PER bars the introduction in court of prior or contemporaneous evidence submitted to supplement or contradict the terms of an integrated written agreement. For the PER to apply, the court must find that the provisions sought to be contradicted or supplemented were "integrated," or, intended by the parties

to be a complete and final expression of their agreement. If the court finds that the agreement was not integrated, then the court could allow the parol evidence in.

Here, although there was no "merger clause" (a clause that specifically states that the writing is a final agreement), the presence or absence of a merger clause is not controlling. A court would likely find that the agreement between B & W was a final integration as to the sale of land and the existence of an option, thus barring parol evidence on those topics--and, likely, barring evidence of Provision © of the agreement, because the interest in land would've been stated in the original contract. The ambiguity of the term "car skeleton processing plant" may allow the court to bring in evidence of what the parties meant by that term, meaning that Provision (a) would probably pass the PER. Provision (b) may also be allowed to give context to Provision (a).

However, if the oral agreement was made after the written agreement, the entire agreement would be unenforceable. A valid contract requires an offer, acceptance, and consideration. Consideration means that there must be a bargained-for exchange between the parties. Even assuming valid offer and acceptance, if the oral agreement was after the written agreement, it would likely constitute a separate contract. As its own contract, it fails for lack of consideration because B incurs only detriments while W gives up nothing. Thus, there is no "bargained-for" exchange, and the contract would fail.

(2) B could seek specific performance to enforce the option and make W sell the property. Specific performance is an equitable remedy, and, as such, requires a showing that (1) a legal remedy is inadequate and (2) an equitable remedy is feasible. Here, the legal remedy is inadequate because the subject matter of the contract is unique. Each piece of land is considered to be unique, and, thus, money damages do not compensate a plaintiff seeking to enforce an option contract for land. Only the transfer of the land in question is the adequate remedy. Moreover, the equitable remedy is feasible because it is simply forcing W to perform the steps he was required to perform.

B could seek an ejectment action based on W's trespass. Trespass to land is the intentional act of going onto the real property of another without permission. Here, W is trespassing because his junk cars are currently on B's property. B can seek money damages for any damage to the land that W's cars may have caused and she can seek an ejectment of W from the property. Moreover, she should seek such a remedy to avoid W's future claim of adverse possession of her property (gaining title to land by possession for a legally-prescribed duration).

(3) W may claim that the option is invalid because B breached the contract, but this defense is not very strong. In order for a party to stop performing under a contract, there must be a material breach of the agreement. Here, even if there was a valid oral contract, B's failure to open a car skeleton processing plant or allow W to keep his junk cars on the property probably would not be a material breach that would excuse W's performance under the agreement. Instead, W could sue for money damages as a result of the breach, but would still be required to sell the land under the option.

However, because B is seeking equitable relief (specific performance), W may claim equitable defenses. First, W may defend that B cannot seek specific performance because she has unclean hands. The "unclean hands doctrine" requires that "those who would have equity must do equity." W will claim that B's hands are unclean because she induced him to agree to the written contract by agreeing to an unenforceable oral contract. Her action would bar her recovery.

W could also defend with estoppel, if B knew that W was agreeing to the contract relying on the unenforceable oral contract.

Question 3 - Sample Answer # 3

1. Yes, the oral argument is enforceable by Willie based on the doctrine of parol evidence. Under this doctrine the court does not usually allow the parties to bring in extrinsic evidence if the contract/document is deemed to be fully integrated and complete on its face. However, in instances where there are latent or patent ambiguities within the document, the court will often allow extrinsic evidence to be admitted in order to clarify such ambiguities. Here it is clear that the contract for the sale of land adequately described each parcel of property. However, the agreement referred to the 20-acre parcel as a site for the "car skeleton processing plant." Although there is no attachment or any other mention of what this description means, the court will likely find that an explanation as to what this said agreement entails would likely be proper. Therefore, Willie would likely be able to provide parol evidence of the oral agreement entered in December 2006 following the purchase, and it will likely be enforced against Barbara if both parties were under the same understanding that the oral agreement was in fact what the parties were intending to reference in the original contract through this description. The fact that Willie had been operating a junkyard on his property for several years prior to the sale will lend to the fact that Barbara was aware and consented to the stipulations.

2. The remedy that would likely be available to Barbara to enforce the option in the Agreement is the nonmonetary/nonequitable remedy of specific performance. In order for an individual to be entitled to specific performance it must be proven that a contract did exist, a legal remedy would be inadequate, the non-equity remedy would be feasible, and there are no defenses to such remedy. In Barbara's case, there was a contract made. There was a valid Purchase and Sale Agreement for real property signed by both parties with an adequate description of the property. This also satisfies the statute of frauds requirement for purchases of land.

Barbara would also likely prove that a legal remedy would be inadequate as land is unique and usually requires that the damaged party be issued the land in order to be made whole, not monetary damages. This remedy would likely be feasible as Willie still owns the land and it is in the same condition, but the issue arises here and with the defenses. If Willie is able to prove that the oral agreement should be enforced then she cannot claim rights to the property without adequately performing her end of the bargain. The oral agreement provided that the property be operated as a

"car skeleton processing plant," if Barbara had no intention to do so this would preclude her access to the land as the description is an express condition of the contract.

