July 2012 Bar Examination Sample Answers

Question1 - Sample Answer #1

1(a)

King Pin can argue that Drug Dealer's recorded statements should be excluded because they violate the Fourth Amendment (4A) rule against unreasonable search and seizure and that the statements are hearsay. Under the 4A, police must obtain a warrant before they engage in the search and seizure of a person or their effects. King Pin might argue that by recording the telephone call, the officers violated Drug Dealer's legitimate expectation of privacy in conversations on the phone. This is an expectation that Drug Dealer subjectively thought he had and one that society recognizes as reasonable.

Normally, police officers must obtain a warrant to put a wire tap on a persons phone which requires that they name the suspect, that the wiretap be fore a limited time, that the warrant name the crime involved, and describe with particularity the conversations to be recorded. King Pin might also argue that if such statements are not excluded under a 4A violation, they are hearsay, which would be out-of-court statements asserted at trial to prove the truth of the matter, namely that King Pin conspired to sell cocaine, possess cocaine, and the other named crimes.

(b)The arguments to exclude the statements under the 4A should be made at a pre-trial hearing during a motion in limine. At that time, the prosecution will have the burden of showing that the recorded statements do not violate the 4A. Hearsay objections to such statements could be made at trial if not excluded under the 4A.

(c) The motion to excluded the recorded statements under the 4A is not likely to succeed because a person can only assert their own 4A rights. In the instant case, there is no indication that King Pin's phones were wiretapped without a warrant. Drug Dealer was simply speaking to informant who had his own conversations recorded by the police.

There is no legitimate expectation of privacy for one who makes statements to someone else who is working with police. King Pin cannot assert Drug Dealer's 4A rights. A person can only assert their own.

Accordingly, King Pin's argument is unlikely to succeed on those merits. In regards to the hearsay objections which may be asserted at trial, King-Pin also will not succeed. Under Georgia law, his statements would be regarded as a exception to the hearsay rule as admission by a party-opponent. Additionally, his statements would be regarded as an admission of a co-conspirator which is an exception to the hearsay rule. Such statements must be made during the conspiracy and in furtherance of the conspiracy. In the instant case, King Pin said in his call that he was willing to sell cocaine and the call followed conversations with informant and Drug Dealer. Thus, the statements were made during and in furtherance of the conspiracy to sell and possess cocaine.

2(a) King Pin can argue that his statements to police were the product of an unlawful arrest, and therefore as the fruit of the poisonous tree should be excluded as a violation of his 4A rights. Under this doctrine, any evidence obtained as the product of an unlawful arrest must be excluded.

(b) This motion should be made during the pre-trial hearing by King Pin's counsel during motions in limine .Such arguments should not be made in the presence of the jury.

(c) Whether the argument succeeds turns on whether the police had probable cause to arrest King Pin. Probable cause means that officers have more than reasonable suspicion to believe that the person arrested has committed a crime. The facts indicate that King Pin only drove up in the car with Drug Dealer. There is no indication that he participated in the handling of any drugs, made any statements, or had any weapons that would give the police probably cause to arrest him at the time for the commission of a felony. The facts say that King Pin was chased by police and arrested. If he was in fact chased without probable cause, then he was unlawfully seized, and any statements made as a result of that arrest even with Miranda would be unlawful. However, if King Pin is in fact in any recorded conversations, then the police may have had probable cause to arrest him, and in that case, his confession would be admitted. He was properly administered his Miranda rights and there is no indication that his confession was not voluntary and intelligent. He did not invoke unambiguously his right to remain silent, or right to counsel that exists under Miranda.

3(a) King Pin can argue that the shotgun and cocaine found in the car should be excluded because police did not have reasonable suspicion to stop the Lookout's car and did not have probable cause to search the car. Absent a warrant, police must have probable cause to search a car meaning there is a fair probability contraband will be found under the automobile exception.

(b) Arguments should be made during a pre-trial hearing to exclude as a violation of the 4A.

(c) The argument will not succeed for several reasons. Given the fact that a drug sting had just gone down, and the Lookout Driver signaled to the Drug Dealer, the police had reasonable suspicion to stop the driver of the car based on articulable facts. They saw the Lookout pull up at the same time as the Drug Dealer and make such motions. The police only developed probable cause though to search the car after the k-9 unit arrived. One does not have a reasonable expectation of privacy in the smell of one's car; therefore, the police were justified in using the dog as long as they did not unreasonably detain the Lookout Driver to accomplish this goal. There is no indication they did. Therefore, under the automobile exception the police could search the car without a warrant. Even if the police were not justified in their search of the car, King Pin has no reasonable expectation of privacy in the search of Lookout's car. Therefore, he cannot assert Lookout's 4A rights and the items could be used against him at trial.

Question 1 - Sample Answer # 2

1)
a) The issue is whether Drug Dealer's statements may be admitted into evidence and used against King Pin, his alleged co-conspirator. King Pin can argue that the recorded statements made by Drug Dealer are inadmissable hearsay. Hearsay is a statement by an out of court declarant that is offered to prove the truth of the matter asserted. Here, the statements were made by Drug Dealer out of court and would be offered to prove the truth of the matter asserted, that King Pin agreed to sell the cocain. Thus, it is inadmissible hearsay, unless it fits into an exception or falls into a non-hearsay category.

b) The issue here is when an argument should be made to suppress the statements made by a co-defendant that is unavailable. King Pin could try to file a pre-trial motion to suppress the statements. king Pin could file a brief in support of its motion and argue for the suppression of the statements, and then argue them at a hearing on the motion. However, the best time to challenge the introduction of hearsay testimony is to make an objection at trial when the prosecutor offers the statements into evidence.

c) When a declarant is unavailable, an out of court statement made by that declarant is admissible if it was made under oath and the party it is being offered against had a chance to cross examine. Here, Drug Dealer is unavailable, and the statements were not made under oath and King Pin did not have an opportunity to cross examine Drug Dealer regarding the statements. Therefore, the statements may not be admitted and are hearsay. However, the statements may be admitted as an admission by a party opponent. Such admissions are non hearsay and are admissible. A statement made by a co-conspirator is admissible as an admission by another co-conspirator if the statement was made by a co-conspirator in furtherance of the conspiracy. King Pin could argue that there was no conspiracy, and thus the Drug Dealer, at the time of the statements was not his co-conspiracy. In Georgia, a conspiracy takes place when two or more people agree to engage in a criminal course of conduct and take an overt act in furtherance of the conspiracy. Here, there appears to have been a conspiracy because the parties agreed on the drug deal and several actions were taken to prepare for the deal. Thus, there is likely a conspiracy, and the statements were made in order to facilitate completion of the conspiracy, the drug deal, thus, the statement is likely admissible as an admission by a party opponent.

2) The issue here is whether a confession may be admitted into evidence if it was obtained after a suspects Miranda rights were read to him but in exchange for a bond hearing.

a) King Pin can argue that his confession was not given voluntarily because it was induced by the promise to be released on bond, which was no kept by the prosecution, and thus the product of police coercion.

b) The issue is when should a defendant in a criminal case argue that his confession to the underlying crime should be suppressed. A defendant in a criminal case should file a pretrial motion to suppress to challenge his confession. Thus, King Pin should file a motion to suppress his confession before trial. king Pin could file a brief in support of his motion and argue for the suppression of the evidence, and then argue for the suppression at a hearing on the motion. King Pin should also object to the admission of the evidence at trial.

c) For a confession to be valid a confession must be given 1) after the suspect has been advised of his Miranda rights; and 2) a valid waiver of those rights has been obtained. Here, the facts indicate that King Pin confessed after his Miranda rights were given to him. Thus, the issue is whether his confession was given after the police obtained a valid waiver of those rights. To be valid, a confession must be given knowing and intelligently, and it must be given voluntarily. A statement will not be considered voluntary if it was the product of coercion. King Pin can argue that his confession was not given voluntarily because it was induced by the promise to be released on bond and thus the product of police coercion. Generally, a statement may not be induced by a promise for lenient treatment. However, being released on bond would not be considered lenient treatment. Lenient treatment would be receiving a lighter sentence. Thus, King Pin will likely not be able to suppress his confession, even though King Pin was not subsequently released on bond.

3) The issue here is whether evidence obtained from a defendant's automobile may be used against him if he was not a passenger in the automobile. King pin can argue that the search violated his fourth amendment right against unreasonable searches and seizures.

b) The issue is when should a defendant in a criminal case argue that evidence of the underlying crime was obtained in violation of his right against unreasonable searches and seizures should be suppressed. A defendant in a criminal case should file a pretrial motion to suppress to challenge such evidence. Thus, King Pin should file a motion to suppress the evidence before trial. king Pin could file a brief in support of his motion and argue for the suppression of the evidence, and then argue for the suppression at a hearing on the motion. King Pin should also object to the introduction of the evidence at trial.

Generally, a police officer must have a search warrant to search a person's person, place, or things. However, there are several exceptions to the general rule, one of which is the automobile exception. Because citizens have a lower expectation of privacy in their automobiles, police may search an automobile if they have probable cause to believe that evidence of crime will be found inside of it. Here, Lookout did not consent to the search of Drug Dealer's car even though he had the authority to do so. The officer then used a drug dog to search the outside of the car. An officer may use a drug dog to smell around a car if the time it takes for the dog to get there is reasonable. Here, the facts indicate that the dog was used immediately, thus the use of the dog was permitted. Once the dog alerted that drugs were in the car, the police officer had probable cause to believe that drugs were in the car and thus he was permitted to search it. Thus, King Pin will not likely be able to prevent the prosecution from using the evidence at trial.