3. Willie's best argument to the claim to enforce the option in the agreement will likely be for breach of contract as he has rightfully counterclaimed. Willie can argue, through the use of the oral agreement admitted by parol evidence, that such a condition was actually a condition precedent to Barbara's ability to purchase the 30-acre parcel through the 10 year option. A condition precedent is a condition that must be met in order for another phase or conditioned part of the contract to take place. If the court agrees that the oral agreement should be admitted, and further that it should be enforced, the court will likely hold that Barbara's failure to operate the 20-acre parcel as a car skeleton processing plant is a complete breach of contract on her behalf which would serve as a repudiation of the contract and would also relieve Willie from being forced to honor the 10 year option to buy the remaining 30-acre parcel. Barbara was to begin operating the car skeleton processing plant on the 20-acre parcel soon after the purchase of the land according to the oral agreement that Willie alleges. Her failure to operate the car skeleton processing plant, no purchases of any car skeletons from Willie's junkyard, and the demand that Willie remove the junk vehicles demonstrates that Barbara had no intention to operate the 20-acre parcel as a cite for the car skeleton processing plant as was in the Purchase and Sale Agreement and is thus evidence that she is in breach of contract for which Willie will likely be released from any contractual obligations regarding this matter, or the court will look to try and reform the contract accordingly to meet this evidence.

Question 4 - Sample Answer # 1

Mr. Counsel,

After reviewing the issues presented I would recommend consideration of the following regarding the different records sought.

1. The notice to produce the psychiatrist's records - Under the Georgia Civil Procedure Act (CPA) it is appropriate to serve a party or non-party to produce records necessary to the claim at issue. Once this notice is given the other party would have 21 days to respond and could seek a 10 day extension to that time frame if the party can state a viable reason it is necessary to extend the time. However, even if no objection is timely filed you would not be able to obtain the records without some action by the court. The lack of an objection in this case does not overcome the fact that the records and the information in them are privileged. It would require the court to step in and order the psychiatrist to produce the records. Another option would be to get the court to order a mental examination of Mr. Jones (J). Under a court order mental examination the records are not privileged and the patient cannot assert a right to keep them out of the claim at hand. This option would allow for an impartial mental health specialist to examine J and release those findings to you.

2. Even if there was a timely objection the production of the records will likely not be compelled. Under the Georgia rules of evidence the appropriate objection for the other side to make is that the information is privileged and that the client has not given up his right to assert the privilege. Under Georgia law communications between, and the records of, a patient and psychiatrist are privileged and will not be provided unless the patient gives his consent. The Federal Rules of Evidence do not recognize this particular privilege and specifically state that the rules of privilege will be adopted by the individual states. Georgia law has established that the privilege will extend to those providing mental health care to patients and specifically medical doctors who are psychiatrists. In addition, a claim for pain and suffering allows for general damages under Georgia law to be determined "by the enlightened conscience of an impartial jury." Therefore the psychiatrists records are not necessary for J to prove his pain and suffering in order to be awarded general damages. J will be able to present enough evidence to allow the jury to consider the actual pain and suffering claim and award general damages without the need for further information from his psychiatrist. This privilege has not been waived by J, and since the court will find that the records are not necessary to prove the claim for damages you will not be given access to the records.

3.(a) Dr. Welby's (W) records are not privileged. At issue is whether or not a medical doctor and her patients, as does a psychiatrist, enjoy a privilege in protecting their communications and records. In Georgia there is no such privilege for physicians. Georgia law does provide the Physicians' Shield, which protects doctors from liability when they must divulge information from patients due to a civil proceeding. Also, Georgia law allows that a physician's records, including a personal file that the doctor maintains will be available to the other party when a claim involves personal injury, where the claimant has put his injury in issue. Here, J's basic claim is personal injury due to the traffic accident and therefore has put his physical injury in issue in this case. This allows you to seek to have those records produced in order to understand the level of damages claimed or that might be asserted when there is a trial. The damages for personal injury require proving things such as medical costs, future costs, lost wages and lost potential earnings and in order to prove these J must produce his medical records to demonstrate the extent of his injuries.

(b) Ethical Concerns - Considering the above information, a better approach to getting the records might simply be a motion to produce. Under Georgia's rules of professional conduct for lawyers it is required to deal honestly with the opposing party and to ensure fairness in the tribunal by dealing fairly at all times with the court. If you seek to get these records by not informing J's lawyer, by attempting to trick W into sending the records in order to avoid a deposition when you have no intention of doing a deposition anyway, then you will not be dealing fairly with the opposing party or the court. Since the records are available to you anyway, and there is no privilege that would keep W from producing them, the most ethical and most efficient manner to obtain the records would be to send a notice to produce laying out the reasons why there is no viable objection (as stated above) and if they are not produced seeking remedies from the court to order the production. In addition, it is always wise and will keep potential ethical issues from arising if you communicate with the opposing attorney. By attempting to keep this communication with W from J's attorney you are not dealing fairly and would likely find yourself facing reprimands from the court if/when J's

attorney complains.

With the above information in mind it might be best to use the procedures available to obtain the necessary information for this case.

Sincerely,

Applicant

Question 4 - Sample Answer # 2

1. If no objection if filed, defense counsel can obtain the medical records

If no objection is filed, Defense counsel may proceed in obtaining the medical records. Under the civil practice act, it is permissible for a non-party to be served with a notice to produce. Unlike in Federal Court, no subpoena duces tecum is required in order obtain records, papers, or other documents from a non-party. Dr. Adler is a non-party and he has been given a notice to produce. It was permissible for defense counsel to seek the medical records of Mr. Jones based on his physical condition being an issue in the case.

Further, defense counsel correctly copied the plaintiff's lawyers on the request. Under the CPA, a party must object to the discovery of any information it claims to be improper or privileged. If this objection is not filed, it may be waived. The privilege is held by the client, and therefore the client must consent before such records can be produced. However, if the plaintiff does not object, Dr. Adler may attempt to assert the privilege on behalf of patient. In that case, because he is a nonparty, defense counsel may need to serve him with a subpoena.