Question 1 - Sample Answer # 3

MEMO

1. King Pin (KP) would like to block the use of Drug Dealer (DD) and Informant's recorded statements in which DD agreed to call KP to obtain cocaine and DD said KP would sell cocaine for $7500.

a) KP can argue that these statements are inadmissible hearsay. Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted in the statement. It is inadmissible unless there is an exception in the rules of evidence. KP can argue that the statements, especially the one asserting that he is willing to sell a kilo of cocaine for $7500, is being offered to prove its truth. KP may also want to argue that his rights under the Confrontation Clause of the Sixth Amendment would be violated if his co-defendant's statements were admitted against him and implicate him and he has no opportunity to cross-examine the co-defendant.

b) KP can file a motion in limine to have the statements evaluated before trial and have the judge determine their admissibility, or he can wait until trial and object on hearsay grounds when the evidence is presented to the court.

c) There are a couple of exceptions to the hearsay rule that could be used to admit the recordings. First, a statement that indicates the declarant's state of mind, generally meaning his intent to do something in the future, is admissible under the state of mind exception. DD said that he would call KP to obtain the cocaine. Thus, the statement may be admitted as showing DD's state of mind. However, the statement that KP would actually sell cocaine would not fall under this exception. Alternatively, there is an exception for the statements of co-conspirators. These statements must be made in furtherance of the conspiracy. Here, it can be argued that DD's statement would also fall under this exception. KP can argue that he was not yet involved in the conspiracy when the first phone call between DD and Informant took place. However, he was involved by the time the second call was recorded. Thus, the first call is likely admissible under the state of mind exception to the hearsay rule and the second statement under the co-conspirator exception.

As for the Confrontation argument, the statements made by DD implicating KP are likely admissible. The Clause mainly applies in cases where a co-defendant confesses because the statements are considered testimonial- made to police to aid in prosecution. Here, DD didn't even know he was being recorded or that Informant was an informant, thus his statements are not testimonial and this argument fails.

2. KP wants to suppress the confession in which he confessed that he had participated in the sale between DD and Informant.

a) KP can argue that his confession was involuntary. Pursuant to the Fifth Amendment, before any custodial police interrogation, the police must give Miranda warnings to the defendant. Whether the questioning is custodial or not is judged by whether a reasonable person would believe he was free to leave. If not, then the questioning is custodial. A person under arrest is not free to leave, so KP was in custody when he confessed. The facts indicate that KP was given his Miranda warnings prior to making the confession and there is no indication that he invoked either the right to remain silent or the right to an

attorney. However, any waiver of Miranda warnings must be voluntary, meaning that it be made knowingly and intelligently. Here, KP alleges that he was told by police that if he made a statement he would be released on bond. He'll argue that this amounts to making his confession involuntary. An involuntary confession is inadmissible at trial as substantive evidence, but could be used to impeach if KP took the stand to testify.

b) KP can file a motion in limine to have the confession evaluated before trial and have the judge determine its admissibility. If it is admitted erroneously, a conviction would be overturned on appeal unless the state could show that the error was harmless, meaning that there is other overwhelming evidence of guilt so KP would have been convicted anyway.

c) KP will likely lose on this argument as well. There is no indication that KP was badgered by the police into confessing or threatened if he did not confess. The indication that KP would be released on bond if he made a statement would likely not be construed by a judge to make his confession involuntary.

3. KP wants to suppress the shotgun and cocaine found in the Range Rover (RR).

a) KP can argue that the search of the RR was illegal. Generally, searches by police must be made pursuant to a warrant. This is because the Fourth Amendment Search and Seizure clause requires that a search be reasonable. The warrant is generally needed to search any area in which the defendant has a reasonable expectation of privacy, which includes his vehicle. The warrant must be issued by a detached magistrate upon a finding of probable cause after considering a sworn affidavit from the police. However, there are a number of exceptions to the need for a warrant, including consent and the automobile exception.

b) Again, it would be best to file a motion in limine prior to trial to convince the judge that the evidence should be suppressed.

c) If the police receive voluntary consent to a search, then the search is permissible for the scope of the area consented to and the fruits of the search will not be suppressed at trial. Here, the facts indicate that Lookout refused consent, so that exception to the need for a warrant will not apply. Also note that this search is not a search incident to a constitutional arrest, which is another exception to the warrant requirement, because Lookout was arrested after the search. However, the police may search an automobile without a warrant if they have probable cause to believe that it contains contraband or instrumentalities of a crime. Reasonable suspicion is not enough. The sniffing of a car by the police has been held not to constitute a search, so using the drug dog was permissible. Further, when the dog alerted the police to the presence of drugs, the police had probable cause to search the RR. Accordingly, the cocaine will be admissible at trial. Further, the police may seize any evidence that is in plain view when conducting a constitutional search. This would include the sawed-off shotgun (would be admissible even if not in plain view), which will also be admissible against KP.

Question 2 - Sample Answer # 1

Memorandum

1. In a divorce proceeding, Georgia follows the equitable division of property approach, under which each spouse will take out of the marriage their separate property and the court will make an equitable division of the marital property. However, an equitable division does not necessarily mean an equal division. Separate property is classified as property that a spouse has brought into the marriage, any appreciation it has earned if not the result of the efforts of a spouse, and any property received as a gift, bequest, devise, or descent. Marital property is property acquired during the marriage. Mixed property constitutes of both separate and marital property. It is important to note that separate property will become marital property if it inextricably mingles with marital property or the separate property of the other spouse. However, commingling does not occur if the separate property can be traced into the new product. In making an equitable distribution of marital property, the courts will consider the parties age, needs, health, education, vocational skills, employability, earning capacity, present income, opportunity to acquire future income and contribution to the marital assets.

In this case, John owned a home prior to the marriage which would be deemed his separate property. When he sold the property and obtained $200,000, that money was still his separate property. Even though he used the money to buy the martial home, that portion of his separate property can be traced into the new home and, thus, John will have a right to the $200,000 of separate property he put into buying the home. While the facts indicate that the home was titled in both parties' name, Georgia courts will make an equitable division of property no matter how it is titled.

In addition, Mary received $15,000 from her previous marriage would be considered her separate property, however, she used this money to add a pool and pool house to the residence. Since her contribution of separate property can be traced into the home, that portion remains her separate property as well. Considering that the property is valued at $280,000, John will be distributed his $200,000 of separate property he contributed and Mary her $15,000. However, there remains $65,000 which the court must determine its distribution. The facts indicate that Mary and John jointly signed the mortgage for $100,000, but do not specify what portion of the mortgage was paid by each party. In making the equitable distribution of the remaining $65,000, the court should divide it among the parties equally since neither spouse seems to be more in need, or lacking education, employability, or income.

2. John's affair will have no effect on the distribution of the marital assets. Generally, spousal misconduct is considered in making an equitable division of marital property and in determining alimony. However, where the court finds that there has been condonation, the court will not consider evidence of a spouse marital misconduct such as adultery. Condonation occurs when a spouse willing forgives another spouse for their marital misconduct with full knowledge that the offense has occurred. Forgiveness and continuation or resumption of the marital relationship is the key element of condonation.

In this case, John had an affair in 2010 which Mary learned of and subsequently separated from the marital relationship. However, after John agreed to counseling, Mary forgave him and reconciled. Since Mary forgave John with full knowledge that the adultery occurred and she resumed the marital relationship, the adultery cannot be considered in making the

equitable distribution of marital assets.

3. Mary's adultery will be considered in the distribution of the marital property if it was the cause of the separation. The facts indicate that John filed divorce on the grounds of adultery. Therefore the cause of the divorce will be considered to be Mary's adultery with her boss. Since the adultery was the cause of the separation, Mary's adultery will be considered in making the distribution of marital property, and will be a bar to receiving alimony from John. However, Mary could assert recrimination. Recrimination is when the spouse seeking the divorce is guilty of a marital offense as well. Although John was guilty of adultery, Mary will be unsuccessful in this claim because of her condonation of the adultery.

4. In determining whether to award attorney's fees, a Georgia court has discretion over this and will consider the financial circumstances of the parties. A spouses misconduct is not considered in making an award for attorney's fees because the award is made in order that both parties have effective representation so that all issues are fully heard and fairly resolved. However, the facts indicate that both parties have retirement accounts with about the same value. In addition, even though John has about $200,000 in the house, Mary has $15,000 of separate property in the marital residence and may receive half of the remaining $65,000 in the marital home. She also remains gainfully employed. Therefore the court is unlikely to find that is Mary in a financial condition in which John should be forced to pay her attorney's fee.

Question 2 - Sample Answer # 2

1. Mary would have roughly a one-fourth claim to the equity in the home. In Georgia, upon divorce, courts will equitably divide the marital property of the spouses. Marital property is property that is acquired during the marriage. Separate property is property acquired before marriage and anything acquired by bequest or devise during the marriage. Generally, separate property can become martial property if it is commingled with separate property of the other spouse during the marriage. Here the home is martial property even though it was purchased with $200,000 from the sale of John's home before the marriage. Generally, property that is purchased with separate property of the spouses will be apportioned into separate and marital property according the contributions of the spouses to that property. John paid the $200,000 for the $300,000 home and jointly mortgaged the remaining $100,000 with Mary. Mary contributed her separate $15,000 from her prior marriage to the pool and pool house. Therefore, the mortgage and the pool would be marital property, while the $200,000 would likely be separate property. Mary would be entitled to roughly a fourth of the marital property because her overall contribution to the $280,000 equity was $65,000.

2. Georgia courts consider a number of factors in determining the equitable distribution of property, including the actions of the parties during the marriage. Courts will consider adultery when making a determination but adultery is not a bar to equitable distribution. Because Mary can prove that John had an affair, the court will likely consider that in determining John's portion of the equity in the marital home. However, John will likely have a defense of condonation with regard to his affair. Generally, when adultery is used as a ground for divorce, it can be defended on the ground that the other spouse forgave the adultery and resumed marital relations; this is called condonation. Here, because Mary forgave John and reconciled with him, John could defend on the ground of condonation and John's adultery would likely be a non-factor in the equitable distribution.

3. The issue is whether Mary's adultery will be considered in the distribution of the marital assets. As stated above, the court will consider the conduct of the parties to include adultery in the equitable distribution of the marital property. Mary began her affair with her boss after the reconciliation. Adultery is usually proven by circumstantial evidence of opportunity to commit the adultery and inclination to do so. If John can prove that Mary had the opportunity (likely because he is her boss) and inclination to have the affair, the court will consider Mary's affairs in determining her portion of the marital assets. If both spouses have unclean hands (recrimination) in the grounds for divorce, such as where both spouses commit adultery, the court will not consider any of the bad acts. However, Mary will not have a defense of John's affair because she condoned it by reconciling with him. Therefore, it is likely that her distribution could be lessened because of her conduct.

4. Attorney's fees are generally only awarded when there is a sufficient showing of bad faith on the part of the other party. Attorney's fees are not part of an equitable distribution but could be awarded under an alimony award. Alimony is designed to support a spouse that has been rendered unable to support his or herself, at least in part, because of the marriage. However, adultery in Georgia is a complete bar to alimony. Therefore, if John can prove Mary's adultery as stated above, Mary will not be entitled to any alimony, and as a result will not be able to get her attorney's fees.

Question 2 - Sample Answer # 3

1.

As a preliminary matter, valid prenuptial agreements are enforceable to dictate terms of property distribution in Georgia. However, because there is no prenuptial agreement between John and Mary, the court will turn to Georgia's rule for property distribution absent such an agreement. Georgia is an Equitable Distribution state. This means that all of the property of the husband and wife is first divided into "Separate" and "Marital" Property. All of the Separate Property is given to the respective party who possessed it prior to the marriage or who acquired it "separately" through gift, devise, or bequest. The remaining "Marital Property" is then divided in an Equitable manner between the two parties. It is important to note that Equitable Distribution is not the same thing as Equal Distribution. The division will be done equitably based on many factors including the age, education, and ability to find work of the parties. Consideration will also be given to needs such as financial, health, and support of children. Further considerations will be given to things such as the contributions made by each party. Additionally, in Georgia, Marital Fault will be factored in as well. Here, neither party is left with any Separate Property. Although John did have a separate home prior to the marriage, he sold this home before the marriage and invested the proceeds into a marital home for himself and Mary. Thus, rather than being considered "separate property," the $200,000 of John's became "marital property." (However, as mentioned below, the $200,000 will still be considered as a contribution made by him towards to property of the marriage) The only property to be divided is the marital home and it is considered "Marital Property" for the purposes of the Equitable Distribution. So, the distribution will key on how the marital home is divided between John and Mary. In this case, both parties worked throughout the marriage, they have no children, there is nothing to indicate drastic differences in age or education, and both parties are at least at some degree of marital fault for the adultery that they committed. Also, both parties have retirement accounts of approximately the same value - so the standard of living factor is likely to be moot here. Therefore, the respective contributions of the two parties is likely to be the most telling factor here. In this case, John contributed $200,000 to the marital home while Mary only contributed $15,000. Therefore, the court is very likely to determine that John is entitled to the vast majority of the value of the marital home. Because Mary does have some rights to the home (as she put in $15,000 and both of them also contributed to paying the mortgage of the home throughout the marriage), the court will most likely order that the home is sold and then divide the profits between John and Mary (once again, giving the lion's share of the proceeds to John).

2.

Marital Fault is considered in Georgia to be a factor when dividing the marital property based on Equitable Distribution. Adultery is considered a type of Marital Fault. Here, because John committed adultery, this could be factored in against him when the court is engaging in the Equitable Distribution analysis. However, two facts will substantially mitigate the detrimental effect on John's distribution. First, Mary forgave John for his adultery and also forgave him. Second, Mary engaged in adultery of her own. Because of Mary's own adultery, John can raise the defense of Unclean Hands if Mary attempts to hold his adultery against him in the distribution proceedings and she will be estopped from doing so because she engaged in the same behavior herself. It should also be noted that the adultery committed by John and Mary will preclude either one of them from obtaining alimony from the other because in Georgia adultery is an absolute statutory bar to alimony.

3.
As was the case with John's adultery, Mary's adultery will be factored in because it is a form of Marital Fault. Also, just as John would be able to raise the defense of the Unclean Hands Doctrine, so too would Mary if John tried to use her adultery against her. In the end, it is likely that the court will neutralize any claim of adultery on both sides due to both parties having unclean hands. However, if Marital Fault due to adultery were to be held against either party to any degree, it is more likely to affect Mary's distribution of assets because he never forgave her and they never reconciled after her adultery.

4.
In all likelihood, the best chance at getting attorney's fees would be to rely once again on the Unclean Hands Doctrine. To do this, Mary would argue that John cannot raise Adultery as a proper grounds for a Fault-Based Divorce. She would then counter that the marital problems are his fault and he is causing the divorce and should therefore be required to pay Mary's attorney's fees. However, I think Mary would be unlikely to be successful in getting John to pay attorney's fees. Because John never forgave Mary or reconciled with her after her adultery, his filing for a Fault-Based Divorce based on such adultery is probably valid and will excuse him from having to pay Mary's attorneys fees.

Question 3 - Sample Answer # 1

(1) The question at issue is whether the court can decide a case so intricately intertwined in religious controversies. The Establishment Clause of the US Constitution prevents excessive entanglements between church and state. This doctrine is applicable to the states through the 14th Amendment of the Constitution. Specifically, the Establishment clause holds that any regulation by the state that raises sect preferences will receive strict scrutiny. Otherwise, the state action must meet the *Lemon* Test: the regulation must be secular, the regulation neither advances nor prohibits religion, and the regulation doesn't create excessive entanglements between the church and the state. Bringing this action in state court will require a *state action* to determine the rights, authority and hierarchy of the Church. The court's determination of who holds title to the land would likely be proper (because it would merely be determining ownership of an interest in land). Additionally, the court might not run afoul of the Establishment Clause by interpreting the Church's Incorporation and Bylaws as to who may properly make decisions regarding church property since the Church is most likely incorporated as a not-for-profit corporation under Georgia state law. Court's generally have authority to rule on a dispute arising under the bylaws or articles of a corporation (including non-profit corporations) registered in the state. However, a ruling on whether or not the Bishop controls all decisions affecting the Church's doctrinal issues of faith would likely constitute an excessive entanglement by the state. This is because it would require the court to make determinations on the beliefs and authority of the religion itself - a decision that is not secular in nature and leads to excessive entanglements with religion.

(2) The question at issue is whether or not the state can regulate the rights of church members to bring firearms to a public church service. The Free Excise Clause of the US Constitution prevents the government from infringing on the free exercise of religion. This doctrine is applicable to the states through the 14th Amendment of the Constitution. Any attempt by the state to regulate religious beliefs must meet strict scrutiny - the state much prove that the regulation is necessary to achieve a compelling government interest. However, a court may regulate religious conduct in some instances. For example, a neutral and generally applicable law that is not related to the suppression of religious beliefs is enforceable against a religion unless that group can show that the purpose for enacting the law was to specifically discriminate against that religion. Presently, the question at issue regards the Second Amendment and its protection on the right to bear arms - specifically, whether or not the state can regulate the Church member's bringing firearms to public church services. This is a question of a generally applicable law that is unrelated to religious beliefs or practices and is not directed at this specific Church. The Second Amendment's protection of the right to own and carry firearms is not exclusive and can be regulated by states. For example, states can limit the places that concealed weapons may be carried and can regulate who may properly purchase and own a firearm. Therefore, it is within the court's discretion to rule on this issue.

(3) Again, seeking a court ruling on the removal of the Pastor of the church may constitute a violation of the Establishment Clause as outlined in question 1. However, there are some facts and circumstances that may properly allow the court to rule on the case. For example, if the Pastor of the church has an employment contract or is considered an "employee" of the Church, the court may be able to rule on the employment status and the rights and abilities of the church members to fire the pastor. In this case, the court would not be determining the proper religious authority but would merely be deciding an employment dispute, something that a superior state court is entitled to hear.

It is unlikely that the court has the ability to determine the status of church members. Again, this would require the court to assert itself into a religious dispute not based in law but on the religious tenants of the church. As a result, any court ruling on the status of a church member would likely be violative of the Establishment Clause.

However, the court will likely be able to rule on whether the Church communications are privileged in light of the suit for liable and slander. In this instance, the court would be ruling on evidentiary matters to be asserted at the libel or slander trial. This evidence, as it relates to the libel and slander suit, have independent significance in that it is material and probative on a question of violation of the law. Moreover, a court ruling on this issue doesn't require the court to touch on issues of religion or the status of Church members. Instead, the court would be ruling on a civil claim recognized under Georgia law. As a result, the court can likely rule on the privilege of the communications in light of the libel and slander suit.

Question 3 - Sample Answer # 2

I. PERMISSIBLE INTERFERENCE IN RELIGIOUS CONTROVERSIES BY THE JUDICIARY, AND HOW SUPERIOR COURT SHOULD RESPOND TO ISSUE OF JURISDICTION IN THE FIRST ACTION

The tension here is between preserving the autonomy of religious groups, and allowing religious groups the same rights under the legal system (to enforce contract or property interests) as those afforded to private secular parties. As a general rule, the defendant-faction is correct to argue that the Superior Court has no jurisdiction to "become involved in religious issues," because the Establishment Clause of the 1st Amendment (as incorporated through the 14th Amendment) mandates that the state not take sides in religious controversies or deciding matters of religious dogma, and the Free Exercise Clause (as incorporated) prohibits state entities, such as courts, from singling out a particular religious group for unfavorable treatment.

The jurisdiction of the court will depend on whether it can locate neutral (irreligious) principles to decide which group has control over the property. First, the court may look to internal agreements between the central Diocese and the local Congregation. For instance, if there is an agreement that the congregation holds the property in trust for the Diocese, then the court may be able, without deciding doctrinal matters, to make a determination of ownership or control based on traditional legal principles. Such an agreement would not necessarily prevent entanglement (for instance, if the agreement provided the property to be held in trust "for so long as the Diocese maintains the tenets of the faith..." then it would not be appropriate for the Superior Court to construe it.) Second, the Superior Court, if all else fails, may look to other neutral legal principles, such as an implied contract that the property would be held subject to the control of the Diocese in exchange for the right of the Congregation to use it. Third, it could look to title of the church and award ownership and control on that basis. Finally, failing any other principle, the court could award the majority faction control, which is perhaps as close to a neutral principle as one could achieve here.