2. If objection is filed, records cannot be produced to the defense counsel

Plaintiff's counsel may file an objection based on the psychologist-patient privilege. Georgia recognized a psychologist/psychiatrist privilege which protects information which is disclosed to a psychologist or a psychiatrist for the purpose of seeking treatment for mental health from being disclosed without the patient's consent. This privilege is based on the overarching policy that this information is sensitive in nature, and the risk of disclosure to third parties could greatly impede the performance of this important service. This privilege would apply here given the fact that Mr. Jones obtained counseling for his mental health problems from Dr. Adler, who is a board-certified psychiatrist. Notably, the privilege does not apply when the court has ordered a psychological evaluation. Therefore, defense counsel could request a court-ordered mental examination of Mr. Jones pursuant to Georgia law. Although Mr. Jones has arguably put his mental condition in issue for asserting that he is entitled to recovery for his mental injuries, the disclosure of medical records from Dr. Adler would not be permissible under Georgia law.

3. Deposition:

(a) Dr. Welby's Records are Not Privileged

Whenever a plaintiff puts his physical condition at issue, as was done in this case by filing a personal injury claim, the opposing party has the right to gather evidence relating to that condition. It possible that Dr. Welby could refuse to turn over these records on the grounds that they are protected by the doctor-patient privilege. However, Georgia does not recognize such a privilege for ordinary medical doctors. Therefore, if he refused to comply, he could be served with a subpoena.

(b) This is not an appropriate method of obtaining records

Under the Civil Practice Act, a party may not conduct discovery for improper purpose including harassment, embarrassment, or delay. Under the rules, a party is permitted to seek discovery on any matter which could lead to relevant evidence. However, certain formalities associated with discovery must be followed. First, when a party serves a discovery request, including requests to produce, notice of depositions, and subpoenas, the opposing party must be notified. This gives the opposing counsel an opportunity to object or attend the deposition.

Here, there are several ethical problems associated with seeking to coerce Dr. Welby from turning over his records by serving him with a subpoena to appear at a deposition that is not planned to occur, and without notice to the opposing counsel. The CPA does not require that nonparties be served with a subpoena duces tecum in order to compel them to produce tangible documents or papers. Defense counsel could have simply subpoenaed the records of Dr. Welby. Second, it would be appropriate to take Welby's deposition. However, both actions required notice to the opposing party. Here, defense counsel is attempting to coerce Dr. Welby to produce so that he does not object to the subpoena by "threatening" him with taking his deposition. This is not permissible under the CPA or the GA Rules of Professional Conduct. The court could become involved and file sanctions on defense counsel for failing to follow proper procedure concerning discovery. Even though defense was planning on turning over the records to the plaintiff, defense has still failed to comply with the rules.

Question 4 - Sample Answer # 3

1. Defense Counsel's Request to Produce

No, Defense Counsel may not obtain the records in the event that the Plaintiff Attorney does not object in a timely fashion. At issue is whether a defense against discovery by the opposing party is waived if no timely objection is made. Under the Georgia Civil Practice Act, an objection must be made within 30 days, not 20 days of the discovery tool. Furthermore, even if the objection is not brought within a timely manner, undiscoverable information does not become discoverable simply

because of a failure to object. If a privilege or some other evidentiary rule bars discovery of a document, the document remains privileged. The privilege is only the Dr. or the Patient's to hold. Here, the Defense Counsel stated the wrong time period for objection from the Plaintiff's Attorney, and failure of the Plaintiff's Attorney to object within an arbitrary time period set by the Defense Counsel has no bearing on the issue of privilege of the documents at issue in the Request for Production. Therefore, the Defense Counsel may not obtain the documents simply because the Plaintiff Attorney did not meet the Defense Counsel's 20 day requirement.

2. Dr. Adler's Records

Dr. Adler's records are not discoverable whether or not John Jones' ("JJ") attorney timely objects. At issue is whether a psychiatrist may release the records of a patient without the patient's consent, or in other words, whether this information is privileged under the Federal Rules of Evidence or the Georgia rules. Under Georgia law, there exists a Mental Health Care Privilege. This privilege holds that a patient's confidential communications with his or her mental health care profession (i.e., psychiatrist) are privileged and are not discoverable. Here, Dr. Adler is JJ's psychiatrist and JJ went to see the Dr. for PTSD resulting from the incident which is at issue in the case. Therefore, Dr. Adler's records are not discoverable.

3. Dr. Welby's Records

(a) Whether Dr. Welby's Records are Privileged

Dr. Welby's records are not privileged in Georgia (meaning, they are discoverable). At issue is whether JJ or his physician may hold JJ's medical records under Georgia law. Under Georgia law and the Federal Rules of Evidence, there is no physician-patient privilege, meaning that the records that are kept in furtherance of a patient's condition are subject to discovery before the trial, especially if they relate to damages which are at issue in the case. Here, neither JJ nor his physician may withhold JJ's medical records because his Dr. Welby was in charge of his overall medical care. Thus, they are discoverable by the Defense.

However, Georgia does have a physician-shield statute, whereby a physician may not release medical records unless authorized by the patient, by court order, or by subpoena. Here, the medical records have been subpoenaed, and eventually the Defense would be able to obtain the records through court order if they are able to show in the future that the physician and/or Plaintiff Attorney is violating discovery rules (such order can only be obtained with a showing that Defense has tried in good faith to obtain discovery without the court getting involved). Therefore, the physician-shield statute will not save these records from being discoverable.

(b) Is this an Appropriate Manner to Obtain Records?

This is not an appropriate way to obtain medical records. At issue is whether the "notice" of the deposition is being used to coerce the Dr. into sending the records. Under Georgia law, a party

seeking to obtain documents must send a Request to Produce Documents and Things. If served on a non-party, then a subpoena must accompany the Request to Produce in Federal court, and in Georgia courts, the Request itself is enforceable without a subpoena. Notice should also be given to the opposing party that such a request has been made. Additionally, the party served has 30 days to respond. Here, the Defense Counsel is attempting to obtain medical records, thus, it is inappropriate for Defense Counsel to "notify" the nonparty of a deposition and try to obtain the records without a proper Request for Production.