In summary, the Superior Court has jurisdiction over this action because it involves title to land and equitable relief. The court should entertain the case like it would any controversy over land ownership and use, while carefully crafting its order, if any, to avoid taking sides in the religious matters.

II. RIGHTS AND LIMITATIONS OF CHURCH MEMBERS TO BRING FIREARMS TO A PUBLIC CHURCH SERVICE

In general, the defendants have some right to own and possess firearms under the 2nd Amendment (as incorporated). The precise scope of that right is not clear. Under Heller v. DC and McDonald v. Chicago, it is clear that there is a right to possess firearms for self-defense in the home. However, two problems are raised by the defendants' actions. First, the United States Supreme Court has not held that there is a right to possess firearms for self-defense outside the home. Second, the Heller v. DC decision expressly noted that "longstanding restrictions" on carrying firearms in certain public places would be permissible limitations on the right provided under the 2nd Amendment.

Even assuming that there is a right to carry firearms in public as well as the home, a church

would seem to fall into the class of sensitive places that the Court alluded to in Heller, given that it is a place where a variety of people gather (young, elderly) and, as illustrated by this fact pattern, a place of heightened tension at times. The Court has not articulated a standard of review for restrictions on possession of firearms, but even assuming strict scrutiny, the Superior Court might find a compelling interest in granting the injunction until the controversy is resolved. On the other hand, if the defendants truly believe that they are in danger, the Superior Court might craft the injunction to impose restrictions on the plaintiffs' conduct as well. This will be difficult because an injunction must be reasonably precise, but if the Superior Court can gather the facts concerning the threats here, perhaps an enforceable order could be issued that both banned the firearms and assured the safety of the defendants.

III. WHETHER COURT HAS JURISDICTION TO CONSIDER REMOVAL OF PASTOR AND STATUS OF CHURCH MEMBERS AND POSSIBLE PRIVILEGE DEFENSES

Two issues are raised in the third action: (1) the act of excommunication; and (2) publishing the excommunication.

As noted above, courts cannot generally decide matters of religious controversy. Unlike a dispute over land, there is no neutral principle to decide whether a pastor's excommunication is "legal" or not. Moreover, deciding the question, even if there were neutral principles, would interfere too severely with the rights of the church to govern its own affairs. This issue likely cannot be decided by the Superior Court.

The publication is also protected by the Religion Clauses, not as a result of common law privilege as much as that interfering with the rights of the Pastor to excommunicate and publish would implicate the guarantees of both the Free Exercise and the Establishment Clauses. To illustrate, under the common law and Free Speech Clause constitutional law, this suit likely involves a matter of private concern involving private persons, so the plaintiff could make a prima facie case without proving falsity. The defendant would then defend by showing that the plaintiffs had been excommunicated (the truth defense). To the extent that the excommunication itself involves slander or libel, there would be no way to decide whether it was justified without deciding questions of religious doctrine. While courts may look into the sincerity of beliefs in certain cases (e.g., unemployment benefit exemption cases), here, looking to sincerity would likely be too intrusive and would violate both the Establishment and the Free Exercise Clauses.

Question 3 - Sample Answer # 3

Georgia Courts, as an extension of the judicial branch of state government, are prohibited from getting involved in predominantly religious disputes. The United States Constitution, applicable to the State of Georgia through the 14th Amendment, prohibits government from passing any law "respecting the establishment of religion." Morever, the government cannot infringe upon the people's right and freedom to practice their individual religions as they see fit. However, a religious body is not denied access to the courts altogether, and can certainly be a party to any action involving non-religious matters and disputes.

The issue, therefore, is how to determine what disputes are religious in nature and what disputes are secular in nature. There is no bright line test in which to apply. Indeed, these issues are often tricky and our courts of guidance can do little but offer general, multi-part balancing tests - think Lemon test for religious activities in schools.

Here, the Court would have to look at the actual controversy and boil it down to its case. If the controversy called for the interpretation of some law or legal contract, the Court could likely assert jurisdiction. However, the Court must refrain from interpreting any religious law, custom, doctrine, etc.

Because the Church is (presumably) lawfully organized and has filed Articles of Incorporation and By Laws, the Court could, I would argue, retain jurisdiction to declare rights under those matters. Indeed, this is no different than a dispute within a wholly secular corporation over how profits should be invested, etc. Therefore, to the extent the issues raised in the first DJ can be resolved under Corporate and Contract law, the Court may properly hear the same. Any doctrinal issues (ex-communication), however, would be religious in nature and not subject to Court Jurisdiction.

The Constitution provides the right to keep and bear arms - a right that was recently upheld as an individual right. However, this right is not absolute. Government can place reasonable restrictions on gun ownership. It is unclear from current case law whether this right is "fundamental" so as to trigger strict scrutiny, but I suspect it will be interpreted as such. Therefore, any gun restriction (assuming strict scrutiny is applied) must be narrowly tailored to further a substantial government interest.

For example, almost all states, GA included, require some type of permit to carry certain kinds of guns (handguns, etc.). Even with such a permit, lawful gun owners are prohibited from bringing guns to certain places. These places generally include establishments that serve alcohol, voter polling places, and sometimes church services. The gun lobby in GA has been pretty active as of late and, as our laws continue to change, I honestly cannot remember if guns are summarily banned at church services within this State. If they are, I suppose that would be dispositive of the issue. If not, we would again have to turn to the church by-laws. If not mistaken, the new open-carry laws allow businesses and establishments to "opt out" by conspicuously posting signs that permit guns on their premises. If the church has taken this action, their wishes can be enforced and guns excluded. However, absent a blanket ban under State law, or specific church action, I see nothing to prevent church members in the present case from carrying firearms assuming they abide by all other firearms law.

As discussed in Section 1, the Court lacks jurisdiction to rule on purely religious issues. I would think this restriction would prevent the Court from addressing issues related to the

removal of a Pastor and the status of church members. These would appear to be purely doctrinal questions that would have to be resolved within the Church itself. Therefore, the Court should probably dismiss the third action, at least to these issues.

The matter of privileged communications raises another issue entirely. GA does recognize a priest-penetant privilege. This means that a Priest (or other religious official) cannot be compelled to divulge privileged communications with church members made for religious purposes, such as confession, etc. However, I don't think this privilege extends to external communications. Stated differently, a conversation at the confessional is much different than an announcement in the Church bulletin. In the former, both parties have a reasonable expectation of privacy (not to confuse the standard that should be applied). The Church bulletin is printed for the sole purpose of getting the word out - not keeping it confidential. Thus, just because a statement is made in a Church or by a church member, we cannot automatically grant that statement privilege.

Moreover, "publication" to third parties is an element of libel/slander that must be present for the cause of action to arise and would necessarily be relevant to the lawsuit.

Question 4 - Sample Answer # 1

I. Was there an enforceable contract between Gray & Author?

A. On what date was the contract enforceable? Why?

On May 27, 2008, the officers of Gray, including Hill, made a written offer to Author to write the book. Author asked for some time to think about it, and Gray did not object. An offer, unless revoked, stays open for a reasonable time.

On June 7, 2008 Author sent a letter to Gray agreeing to the terms of the letter agreement. It was received before or by June 10, 2008, when Gray mailed the $5k advance to Author.

An enforceable contract requires an offer, an acceptance, and consideration. The first two elements have already been discussed. Here, consideration would be payment of a total of $20k in exchange for the writing of a book by Author.

The statute of frauds requires that contracts that cannot be completed within one year must be in writing to be enforceable. Here, the terms of he contract say that delivery must be by June 1, 2011 - 3 years later. However, the manuscript could be turned in sooner. But, placing this contract within the Statute of Frauds is the provision stating that at least 18 months would be spent researching for the book.

The statute of frauds requires a writing, signed by the party against whom enforcement is sought. Not all of the provisions must be contained in one writing. Here, there is the letter agreement signed by an officer of Gray and the letter written and signed by Author. Together, these writings would satisfy the statute of frauds requirements.

Because there was an offer, an acceptance, consideration, and the requirements of the statute of frauds are fulfilled, there is an enforceable contract.

B. What if acceptance had been by telephone or email?

If Author's acceptance had been via telephone, then the statute of frauds would not be fulfilled because Author would not have signed a writing that could be used against him to enforce the contract. But, if the acceptance had been via email, the analysis should be the same, because he would have intended any signature contained in the email to be his signature for purposes of the deal. Additionally, both of these methods of acceptance would make the contract enforceable on June 7, 2008 when they would have been sent and received.

Either way, the acceptance date was June 7, 2008, because of the mailbox rule, which makes acceptance effective on the date it is sent.

II. Damages

A. Advice regarding liquidated damages modification and damages generally?

Generally, damages cannot be speculative in nature. Damages must represent actual losses that result to a party.

Here, the oral modification of the agreement to include the liquidated damages provision should not be enforced. First, the agreement fell within the Statute of Frauds, so any modification should also meet the requirements for the statute of frauds. Here, the oral modification did not. Second, the modification as not supported by any consideration, which is required in service contracts.

Liquidated damages generally require that the amount of damage foreseeable at the time the contract was entered would be hard to calculate or estimate and that the measure would fairly reflect the amount of damage that would occur to the non-breaching party.

Also, damages may take into breaches that occurred. During the initial discussions, Gray made it clear that the deadline was important in order to have the books available for Christmas sales. However, there was not a time is of the essence clause contained in the contract.

B. Defenses Author has against liquidated damages and damages in general?

Author could raise the statute of frauds as a defense to the modification.

Additionally, Author may be able to assert impossibility based on his severe illness for 2 months that put him in the hospital. Gray and Hill were aware of the illness. Author called Hill to inform her of the illness and said that he would need a few more weeks to finish. During this conversation, Hill did not object or demand that the deadline be met. But, if it is determined that a time is of the essence clause would be implied into the contract because of the discussions between the parties, then Author may be liable for some amount for his breach.

C. Can Gray use the parol evidence rule regarding the liquidated damages modification?

Where a writing is fully integrated, usually by containing a merger clause, the parol evidence rule would prohibit the introduction of previous or contemporaneous oral communications used to differ or contradict the terms of the written contract. Here, the writings were not fully integrated, and may have left out certain provisions that may not always been included in a writing. A writing is not considered integrated where it is possible or likely that certain non-crucial terms may have been left out of the writing. Crucial terms often include quantity and price. Additionally, the liquidated damages modification was done subsequent to the contract, which would not be covered by the parol evidence rule.

III. Advice to Gray regarding Author's hiring of Learner

If Gray had sought advice regarding the use of Learner for research and writing, delegation would have been explained. In a contract, duties of a party may be delegated to another person, who was not included in the original contract. In the contract between Gray and Author, there was not a clause prohibiting delegation. However, delegation can prove to be an issue where the person was hired because of their special knowledge or skill and the delegatee does not possess the same qualities. Here, Author hired Learner to assist, but continued to supervise his work and do most of the writing. There is nothing to indicate that Author was a much better researcher. Further, this was a common practice for Author. Therefore, Gray would have been unsuccessful if it had challenged this delegation or employment of Learner.

Question 4 - Sample Answer # 2

1.a. Yes, there was an enforceable contract between Gray and Author. An enforceable contract requires an offer, acceptance and consideration. Here, the offer was made by the letter agreement at the May 27 meeting. An offer will remain open, unless otherwise stated, for a reasonable amount of time after it is made, in light of the surrounding circumstances. Here, Author said he wanted to think about it for a while and would get back to Gray within a couple weeks. Gray did not object to that, and Author got back to Gray within the couple weeks stated, so the offer had not terminated. Author's acceptance was effective on June 7, when his acceptance was sent. According to the mailbox rule, acceptances are valid when they are postmarked. Therefore, the contract was valid on this date. The consideration for the contract was the performance by Author (writing the book) and payment by Gray.

b. Because this contract was one that could not be performed within 1 year or less, it falls within the statute of frauds. A contract under the statute of frauds will not be enforceable unless it is in a writing containing the essential elements of the contract, and is signed by the party to be charged. Here, assuming that the letter Author sent to Gray was signed, and because it contained the specifications of the contract (payment, time frame, subject, parties), it was enforceable under the statute of frauds. However, had the acceptance been made by phone, it would not have been a signed writing, and would thus be unenforceable under the statute of frauds. If the acceptance had been via email, it may still have been enforceable if it contained something intended to be the signature of Author, and agreed to the terms in the letter agreement.

2.a. Liquidated damages clauses are generally enforceable in Georgia courts if actual damages are uncertain at the time of the contract, and if the amount of damages is a fair estimate of actual possible damages as a result of breach. It does not matter if there are no actual damages. Here, the clause itself would likely be enforceable under this general standard. $1,000/month does not seem unreasonable, and it would be difficult for Gray to determine exactly what their damages would be if Author breached.

However, also at issue here is the modification of the contract, because the clause was added after there was already an enforceable contract. A modification of a contract must be assented to by both parties to the contract. Further, there must be additional consideration for a modification, unless performance by one party was rendered impossible or economically unfeasible by an unforeseen event. Here, at most, Gray was entitled to request assurances from Author when it heard about his other failed book projects. However, this information was not enough to allow Gray to modify the contract without additional consideration. A pre-existing legal duty may not constitute consideration, and here, Gray was already under a legal contractual duty to pay Author for his performance. No additional consideration was offered by Gray in return for Author signing the liquidated damages clause, so the modification to the contract may be unenforceable.

As for general damages, Gray will have a hard time recovering. Even though the manuscript was late, they will still have it available by December 1, according to the 4 month time frame given by the publisher. Therefore, they will not likely lose any expected profits. Further, though it was stated that timing was important, there was no specific "time is of the essence" clause in the contract. Additionally, Author was physically unable to complete the project on time due to illness, but still performed almost entirely, with the exception of being late. Essentially, Gray got the intended benefit of their bargain, and owe

Author the agreed upon contract price. Nothing that Author did excused Gray's performance of the contract.

b. Adding to the issue mentioned above regarding modification of the contract, Author may have a duress argument against Gray. Duress is present when a party to a contract has no reasonable alternative but to assent to a contract or a modification. Here, Gray threatened to find another writer for the book project if Author did not agree to the liquidated damages provision. This likely amounts to economic duress, especially considering that Author had already begun writing and had turned down other projects to do so.

Author may also have a statute of frauds defense to the modification. If a contract, as modified, would fall under the statute of frauds, then the modification must be in writing to satisfy the statute of frauds. Because this contract, as discussed above, does fall under the statute of frauds, the modification adding the damages clause also falls within the statute. Because the agreement to the modification was oral, and not signed by the party to be charged, the modification will likely be unenforceable.

c. The Parol Evidence Rule bars the use of evidence of prior or contemporaneous oral agreements to prove the contents of a fully integrated written contract that the parties intend to be the final agreement. Gray may argue that the written contract including the liquidated damages clause was intended to be the final agreement, and that the contract was fully integrated, thus barring Author from bringing in evidence of the modification discussions. However, the Parol Evidence Rule does not bar evidence of oral agreements made after the written contract was fully integrated. Therefore, Author may argue that the modification of the contract adding the liquidated damages clause was made after the original contract had been fully integrated, thus allowing evidence of the modification.

3. Gray could have argued that Author allowing Learner to do his research and writing for him was an unallowable delegation of duties. Duties for personal services may not be delegated, and here, Author was providing a personal service for which he had been specifically chosen because of his qualifications. While there did not exist a non-delegation clause in the original contract, a court may presume an implied non-delegation agreement when a contract is for personal services. However, Gray would likely have to show that Learner was doing actual substantive work under the contract, as opposed to just assisting Author with his work.

Question 4 - Sample Answer # 3

(1)(a) There was an enforceable contract on June 7, 2008 when Author sent a letter to Gray agreeing to the terms of Gray's letter agreement. An offer is accepted in Georgia when there is a promise to perform. Additionally, under the mailbox rule, there is an acceptance when a promise to perform is put in the mail provided that mailing an acceptance is a reasonable method. Consequently, there was an enforceable contract on June 7, 2008, the day in which Author mailed Gray a letter of acceptance. The date Gray cashed the check or received the check is irrelevant.

(b) If the acceptance had been telephoned, there would have been a statute of frauds problem. In Georgia, a contract that cannot be performed within a year must comply with the statute of frauds. The Statute of Frauds requires that a contract that cannot be performed within a year be in writing, signed by the party against whom enforcement is sought, is generally understood as a contract, and contains contractual terms. If the Statute of Frauds is not complied with, the contract is void. If the acceptance had been telephoned, the Statute of Frauds would not have been satisfied. This is a contract which cannot be performed within a single year. The contract is to be performed within several years. Consequently, there must be a writing and a telephone acceptance would not be a valid acceptance. If Author's acceptance on the other hand had been made by email, this may very well satisfy the statute of frauds provided that all of the elements of the statute of frauds are met. An email is considered a writing under Georgia law and an electronic signature is also sufficient to constitute a signature for statute of frauds purposes. Provided that the email contains the other elements, specifically that the email can be generally understood as a contract and contains contractual terms, this would be sufficient to satisfy the statute of frauds.

(2)(a) Liquidated damage clauses are enforceable under Georgia law provided the amount of damages is hard to calculate and the amount of liquidated damages are reasonable under the circumstances. Hence, there is nothing wrong with inserting a liquidated damage clause into a contract so long as the amount is reasonable. However, generally liquidated damage clauses are part of the initial contract. They are usually not added subsequent to the contract. Under Georgia law, any modifications to an original contract between non-merchants require consideration. Additionally, modifications must comply with the Statute of Frauds if the modified agreement would fall within the Statute of Frauds and the modification concerns a material term. If the modification does not concern a material term, the original agreement may serve to satisfy the Stuate of Frauds. Here, this contract clearly falls within the Statute of Frauds because it is a contract that cannot be performed within a year. Consequently any modification of the contract that concerns a material term must also satisfy the Statute of Frauds. A liquidated damages clause is a material term. Thus, the liquidated damage clause must be in writing, signed by Author (the party to which enforcement is sought), contain the liquidated damage clause language, and additionally have separate consideration aside from the initial contract.

(b) Author will likely argue that the liquidated damages clause was a modification which required consideration. Author will argue that there was no consideration here because there was no bargained for exchange with regard to the addition of the liquidated damages clause. Additionally, Author will argue he agreed to the liquidated damage modification under duress, specifically that he had no choice but to agree to the term because he had already begun work on the project and expended money. This will likely be a successful argument. The modification required separate consideration from the initial agreement and

here there was none present. Author will also argue that the modification is void because it failed to satisfy the statute of frauds. This too is likely a successful argument. A liquidated damage clause is a material term . Under Georgia law, it must also satisfy the Statute of Frauds as it too falls within the Statute of Frauds because it cannot be completed in a year. Here, there was no writing evidencing the liquidated damage clause agreement. Gray called Author to suggest the liquidated damage clause provision and Author agreed orally.

(c) The parol evidence rule excludes prior and contemporaneous oral agreements to a contract. It does not apply to subsequent oral agreements or modifications. Consequently, the parol evidence rule cannot be used with regard the liquidated damages modification of this contract.

(3) If Grey had approached me for legal advice once Hill became aware that Author hired Learner, I would have advised Grey to demand that Author write the book on Gray County history or threaten to hold Author in breach of contract. Author delegated his duty to write the book to Learner. Normally, one can delegate their duties without the permission or consent of the other party. However, if the contract involves special skills, one cannot delegate their duties to another individual if such delegation would materially alter the contract. If delegation results in a material alteration of the contract, there is a breach of contract and one can sue for damages. Here, once Grey learned of Author's delegation to Learner, Grey may have been able to argue breach of contract because perhaps delegating authorship of this book to a student constitutes a material alteration of the contract. Grey could have argued that Author was a famous author known in the community for writing historical society books and that only Author could write this book for the Gray County Historical Society. Nevertheless, it appears that Grey waived this argument by not pursuing the issue further.