In addition, this tactic seems highly unethical. Under the Georgia Rules of Professional Conduct, a lawyer is required to act appropriately 24 hours a day as an Officer of the Court. This includes using inappropriate tactics during the course of litigation. Here, it appears that Defense Counsel is attempting to "get a peek" at the records before the Plaintiff Attorney and in order to do so, is using the threat of deposition against a nonparty. This seems highly unethical and the Defense Counsel should follow Discovery Rules and refrain from using coercive tactics.

MPT 1 - Sample Answer # 1

I. **Carol Walker may not be compelled to give testimony or produce materials relating to communications with her client, William Hammond, because under the Franklin Rules of Professional Conduct (FRPC), she is prohibited from disclosing information relating to the representation of a client unless one of four exceptions applies, and given the facts presented, none of these exceptions apply.**

A. First, Walker may not be compelled to give testimony or produce materials relating to her confidential communications with Hammond because she did not receive his informed consent to do so.

Under FRPC 1.6, a lawyer shall not reveal information relating to representation of a client unless the client gives informed consent. In the facts presented, Walker never received informed consent from Hammond to disclose their communications. Therefore, the first exception to the rule prohibiting disclosure of client communications does not apply.

B. Second, Walker may not be compelled to give testimony or produce materials relating to her confidential communications with Hammond because the disclosure is not impliedly authorized in order to carry out the representation.

Under FRPC 1.6, a lawyer shall not reveal information relating to representation of a client unless the disclosure is impliedly authorized in order to carry out the representation. Again, from the facts presented, there is no implied authorization for Walker to disclose the communications with Hammond in order to carry out her representation of him. Therefore, the second exception to the

rule prohibiting disclosure of client communications also does not apply.

C. Third, Walker may not be compelled to give testimony or produce materials relating to her confidential communications with Hammond because she does not reasonably believe the disclosure is necessary to prevent certain death or substantial bodily harm.

Under FRPC 1.6, a lawyer may reveal information if the lawyer reasonably believes the disclosure is necessary to prevent reasonably certain death or substantial bodily harm. From the facts presented, Walker has given no indication that she believes a disclosure is necessary to prevent certain death or substantial bodily harm. Because this exception is a permissive one, meaning it is up to the reasonable belief of the lawyer, so long as Walker reasonably believes that such a disclosure is not necessary, she is actually prohibited from revealing the client communications.

D. Fourth, Walker may not be compelled to give testimony or produce materials relating to her confidential communications with Hammond because she does not reasonably believe the disclosure is necessary to prevent, mitigate, or rectify substantial injury to the financial interest or property of another that is reasonably certain to result from the client's commission of a crime of fraud in furtherance of which the client has used the lawyer's services.

Under FRPC 1.6, a lawyer may reveal information if the lawyer reasonably believes the disclosure is necessary to prevent financial harm to another due to the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services. Again, from the facts presented, Walker has given no indication that she reasonably believes such a disclosure is necessary. Because this last exception is also a permissive one, meaning it is up to the reasonable belief of the lawyer, so long as Walker reasonably believes that such a disclosure is not necessary, she is actually prohibited from revealing the client communications.

II. **Carol Walker may not be compelled to give testimony or produce materials relating to communications with her client, William Hammond, because she has the privilege under the Franklin Rules of Evidence (FRE) not to disclose confidential communications with Hammond.**

A. Under FRE, Walker has the authority to claim the lawyer-client privilege on behalf of Hammond because under the "probable cause" standard applied in State v. Sawyer or the "some evidence" standard applied in United States v. Robb, there is insufficient evidence establishing probable cause to believe that Hammond sought or obtained Walker's services to further a crime or fraud.

In Franklin, a client has a privilege to refuse to disclose and to prevent another person from disclosing a confidential communication made for the purposes of getting legal services. FRE 513(b). In addition, the client's lawyer is presumed to have authority to claim the privilege, but only on behalf of the client. FRE 513(b)(3). The FRE provide an exception to this privilege when the attorney's services were sought in order to enable or aid the client in committing a crime or fraud. FRE 513(d)(1). This exception to the privilege does not apply to facts presented, because either under the "probable cause" standard applied in State v. Sawyer or the "some evidence" standard

applied in United States v. Robb, there is insufficient evidence to show that Hammond used Walker's services to commit a fraud or crime. Similar to the facts of Sawyer, the state has not provided sufficient evidence establishing probable cause that Hammond obtained Walker's services in furtherance of a crime or fraud. While the state may have some evidence that Hammond was thinking of committing insurance fraud, the facts presented do not provide some evidence that Walker's services were used to commit the insurance fraud. Therefore, because the attorney's services were not used in furtherance of the fraud under either standard, the exception to the privilege does not apply. Therefore, Walker may invoke the privilege on behalf of her client, Hammond, and refuse to give testimony or produce materials relating to her confidential communications with Hammond.

MPT 1 - Sample Answer # 2

Body of the Argument

Attorney Carol Walker May Not be Compelled to Testify or Disclose Privileged Documents Because Franklin Rule of Professional Conduct Rule 1.6 Does Not Require the Lawyer to Disclose Privileged Information

Franklin Rule of Professional Conduct 1.6 states that "[a] lawyer shall not reveal information relating to representation of a client unless" the client consents, there is implied authorization, or falls within a permitted form of disclosure. Here, Ms. Walker acquired information during a confidential discussion. In this case, William Hammond has not given his consent and no implied authorization exists. Additionally, Ms. Walker does not reasonably believe that disclosure is necessary to prevent any of the harms mentioned in Rule 1.6(b). Furthermore, the Court may not compel Ms. Walker to disclose the information pursuant to Rule 1.6(b) as it only permits disclosure in certain situations, but never compels the disclosures.