MPT 1 - Sample Answer # 1

Memorandum of Law
Statement of Issues

The State has charged Daniel Soper with killing Vincent Pike. The crux of the case rests on Pike's identification of Soper in a 911 call and a statement to a police at the hospital before his death. Soper seeks to exclude both identifications. He argues that the statements in the 911 and at the hospital call constitute inadmissible hearsay under the Franklin Rules of Evidence (FRE) 801. He also argues that the admission of the statements violates his right to confront his accusers under the Sixth Amendment of the US Constitution.

Analysis

I. Evidentiary Issues: Hearsay and Exceptions

Hearsay is a statement made out of court offered into evidence to prove the truth of the matter asserted. FRE 801. This evidence is inadmissible unless it falls into an exception. Pike's statements were made out-of-court and are now offered to prove Soper's identity. They are hearsay statements unless an exception applies. The excited utterance exception and dying declaration exception are the most applicable exceptions to the statements in the 911 call and at the hospital, respectively.

A. Excited Utterance Exception

The FRE provide an exception to the hearsay rule for "excited utterances": those statements relating to a startling event or condition made while the declarant was under the stress of the excitement that it caused. FRE 803(2). This exception will apply regardless of whether the declarant is available to testify. In evaluating whether the statement was made under stress, the court will consider the lapse of time between the event and the statement, the declarant's physical and mental condition, his observable distress, the character of the event and the subject of statements (State v. Friedman).

Pike's statement to the 911 operator described being shot and identified the shooter as driving a black pickup. In Friedman, a similar statement identifying a shooter was held to "relate to" the startling event. Pike's statement was made at some time after the shooting, though it is unclear how much time had passed. However, the excited utterance need not occur at the same time as the event to which it relates provided the surrounding circumstances lend themselves to establishing the statement occurred while under the stress of a startling event (See Friedman, citing State v. Cabras). Here, Pike was slumped in his car with blood on his chest and stomach, he lapsed into silence twice during the call, and he appears disoriented. This is similar to the case in Friedman where the victim was bleeding, fell silent within moments of arrival.

B. Dying Declaration Exception

The dying declaration exception is available only when the declarant is unavailable to testify because of death, infirmity, or illness (FRE 804 et seq). Here, Pike has died and is thus unavailable to testify. To fall within the dying declaration, the statement must meet the

following criteria: 1) the declarant must have died by the time of trial, 2) the statement must be offered in a prosecution for homicide or in a civil case, 3) the statement must concern the cause of death or the circumstances of the declarant's death, and 4) the declarant must have made the statement while believing that death was imminent. (Friedman). The policy behind this exception is that imminent death encourages truthfulness (see State v. Donn, State v. Leon).

In proving belief in imminent death, the prosecution can rely on many factors including the declarant's language, severity of wounds, conduct or by other circumstances which shed light on the declarant's state of mind. (Friedman. There, the court noted the victim was in a fetal position, bleeding profusely, and repeatedly said he did not want to die, which all pointed to his belief in imminent death despite assurances of survival from emergency medical personnel). When he identified Soper as the shooter, Pike had been at the hospital for some time. He was told by the investigating officer that he was "fading fast." Pike then took a deep breath, identified Soper, and lost consciousness. The circumstances surrounding his statement tend to establish it was made under the belief that he was going to die.

Recommendation

I recommend the motion to exclude on hearsay grounds be overruled. The circumstances surrounding Pike's statements show that the first was made as a reaction to the exciting event and that the second was made under a belief of impending death. Thus, though the statements are hearsay, they are admissible under exceptions to the rule.

II. Constitutional Law Issues: Confrontation Clause

The Confrontation Clause of the Sixth Amendment provides "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him." Thus, statements which can otherwise be admitted under a hearsay exception are nonetheless inadmissible if they are testimonial hearsay and the defendant has not had a chance to cross-examine the declarant. (Friedman).

A. Testimonial Statements

Hearsay statements are only excluded under the Sixth Amendment if they are "testimonial" in nature. "Testimony" is a solemn declaration or affirmation made for the purpose of establishing or proving some fact (Michigan v. Bryant, citing Crawford v. Washington). Thus, to establish whether statements are testimonial, the court employs the "primary purpose" test first raised in Crawford. If a statement is made during a police interrogation for the primary purpose of proving past events related to a later criminal prosecution, it is testimonial. If it is made to enable the police to assist in an ongoing emergency, it is not testimonial (see Crawford, Davis v. Washington). Statements to 911 operators, like Pike's, are subject to this analysis because the operator acts as the agent of law enforcement (see Davis).

Whether an emergency exists is a fact and context-specific determination. (Bryant.) It depends on the medical condition of the victim, the informality of the encounter, the questions asked and responses thereto, and the threat to the public at large posed by the defendant. Both statements were informal and fluid, similar to the statements in

Washington, Davis, and Bryant.

In the case at bar, Pike's statements to the 911 operator were non-testimonial in nature. In Davis, the court held a harried 911 call was nontestmonial in nature because the purpose of the questions was to address the emergency and neutralize the threat. This situation is similar; Pike was asked questions necessary to assess the injuries and other danger. The fact that Pike was shot with a gun makes it more like an emergency (see Bryant).

Pike's statement at the hospital is a closer call. The statement was in response to a police request to "help us . . . put this guy away". The question begged an accusatory response, making it more likely testimonial (Bryant). However, Pike informed the officers Soper was going after Vanessa Mears, the ex-girlfriend. The officer had already spoken to Ms. Mears, who said she had been threatened by Soper numerous times. Thus, the question might better be seen as an attempt to locate the shooter and neutralize the threat to Ms. Mears and the public at large.

B. Declarant unavailable for cross-examination

The Confrontation Clause protects a defendant's right to cross-examine the declarant, opening him up for impeachment on the statements. The court has held that, at a minimum, this requires the opportunity to cross on prior testimony at a preliminary hearing, before a grand jury, or at a former trial and police interrogations. (Bryant citing Crawford). Pike is dead; Soper will not have the opportunity to cross-examine him about these statements.

C. Dying Declaration Exception

The Crawford court held that even statements violating the Confrontation Clause could be admitted as an exception. Specifically, the court discussed in dicta dying declarations. Moreover, our sister states have explicitly held that the Confrontation Clause does not bar admission of evidence of dying declarations (See State v. Karoff and State v. Wirth). Pike's statement at the hospital, though most likely testimonial in nature, was a dying declaration as discussed above. However, the prosecution must establish the testimony is a dying declaration for it to constitute an exception. (See Bryant. The factual basis for admission was an excited utterance, and thus it could not come in.)

Recommendation

I recommend that the statements be admitted despite the fact Soper has not had an opportunity to cross-examine Pike. First, Pike's statement to the 911 operator was nontestimonial: it was in response to an ongoing emergency. Pike's statement at the hospital was similarly necessary to neutralize the threat Soper posed to Ms. Mears and the public at large. Even if it was testimonial, if the prosecution can establish it is a dying declaration, it will be an exception to the Confrontation Clause rule and can come in despite Soper's inability to cross-examine Pike.

MPT 1 - Sample Answer # 2

TO: JUDGE SAND

FROM: EXAMINEE

STATEMENT OF ISSUES

(1) Should the statements made by victim, Vincent Pike (Pike), in a 911 call on March 27, 2012 be admitted as evidence under the excited utterance or dying declaration hearsay exception?

(2) Should the statements made by Pike in response to questioning by Officer Holden (Holden) on March 27, 2012 be admitted as evidence under the excited utterance or dying declaration hearsay exception?

(3) If either or both of the aforementioned statements are admissible, does the 6th Amendment's Confrontation Clause bar either from being admitted as evidence?

ANALYSIS

Hearsay (Rule 801) is an out of court statement offered to prove the truth of the matter asserted. Generally, such a statement is inadmissible. However, two relevant exceptions - excited utterance and dying declaration - may apply. Per Rule 803, an excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement that it caused. Per Rule 804, a dying declaration is admissible if the declarant is unavailable, is being offered in a homicide or civil case, declarant made said statement believing his death is imminent, and such statement was made about the cause of death. Per Rule 804, one is unavailable if not present to testify at trial because of death. For both statements, Pike, the declarant, is unavailable as he is deceased.

(1) 911 Call

The 911 call is a statement made out of court that is being offered by Pike to show the truth of the matter asserted. Here, the 911 call is being offered to prove that his shooter drives a black pickup truck. If the analysis were to end here, such a statement would be inadmissible as hearsay per Rule 801. However, the prosecutor would like to offer this statement as either an excited utterance or a dying declaration.

As noted above, to be considered an excited utterance and thus admissible, the prosecution must show that the statement was related to a startling event and made while the declarant was under the stress of the event's excitement. During the call, it does appear Pike was under the stress of the event. His first words spoken to the 911 operator were that he did not feel good. He also went in and out of silent moments and stated that he was shot, thus it appears he was struggling with his wounds given his silence and the fact that he only spoke after the 911 operated prompted him. Moreover, he barely got more than a few words out and then went silent. This implies that he was under the stress of the event thereby meeting the second prong of the excited utterance analysis.

His statements also relate to this startling event. He stated he didn't feel well, that he was

shot, and that the shooter was driving a black pickup truck. While his answers were in response to questions and not given voluntarily, it does appear that he struggled even to say the few words he did, and his only statements were related to having been shot - he made no other extraneous remarks.

Per *State v. Friedman (Friedman)*, we also consider factors such as the timing between the statement and the event, the declarant's physical and mental condition, his observable distress, the character of the event, and the subject of his statements. We do not know when he was shot, however his statements made to the 911 operator were made almost immediately after having been found by his neighbor and the wound was fresh enough for him to still be alive (he died only hours later). Thus the timing should not be an issue. Additionally, his physical and mental condition appear to be such that he was not able to fabricate anything - he could barely get out the few words he did speak and often went silent. He also mentioned that he didn't feel well and his neighbor encouraged him to "hang in there". It therefore seems the 911 call would be considered an excited utterance.