Attorney Walker May Not be Compelled to Testify Because Franklin Rule of Evidence 513 Allows an Attorney Representing a Client to Assert the Privilege on Behalf of the Client

Franklin Rule of Evidence 513 grants a client the privilege to refuse to disclose and prevent an person from disclosing his confidential communications "for the purpose of facilitating legal services." Here, Mr. Hammond discussed the destruction of his business with Ms. Walker to obtain legal services. Thus, it qualifies as a confidential communication under the privilege.

Pursuant to Rule 513(b)(3) the privilege may be claimed by the client or the person who was the lawyer at the time of the communication on behalf of the client. Here, Ms. Walker was an attorney at the time of the communication. Furthermore, she now asserts the privilege to protect the client from her compelled testify in a grand jury proceeding. As a result, the privilege applies here and Ms. Walker is allowed to use it for the benefit of her client. Therefore, the Court should quash the subpoena because it violates Franklin Rule of Evidence 513

The Crime Fraud Exception is Inapplicable Because the State Lacks Probable Cause or Even Some Evidence Linking the Communication to the Furtherance of Any Crime Due to the Timing of the Communication and the Absence of Evidence of Criminal Conduct After the Communication

The Crime-Fraud exception applies where a client acquires an attorney to commit or to help plan to commit a crime. The mere assertion of a crime is insufficient to support the application of the exception. Evidence must be presented. However, Franklin courts have not yet determined the standard. The courts have not decided between the "some evidence" or the "probable cause" standard. Due to the importance of protecting attorney client privilege and communication, the court should adopt the more protective "probable cause" standard as our sister state Columbia has. However, even if this court chooses to use the less protective "some evidence"' standard the State lacks sufficient evidence to support a finding to apply the exception and compel delivery to a court for in camera review due to the timing of the communication and the lack of any filing of an insurance claim.

In State v. Sawyer, the Columbia Supreme Court applied its probable cause standard to determine if disclosure of privileged information was required due to the crime-fraud exception. In that case, the Court stated that the "mere assertion" of a crime or fraud is not enough, but "the moving party must present evidence establishing probable cause." In Sawyer, the State presented facts showing that the client was in prison, told the police that Sawyer had not bribed him, met with an attorney, and later agreed to testify against Sawyer for a reduced prison sentence. While the evidence did support the determination that Sawyer may have retained his attorney to commit perjury, the Court determined that it was not sufficient to compel disclosure because the evidence provided equal weight to the assertion that the attorney was obtained to help the client make informed decisions.

Here, the State would have evidence that a building was burned and perhaps additional evidence linking Mr. Hammond to the incident, but that evidence would not be enough to establish probable cause. However, Mr. Hammond's meeting with Ms. Walker did not take place until after the destruction of Mr. Hammond's business. Thus, it does not seem that the communication could have been in furtherance of the crime. Furthermore, no insurance claim has been made. Consequently, the communication could not have been in furtherance of a Fraudulent claim. Therefore, while the State may have substantial evidence linking Mr. Walker to the crime, the State has minimal evidence linking Mr. Hammond's communication with Ms. Walker to any crime, which is where the crime fraud exception applies. As a result, the State cannot compel Ms. Walker to disclose documents related to her discussions with Mr. Hammond or compel her to testify to the grand jury because of Franklin Rule of Professional Conduct 1.6.

In United States v. Robb, the U.S. Court of Appeals for the 15th Circuit applied the less protective some evidence standard. In that case, the government produced evidence that the client had discussions with the attorney in the "midst" of a fraudulent scheme and that the attorney was the primary source of legal advice. The court determined that the evidence was sufficient. However, in this case, there is no evidence to support that Mr. Hammond had any discussion with Ms. Walker before the fire that destroyed the building. Additionally, no evidence exists to suggest that another crime has been committed or attempted after Ms. Walker's discussion with Mr. Hammond. Thus, the State lacks evidence to overcome the evidentiary burden of preponderance of the evidence

even under the less protective and less desirable "some evidence" standard.

MPT 1 - Sample Answer # 3

STATE OF FRANKLIN

GORDON COUNTY DISTRICT COURT

In Re Grand Jury Proceeding 11-10 Motion to Quash

Hammond Container Company Subpoena Duces Tecum

ARGUMENT

I. ATTORNEY WALKER IS PROHIBITED FROM PROVIDING EVIDENCE IN RELATION TO HER COMMUNICATIONS WITH WILLIAM HAMMOND BECAUSE THE RULES OF PROFESSIONAL CONDUCT INSTRUCT AN ATTORNEY THAT SHE "SHALL NOT" REVEAL INFORMATION RELATING TO THE REPRESENTATION, AND SHE IS JUSTIFIED IN EXERCISING HER DISCRETION TO REFUSE TO PRODUCE THE COMMUNICATIONS BECAUSE SHE DOES NOT "REASONABLY BELIEVE" IT IS NECESSARY.

The Rules of Professional Conduct governing attorneys include a dictate in the form of Rule 1.6 that indicates a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent... or the revealing is, to the extent the lawyer reasonably believes necessary, to prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services. (Rule 1.6)

Furthermore, Rule 1.6 specifically states that the revelation of communications is in the lawyer's discretion: "to the extent the lawyer reasonably believes necessary." The dictate to the attorney to reveal the communications is likewise phrased in the term "may" as opposed to a direct mandate to disclose. This gives the attorney discretion to disclose communications only when she reasonably believes necessary. (Rule 1.6) Additionally, the crux of Rule 1.6 begins with a dictate that instructs the attorney that he "shall not" reveal information. In light of the use of the permissive revelation versus the overall mandate to NOT reveal information, Attorney Walker may exercise her judgment to assert that there was no reasonably necessity in this instance to reveal the communications.