In regards to a dying declaration, Pike is now unavailable, this is a homicide case, and the statements made during the 911 call related to the cause of this death (the gunshot). Thus, all that is left to analyze is whether Pike believed his death to be imminent. While Pike didn't actually say he felt like he was dying, he did know that he had been shot and he also stated he didn't feel well. Moreover, he could barely speak and was often silent during the phone call. What is more, his neighbor kept reassuring him and telling him to hang in there which implies that Pike's condition must have been such that his neighbor felt the need to try and reassure him, which is circumstantial evidence that Pike was acting a way consistent with one who believes they are dying. Finally, Pike lost consciousness 4 minutes after this call was made and died less than 3 hours later.

However, despite these facts, its not clear whether Pike knew death was imminent or whether he merely thought he was seriously wounded. Therefore, I recommend this admitted as an excited utterance, not a dying declaration.

(2) Police Report

Using the above mentioned analysis for excited utterance in regard to the police report, the time lapse between the event and the officer's conversation with Pike presents a problem for the prosecution. The Officer didn't speak to Pike until 8:12pm, over 2 hours after the 911 call. *Friedman* does state that time alone is not dispositive and the other above-mentioned factors should be considered. Pike had lost consciousness between the 911 call and the officer's questions, however its unclear when he regained consciousness and he may have been conscious long enough to have the initial excitement from the shot wear off. Thus, it appears the report isn't an excited utterance.

Regarding a dying declaration, Pike is unavailable, this is a homicide and his statements are about the cause of death. *Friedman* states that we can ascertain whether one believes death is imminent based on the circumstances which might shed light on the declarant's state of mind. The officer told Pike that he was fading fast and that they didn't want to lose him. It is reasonable to infer that one who was told this would assume they were dying. And, Pike did in fact die 30 minutes later. As such, I recommend admitting the report as a dying declaration.

<u>(3) 6th Amendment</u>

Under the 6th Am, an accused is allowed to confront adverse witnesses. *Bryant.* Thus, to admit a statement over a 6th Am objection, the witness must be unavailable and the accused must have had a chance for prior cross-examination. If a witness's statement is considered testimonial, per *Bryant* & *Friedman,* such a statement is not admissible over a hearsay objection with the exception of dying declarations, per *Friedman,* are admissible despite the 6th Am Confrontation Clause requirement. Per *Bryant,* a statement is testimonial if primarily made for later criminal prosecution & non-testimonial when made primarily to assist police in an ongoing emergency.

The 911 call is likely an excited utterance, meaning to be admissible per the 6th Am, it needs to be deemed nontestimonial and likely will be. A nontestimonial statement is one in which the primary purpose is to enable police assistance to meet an ongoing emergency. *Bryant.* Per *Davis*, statements made to a 911 operator for this purpose are considered nontestimonial. Here, Pike's statement to the 911 operator that his shooter drove a black truck were made in order to find the shooter, who at this point had not been apprehended which means the emergency is ongoing. The scope of an emergency can turn on the weapon used, the medical condition of the victim, and the informality of the encounter with the victim and the police. *Bryant.* Here, Pike still needed medical attention for his gunshot wound and the suspect was still at large. Also, the 911 call wasn't a structured interrogation, instead she asked what happened, who the shooter was & what the shooter was driving, which implies she was trying to find the shooter and see what medical or police help was needed.

The police report is likely a dying declaration, and per *Friedman,* not barred by the 6th Am. However, even absent such an exception, this too is likely considered non-testimonial. The officers still hadn't found the shooter and Pike told them the shooter was after his girlfriend, thus the emergency was still ongoing. Moreover, this wasn't a structured interrogation. Instead, the officer stated they wanted to apprehend the shooter & needed to know quickly who it was so they could find him. Arguably, because the officer said "we need to put this guy away" this conversation could be more for conviction than to end a threatening situation. However, given that a deadly weapon was used & the shooter hadn't been apprehended and was still after Pike's girlfriend, the factors weigh in favor of this still being an ongoing emergency versus questions being asked solely for the purpose of using the statements in later criminal prosecution.

Accordingly, both the 911 call & police report statements are likely nontestimonial and therefore not barred by the 6th Am Confrontation Clause.

MPT 1 - Sample Answer # 3

TO: Judge Leonard Sand
FROM: Examinee
RE: *State of Franklin v. Soper*, Case No. 2012-CR-3798 - Bench Memo

Statement of Issues

(1) Whether Vincent Pike's statements made to the 911 dispatcher and subsequent statements made to Police Officer Timothy Holden while in the ICU, are admissible under the excited utterance and/or dying declaration exceptions to hearsay under the Franklin Rules of Evidence.

(2) Whether Vincent Pike's statements made to the 911 dispatcher and subsequent statements made to Police Officer Timothy Holden while in the ICU, are admissible under the Confrontation Clause of the 6th Amendment of the United States Constitution as non-testimonial statements.

Analysis

Excited Utterance - Exception to Hearsay Under FRE 803(2)

Franklin Rules of Evidence ("FRE") 801(c) defines "hearsay" as an out-of-court statement offered to prove the truth of the matter asserted. Under FRE 802, hearsay is generally inadmissible unless it falls under one of the hearsay exceptions in the FRE, a Franklin statute, or other Supreme Court rules.

Under FRE 803(2), an excited utterance is "a statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Thus, pursuant to 803(2) and the State v. Friedman case ("Friedman"), there are three main elements to the excited utterance exception: (1) a "startling event," (2) a statement relating to the event, and (3) the statement must have been made "under the stress" of the startling event with "no time for reflection." Friedman, State v. Cabras. When examining the third element of the rule, the court should pay close attention to the amount of time between when the event occurred and the statement was made, along with other factors, including the declarant's physical and mental condition, observable distress, character of the events, and subject of the declarant's statements.

Here, Pike's statements on the telephone call with the 911 dispatcher, qualify as hearsay. His statements to the operator, those reflected in the Transcript of 911 Telephone Call, are out-of-court statements offered to prove the truth of the matter asserted. They are offered to prove that he didn't feel good, that he was shot, that the shooter ("he") drove away, that the shooter is "going to get her," and that the shooter was in "[a] black pickup." Therefore, these statements are hearsay.

The issue is whether they qualify as excited utterances. First, as stated in Friedman, being shot is an event sufficient to satisfy the "startling event" requiremenf of 803(2). Thus, because the evidence suggests Pike was shot, this element seems to be satisfied. Second, his statements seem to relate to the event. He told the dispatcher he didn't feel good, he was shot, who the shooter was, and further information about the shooter.

Therefore, because these statements relate to being shot, the second element is satisfied. For the third element, we are unaware of the amount of time that has lapsed between the alleged shooting and the statements to the police officer. However, his statements show he was physically not feeling good and was coming in and out of consciousness, and the subject of his statements concerned his health and the alleged shooter. Further, earlier statements from Jake Snow indicate Pike was bleeding real bad at the time he was encountered. Therefore, it would seem that the statements were made "under the stress" with "no time for reflection." Thus, his statements are likely admissible under the excited utterance exception.

Pike's statements to the Police Officer, also are hearsay. However, his statements were made almost 2 hours later after the telephone call and after having been given some treatment by the hospital, so these statements likely are not admissible under the excited utterance exception.

Dying Declaration - Exception to Hearsay Under FRE 804(b)(2)

Under FRE 804(b)(2), hearsay is admissible as a dying declaration. Pursuant 804(b)(2) and Friedman, to be admissible under this exception, the statement must meet the following criteria: (1) "declarant must have died by the time of the trial, (2) the statement must be offered in a prosecution for homicide [ ], (3) the statement must concern the cause or the circumstances of the declarant's death, and (4) the declarant must have made the statement while believing the death was imminent." Proof of the last element can be shown by the declarant's express language and conduct, severity of the wounds, and other similar circumstances. Friedman.

Here, Pike's statements on the telephone call with the 911 dispatcher, even though hearsay, may qualify as a dying declaration. Pike has died, satisfying the first element. Second, the statement is offered in a prosecution for homicide conviction. Third, the statements concern the cause or circumstances of his death - he tells the dispatcher he has been shot and what car the alleged assailant was driving. The issue is whether he made the statements under a belief of impending death. He had been shot and was coming in and out of consciousness. These facts suggest he may have had the belief of impending death. Even if not, the statements are likely admissible as excited utterances.

Pike's statements to the Police Officer, though hearsay, may fall under the dying declaration exception. Again, Pike has died and the statements are offered in a homicide case. The main statement - that "[i]t was Dan, my girlfriend's ex-boyfriend, and he's going after her' - concerned the cause of death (who had shot him). However, the part of the statement where Pike said "and he's going after her" may not be admissible because it does not concern him being shot, but rather what may happen in the future. Further, it appears the statements were made under Pike's impending belief of death. The Officer told him he was "fading fast," and he was in the ICU, suggesting he probably knew he was going to die. Therefore, it is likely this statement is admissible as a dying declaration.

Confrontation Clause - Testimonial v. Non-Testimonial

Even if admissible as hearsay exceptions, the statements still may be excluded if they violate the Confrontation Clause. The Crawford case held that any "testimonial" statement is inadmissible if the declarant is unavailable, because the individual against whom the statement is offered is deprived of his right to confront the declarant.

Whether a statement is "testimonial" depends on the primary purpose. The Michigan v. Bryant case ("Michigan"), applying the Davis and Hammon cases, helps define the parameters of a "testimonial" statement. In Davis, the court said a statement is "nontestimonial" if the primary purpose of the statement "is to enable police assistance to meet an ongoing emergency." The court also stated a statement is "testimonial" when the primary purpose of the statement "is to establish or prove past events potentially relevant to later criminal prosecution." The determination should be objective, but the courts will look to the nature of the threat (whether it is continuing), the duration and scope of the situation, the medical condition of the declarant, and the informality of the statement.

Lastly, the Friedman court held that, pursuant to dicta from the Karoff and Wirth cases, even if testimonial, it is admissible as a dying declaration.

Here, Pike's statements on the telephone call with the 911 dispatcher appears to be "nontestimonia.l" Pike's statements regarding his own condition medical condition - that he was not feeling well and had been shot - help the dispatcher judge the severity of his medical state (the emergency at hand) and the magnitude of the threat to his life. Further, his statements about the assailant's plans - that "he's going to get her" - suggest that the threat was ongoing. As the court found in Michigan, when an armed shooter is on the loose, an ongoing emergency is at hand. Thus, these statements appear to be nontestimonial.