II. THE DISTRICT ATTORNEY IS PRECLUDED FROM LIFTING THE VEIL OF THE ATTORNEY - CLIENT PRIVILEGE BECAUSE THERE IS NEITHER "SOME EVIDENCE" NOR "PROBABLE CAUSE" TO PROVE THAT THE PRIVILEGED COMMUNICATIONS FURTHERED AN ALLEGED ARSON.

In Franklin, a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of legal services to the client. Furthermore, the privilege may be asserted not only by the client, but also by the attorney on behalf of the client. An exception to this dictate is that the privilege is lifted when the services of the lawyer were sought or obtained to enable/aid one to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud. There is a presumption that communications between the client and attorney are privileged in Franklin, and the party asserting that the privilege is inapplicable bears the burden of proof by a preponderance of the evidence. Additionally, the party asserting the privilege must reveal to the court the communication so that the court may determine its status when the party seeking to defeat the privilege presents "evidence sufficient to raise a substantial question about the communication's status." ® 513/Comment). However, Franklin has not determined definitively that the evidence presented to prove the communication is not privileged is to be proven by a probable cause standard, or in the alternative, whether there must be "some evidence" to the effect to show it is not privileged. (Comment to Rule).

Case law in two jurisdictions has touched on the issue in order to guide courts as to which is the more appropriate standard. The 15th Circuit has indicated, in Robb, that the privilege exists in order to facilitate frank communications; yet, the privilege (as in Franklin) does not apply when the communications were to seek or obtain the lawyer's services to facilitate a crime/fraud. In Robb it was stated that the party overcoming the privilege must do more than merely make an assertion that the client retained the attorney for such a purpose; instead, the moving party must present "some evidence" supporting "an inference that the client retained the attorney for such purpose." Upon such evidence, the court will review in camera the communication, and it will admit the evidence if shown by a preponderance of the evidence that it falls within the crime/fraud exception. At issue in Robb was a mine owner who retained an attorney in the midst of a fraudulent scheme to misrepresent profits, and the attorney had regular contact with the client during the perpetuation of the fraud. In the matter at hand, there is no indication that Mr. Hammond spoke with Attorney Walker until after the alleged arson event (memo to client file). As distinguished from Robb, the representation did not perpetuate throughout any alleged fraudulent scheme, and the representation was not sought to facilitate such a scheme. There was one meeting in order for Mr. Hammond to ascertain his legal rights/expectations; this is no way indicative of perpetuating a fraud. Though met in Robb, this low threshold would not be met in this case because there is not "some evidence" to overcome the presumption of confidentiality.

The Columbia Supreme Court, also not binding, has instructed that the burden on the movant be to prove the assertion via a "probable cause" standard. In its application, the court in Sawyer refused to permit privileged evidence when it would likewise support an inference that the client had

retained the attorney to assure that his choices were informed. In this instance, there is also an equally permissible inference that the consultation with Walker was for the purpose of ascertaining options, and in no way meets a probable cause standard.

Finally, information relating to the investigation (police report) is accessible to all parties involved without the necessity of piercing the veil of the privilege.

MPT 2 - Sample Answer # 1

Preclusion Generally

Under Thompson, preclusion applies where an administrative agency has the authority to adjudicate disputes and decides the issues properly. The doctrine can apply only where agency procedures comport with minimal requirements of due process, i.e. the parties had an opportunity to litigate the claim before the agency. In essence, an agency must act as much like a court as possible. In examining whether current procedures would be given preclusive effect, this memo will address which procedures comport with due process, which do not, and any recommended changes.

1. Which city procedures comply with the requirements for preclusion?

The evidentiary nature of the hearings appears to comply with preclusion requirements. No one factor is dispositive as to preclusiveness, but an important factor is that litigants have an opportunity to challenge evidence against them and offer evidence themselves. In Thompson, the Court noted that "aggrieved parties must have the opportunity to present evidence through witnesses and exhibits and to challenge the evidence presented...through cross examination and objections." The Trenton court stated that due process does not require strict adherence to the Franklin Rules of Evidence (FRE). Here, the current Liquor Control Ordinance (LCO) allows for testimony under oath, objections, cross-examination, and gives an accused party the opportunity to present evidence in its defense, even if not strictly within the bounds of the FRE. Thus, the current procedures for presentation of evidence likely comply with the requirements for preclusion.

The division between the Mayor as adjudicator and city officials as prosecutors complies with preclusion requirements. Under Lui, an agency wishing for preclusive effect must avoid commingling of investigatory, prosecutorial, and adjudicative functions. In keeping with Lui, the Mayor acts as judge and a city official acts as prosecutor.

2. Which city procedures do not comply with the requirements for preclusion, and how could those procedures be improved?

Under Trenton, an important factor in whether preclusion applies is whether the defendant has rights to counsel at the hearing. Currently, the LCO does not expressly provide for defendants to be represented by counsel at the hearing. While this fact alone may not be enough to render the entire scheme ineligible for preclusive effect, affording litigants the right to counsel would be a step toward compliance with preclusion requirements.

Under Lui, notice is sufficient if it apprises the accused of the claims against him and gives him sufficient information to defend himself. The city's current notice may not be sufficient. Although it informs a licensee that he has been charged, the notice might be better if it specifically enumerated the charges against the licensee, rather than noting only the sections of state and city ordinances that have been violated. The notice also should inform the licensee what procedures are necessary to get a hearing, rather than simply informing him to contact the Mayor's office for further instructions.

In view of the "act as much like a court as possible" standard, hearings should perhaps be made the default resolution. The LCO allows for hearings only if the licensee demands one within 10 business days of notice, a procedure which a court might view as somewhat draconian and less like the behavior of a true court.

The LCO currently provides the Mayor with both investigatory and adjudicative power. Changes should perhaps be made to provide for another official, one not involved in adjudication, to investigate claims against licensees in order to comport with the independence required by Thompson.

Under Trenton, prehearing discovery is an important factor in determining whether preclusion should be applied. Currently, no such discovery is provided for in the Ordinance. Allowing licensees access to the evidence offered against them would be a significant change.

The hearing procedure might be improved by providing a more disinterested adjudicator. Under Lui, a disinterested adjudicator is key to compliance with due process requirements. Currently, the Mayor receives and investigates applications, and sees information about the charge before the hearing.

3. How would the recommended changes affect the city's goals of cost and efficiency?

Allowing for counsel likely would not increase cost or inefficiency, and in fact might improve efficiency. The city would not necessarily be required to provide counsel, only to allow for it. Presence of counsel at the hearings would increase efficiency by providing a knowledgeable presence in place of what is now likely a layperson unfamiliar with the nature of the law and how proceedings of this type are conducted. This would allow for less time wasted and smoother operation of hearings.

Changing the current notice would likely result in more use of paper, but would not significantly increase costs or inefficiency. In fact, providing procedural requirements in advance, as well as specific enumeration of charges, would cut down on the time the Mayor's office currently spends

providing licensees with more information after they receive notice.

Admittedly, making hearings the default resolution would increase both costs and inefficiency. Almost certainly more hearings would result, but this change would be a significant step toward the hearing being as much like a court as possible.

Providing for a more independent investigator might shift responsibilities from the Mayor to another, but is unlikely to increase the total amount cost or amount of work needed.

Prehearing discovery might increase the burden on the city, but not in any substantial way. The city could simply allow access to evidence it will present for copying by licensees and their counsel.

Removing the Mayor as adjudicator would increase costs and potentially inefficiency in that an official from another department would have to step in, or a new officer would need to be hired to conduct hearings.

MPT 2 - Sample Answer # 2

MEMORANDUM

I. CITY PROCEDURES WHICH ALREADY COMPLY WITH THE REQUIREMENTS FOR PRECLUSION:

1. The fact that "no licensee shall be fined and no license shall be suspended or revoked prior to a hearing" (Ord. 2-2) allows licensees an opportunity to be heard.

2. The provision providing that "any licensee wishing to contest the charges must request a hearing within 10 days" and that a hearing will occur within 5 days of the request. (Ord 2-2)

3. The procedures for conduct of hearings in Ord. 2-3, specifically the mayor's ability to do court-like things such as placing witnesses under oath, ruling on objections, dismissing charges, conducting the evidentiary hearings in an efficient manner, issuing fines, and the power to suspend or revoke licenses.

4. The procedure for creation of a record of the hearing via the provision of a court reporter with costs to be paid by the City.

5. The fact that the burden of proof is on the City. The standard of proof of "preponderance of the evidence" is probably sufficient as well.

6. The right of the licensee to cross-examine the witnesses presented by the City and present evidence in its defense.

These procedures appear to comport with the minimum requirements for Due Process and thus appear to meet the requirements for preclusion.

II. CURRENT CITY PROCEDURES WHICH DO NOT COMPLY WITH THE REQUIREMENTS FOR PRECLUSION AND SUGGESTED ALTERNATIVE PROCEDURES:

On the whole, Liquor Control Hearings currently do not meet Due Process requirements and thus cannot be given preclusive effect.

First, current notice procedures are inadequate. The current notice tells a licensee only the provision of the Liquor Control License that he has allegedly violated. As the Court held in Lui, "notice is sufficient if it apprises the accused of the claims against him and gives him sufficient information to defend himself." The notice procedures should be changed to inform the licensee of the specific nature and date of the violation, for example "On July 9 you sold liquor to a minor under 21 years of age." The notice should also provide the licensee specific information on how to request a hearing, the time limitation in which to do so, and should specify that the hearing will occur within 5 days of the request so the licensee has time to prepare his case.

Second, the Mayor in his adjudicative function is not sufficiently independent. According to Lui, "impartiality may be impossible when there is a commingling of the investigatory, prosecutorial, and judicial functions." Here, the Liquor Control Ordinance gives the Mayor authority to "investigate applicants" and "enter . . . [licensed premises] in order to enforce the ordinances" and conduct hearings" and "impose penalties." (Ord. 2-1) This implies a significant co-mingling of functions. Instead, the Liquor Control Commission should be composed exclusively of members of the City Council and the Mayor should be stripped of his current authority over Liquor Control other than the authority to conduct hearings and impose penalties.

Third, it is unclear how much discretion the Mayor has in adjudicating these cases. According to Thompson, the doctrine of preclusion does not apply where the administrative agency acts "legislatively" in adopting rules or "ministerially" in implementing action without discretion. The amount of discretion the Mayor has should be clarified.

Fourth, it is not clear who holds the prosecutorial function. According to Thompson, "it is critical

that adjudicators . . . be independent of those prosecuting the matter." If the Mayor and the Liquor Control Commission ("LCC") are made independent of each other, the LCC can validly prosecute liquor violations. The Mayor cannot have a financial stake in the outcome.

Fifth, minimum Due Process requirements are not met at an informal hearing where the licensee's right to counsel is unclear and the Rules of Evidence do not apply. Thompson provides that " . . . the more an agency acts like a court, the more sound the reasons for giving preclusive effect to its decisions. An agency acts like a court when it provides the basic opportunity for representation by counsel and follows basic rules of procedure and evidence." Trenton further suggests that hearsay evidence may be admissible, but thirdhand accounts from unnamed sources the accuracy of which the court cannot evaluate are not. Trenton stated that "Due Process does not require strict adherence to the Franklin Rules of Evidence." ("FRE") However, loose adherence is probably required. We should clarify whether licensees have a right to counsel, and provide that basic court procedures are to be followed. We should also provide that the FRE applies, except that hearsay may be admissible if it comes from a specifically identified source whose accuracy can be evaluated. The licensee must also be given a right to cross-examination or rebuttal for all evidence presented against him.

III. THE RECOMMENDED CHANGES WILL FURTHER THE CITY'S GOALS OF COST AND TIME-EFFECTIVENESS

First, no new jobs need be created to institute my recommendations. Instead, authority will be divided in a slightly different way. New notice forms will need to be printed but this should not be prohibitively expensive

Second, improved notice procedures will save time because licensees will be able to directly request a hearing without the intermediate step of calling the Mayor's office to find out how they may request a hearing.

Finally, ensuring that LCC hearings have a preclusive effect will produce significant time and cost savings by ensuring that issues need not (and indeed may not) be re-litigated in court.

MPT 2 - Sample Answer # 3

MEMORANDUM

To: Lawrence Barnes, City Attorney

From: Applicants

Date: July 27, 2010

Re: Liquor Control Commission Procedures

Per your request, this memo will analyze whether, under applicable legal authority, courts would extend the federal common law doctrine of preclusion to decisions rendered under the procedures set forth in our city ordinances regarding liquor control commission procedures. It will: (a) identify which city procedures comply with the preclusion requirements; (b) identify which procedures do not comply and how these procedures should be changed; and © how the recommended changes affect the city's goal of cost and time-effectiveness. In Thompson, the Supreme Court held that the preclusion doctrine applies to administrative agencies that have the authority to adjudicate disputes and do in fact decide disputed issues properly before it. The preclusion doctrine does not apply when an admin. agency acts "legislatively" in adopting rules or "ministerially" in implementing procedures without discretion. In order for the preclusion doctrine to apply, agency procedures must comport with minimal requirements of due process (Thompson). The more an admin. agency acts like a court, the more sound the reasons for giving preclusive effect. (Thompson).

Thompson set forth the following requirements for the application of preclusion to admin. agency decisions: (1) there must be an opportunity for representation by counsel and 92) the agency should follow basic rules of procedure and evidence. The requirements include, but are not limited to opportunity to present evidence, cross-examine witnesses, the availability of pre-hearing disclosure prior to litigation at hearing, an independent adjudicator, independent from those prosecuting the matter, and specific findings of fact and conclusions of law after a determination has been made.

(a) City procedures currently in compliance

Although each ordinance section could be improved to some extent to guarantee preclusive effect, currently § 2-1, by virtue of sub-sections (5) and (6), comply with the requirements for preclusion by granting authority to the commission to function in a quasi-judicial capacity (conducting hearings, rendering decisions, imposing penalties). This procedure could be improved by vesting the powers and duties in a person other than the Mayor (Lui, holding that commingling of investigatory, prosecutorial and adjudicative functions risks impartiality and violation of due process).

Similarly the standardized form, while substantially in compliance, could be improved by inserting blanks to list specific violations, dates and times, so that there would be no doubt that notice is sufficient to satisfy minimal due process requirements (Lui).

(b) City procedures that do not comply with preclusion doctrine

As discussed above in Thompson, while due process does not require all procedural protections available in a court, there are indicia of due process and importantly, "It is critical that adjudicators, whether they be hearing officers, admin law judges, or persons acting in a quasi-judicial capacity within an agency, be independent of those prosecuting the matter." Where, as here, the Mayor serves as investigator, prosecutor, and adjudicator, due process requirements, applicable to administrative agencies, are at risk of being violated. (Lui) (1) Section 2-2: This section should be amended to provide for pre-hearing disclosure. It should further provide that someone other than the Mayor (an interested person) should conduct the hearing (Thompson, Lui); (2) Section 2-3: While this section provides detailed procedures for conducting the hearing similar to those available in court, this section should be similarly amended so that an independent adjudicator is required. Where the functions of the prosecutor/investigator are mixed with adjudicator within the same agency (here, the Mayor serves on the commission and holds all of its powers and duties), a court must inquire whether the functions, as they are actually performed, are adequately separated so that there is no actual prejudice. (Lui). In such instances, a court is not likely to apply the doctrine of preclusion. The adjudicator has access to the investigator's files outside the hearing, the city's legal counsel is prosecuting on behalf of the agency, the role under current city ordinances is so "management oriented" as to violate due process. (Barber). (3) Section 2-4: As discussed above, the closer an administrative agency complies with court procedures, the more likely the doctrine of preclusion applies (Thompson) While due process does not demand formality in our administrative hearing, (Trenton), the impartiality of the hearing officer is critical. Therefore, the Mayor should not act as adjudicator. The ordinance would have a stronger likelihood of meeting the requirements for preclusive effect if it provided an opportunity for counsel and followed the Franklin Rules of Evidence. Furthermore, while admission of police reports likely satisfy the criteria of "sufficient assurances of truthfulness" for an administrative hearing (Trenton), admission of evidence from other investigative authority might constitute "third hand accounts" from "unnamed sources" whose accuracy could not be determined (Trenton, Lynnbrook). The changes should be made to insert "independent adjudicator" for Mayor; strike "other investigating authorities" and change the final sentence to read that the Franklin Rules of Evidence shall apply.

II. City's Goals of Cost and time-effectiveness

The issue here is whether the recommended changes above will affect the city's goals and effectiveness. Because due process requirements are important to the application of the preclusion doctrine to administrative hearing decisions, the city should finance the costs associated with fair hearings (i.e. independent hearing officers, providing right to counsel and prehearing discovery) from filing fees or from fees issued for the license being regulated (Cf. Lui). As such, the

recommendations should not affect the city's costs in these administrative hearings. Furthermore, such changes should promote the conservation of judicial resources by using local administrative proceedings with adjudicators with the greatest expertise in the subject. These changes would ultimately streamline the process, allow for every motivation to be adequately litigated in such reformed proceedings and ultimately reduce the current costs borne by the City (e.g. court reporters) and allow the Mayor and City Council to more effectively fulfill their roles.