Pike's statements to the Police Officer appear more "testimonial" in nature. At this point, Pike was at the hospital and the threat of him being further attacked had ended. However, his answer was given in response to what appears to be an interrogation about events relevant to later prosecution. The Officer wanted the statements before he perished. Notably, the portion of his statement relating to the continuing threat to his girlfriend - "her" - may be considered nontestimonial, as part of an ongoing emergency. Overall, though, it is likely Pike's statement is "testimonial." Nonetheless, it may be admissible as an exception because it was a dying declaration.

Recommendation

As to the first issue, the motion to exclude should be denied because Pike's statements to the dispatcher are excited utterances and dying declarations and Pike's statements to the police officer are dying declarations.

As to the second issue, the motion to exclude should be denied because Pike's statements to the dispatcher are nontestimonial and Pike's statements to the police officer are testimonial, but admissible as dying declarations.

MPT 2 - Sample Answer # 1

III. Argument

Ms. Ashton should be granted a preliminary injunction against the dumping of dirt in the vacant lot behind her home because she can prove a likelihood of success on the merits, the potential for irreparable injury if the injunction is not granted, and that the balance of equities is tipped in her favor.

A. Ms. Ashton is likely to succeed on the merits because the loud screeching and crashing sounds caused by trucks, the 20-foot pile of dirt, the residential character of the neighborhood, and Indigo's refusal to move its activities to a different location are a substantial and unreasonable interference with the use of Ms. Ashton's land.

Private nuisance is "a non-tresspassory invasion of another's interest in the private use and enjoyment of land." *Parker v. Blue Ridge Farms, Inc.* The fundamental inquiry of such a claim is whether there was an interference with the use and enjoyment of land. In order to recover, a plaintiff must prove that the defendant's conduct was the proximate cause of an unreasonable interference with the plaintiff's use and enjoyment of his or her property, and that the interference was intentional or negligent.

Indigo's conduct was the proximate cause of the interference because their dump trucks were using the roadways, entering the vacant lot, and dumping the dirt onto the property. The trucks they used made noise, and the dirt that they dumped foreseeably was blown, or was carried with runoff, from the vacant lot onto Ms. Ashton's property. The interference was, if not intentional, at least negligent, because Indigo knew that the neighborhood members were upset by the activity and nonetheless refused to change their behavior.

Most importantly, the unreasonable interference created and caused by Indigo was a serious impairment to Ms. Ashton's use and enjoyment of her property. The factors regarding the reasonableness of the interference with Ms. Ashton's use include: the nature of the interfering use and the use and enjoyment invaded; the nature, extent, and duration of the interference; the suitability for the locality of both the interfering conduct and the particular use and enjoyment invaded; and whether the defendant is taking all feasible precautions to avoid any unnecessary interference.

First, the nature of Indigo's use involves loud dump trucks that travel through a residential neighborhood an average of 17 times per day. They make sounds including the revving of engines, pervasive screeching, crashing, grinding, and loud beeping. They have also left a mound of dirt that is 20 feet high in a vacant lot just behind several homes. When there is wind, the wind blows dust and dirt onto the residences behind the lot. When there is rain, runoff from the dirt pile flows into the backyards of the residential lots. Before Indigo's activity, the residents affected were able to sit outside, read outside, garden, and visit with neighbors on their front porch. They are not only unable to do those things now, but the value of their property has decreased and the cleaning expenses for their homes has increased.

Second, the interference used to last day and night, and only recently Indigo has chosen to stop dump trucks from entering the vacant lot past 8 p.m. Now, dump trucks are entering the property and using the roadway from 6 a.m. to 8 p.m., more than 14 hours of loud interference per day. This began in April of 2012 and has continued steadily for the past

three months. There is no indication that the interference is going to stop in the near future.

Third, the neighborhood at issue is not a suitable location for dumping dirt and is much more well suited to quiet residential enjoyment. It is in the heart of the old Graham District and has been referred to as a "neighborhood of peaceful homes and shady trees." *Appling Gazette*. It is one of the largest residential communities and does not have a "single business located within its borders." *Appling Gazette*. Even though the lot is zoned for mixed use, it is in an area that is much better suited to residential use and is an unreasonable place for Indigo to dump its dirt.

Finally, Indigo is not taking all precautions to avoid unnecessary interference. Although Indigo did change the hours of its dump truck operation, it is still working more than 14 hours during the day. Furthermore, Indigo owns a 50-acre tract of land that is on the outskirts of Appling. Although that property is not zoned at the moment, is has paved roads and would be a much more suitable location. It is on the outskirts of town and would not interfere with residences, and is 50 acres, rather than 1 acre, so that the dirt likely would not blow or run onto other people's property.

As the court noted in *Parker*, an unreasonable interference can still be the part of otherwise reasonable, legal conduct--even "a business enterprise that exercises utmost care to minimize the harm . . . may still be required to pay for the harm it causes to its neighbors." Because Ms. Ashton can prove that the travel of dump trucks and the dumping of dirt onto the vacant lot is an unreasonable interference with her land that is unsuitable for the residential neighborhood, Ms. Ashton has a high likelihood of success on the merits.

B. Ms. Ashton will suffer irreparable injury if the provisional relief is withheld because land is unique and Indigo's activities create a serious impairment of Ms. Ashton's ability to read, garden, or otherwise enjoy the use of her land.

As in *Timo Corp. v. Josie's Disco, Inc.*, Ms. Ashton can show that she will suffer irreparable injury if the injunction is withheld. According to *Timo*, "land is unique and . . . any severe or serious impairment of the use of land has no adequate remedy at law." Even though Ms. Ashton is likely to prevail in a case for damages, therefore, she is also likely entitled to equitable relief. The prospect of continued pervasive loud noises, continued runoff of dirt onto her property, and continued blowing of dirt onto her garden, her house, and her windows, creates a harm "for which the law provides no adequate remedy." *Timo*.

C. The balance of equities tips in Ms. Ashton's favor because Indigo's usage is unreasonable in the area and because Indigo has other property that it could use to deposit dirt, reducing the hardship and in keeping with the general public's interest.

The balance of equities clearly tips in Ms. Ashton's favor because the harm to her use of her property substantially outweighs the social value, legitimacy, and reasonableness of Indigo's use. The factors that courts generally look to in this balancing include: the respective hardships to the parties; the good faith or intentional misconduct of each; the interest of the general public; and the degree to which the defendant's activities comply with or violate applicable laws. *Timo*.

First, there is substantial hardship on Ms. Ashton. She cannot engage in any of the activities that she enjoyed prior to Indigo's use of the vacant lot, and therefore cannot enjoy

her property to the fullest extent. Furthermore, she continues to have more expenses for cleaning the outside of her house and her windows than she did previously. Finally, if she chooses to move she will get less for her property than before because the value has gone down as a result of the pile of dirt directly behind her home. Conversely, there would be minimal hardship on Indigo because they have access to another, much larger, tract of land on which they could place their piles of dirt. Although the area would have to be properly zoned, there are already paved roads reaching it. This makes the hardship on Indigo minimal.

Second, it is unclear that either party has acted in bad faith or with intentional misconduct. Both parties met to discuss the timing of the interference, with Indigo eventually agreeing to stop dumping dirt after 8 p.m. Ms. Ashton, in turn, has asked Indigo repeatedly to do something about the damage to her home before choosing to proceed with litigation. This factor weighs equally for both parties.

Third, although the general public has an interest in keeping Indigo's business, they do not have an interest specifically relating to where Indigo places its dirt. Although Indigo has "a good record on environmental matters, . . . an even better one on home construction," and is providing jobs for young families, they can continue to do these things even if they have to move their dirt pile to another location. In fact, moving the pile of dirt to the 50-acre tract of land might add even more jobs because they would be able to continue dumping dirt during all hours of the night, rather than being limited or restricted by time.

Finally, the activity does comply with applicable laws because Indigo is dumping dirt on a vacant lot that is zoned for mixed, rather than residential, use. All of the affected lots, however, are for residential use.

In conclusion, because there would be significant hardship to Ms. Ashton without the injunction and relatively little hardship on Indigo, the balance of equities tips in Ms. Ashton's favor. The court should grant Ms. Ashton a preliminary injunction.

MPT 2 - Sample Answer # 2

III. Argument

A plaintiff seeking a preliminary injunction must establish a likelihood of success on the merits, the prospect of irreparable injury if the provisional relief is withheld, and that the balance of equities tips in the plaintiff's favor. [*Otto Records*]

A. Defendants trucks and the mounds of dirt on its property result in dirt and noise that makes it impossible for Plaintiff to use and enjoy her property in a reasonable manner.

To establish a likelihood of success on the merits for a private nuisance claim, a plaintiff must show that the Defendant's conduct was the proximate cause of plaintiff's harm, that defendant's acts resulted in an unreasonable interference with plaintiff's use and enjoyment of her property, and that this interference was intentional or negligent. Here, plaintiff has established a prima facie case because defendant's trucks and dirt were the direct and proximate cause of plaintiff's harm, plaintiff can no longer enjoy her garden or front porch at any time during the day because of defendants's activities, and defendant was aware of its interference with plaintiff's use and enjoyment of its property after plaintiff petitioned the defendant for redress directly, yet despite plaintiff's pleas defendant continues to engage in these harmful activities.

Defendant's activities are the proximate cause of plaintiff's harm. Defendant selected and purchased a lot zoned for mixed residential and commercial use in the middle of a residential neighborhood. On this lot, Defendant deposits loads of dirt on a continuous basis on an average of 17 times per day, from 6 a.m. to 8 p.m. at night. Defendant's dump trucks have loud, roaring engines and screeching brakes, and when the trucks dump their materials directly behind Plaintiff's home it makes loud crashing, grinding and beeping sounds. The sounds emanating from the activity of these trucks on a continuous daily basis makes it impossible for Plaintiff to enjoy her rose garden or sit and socialize on her front porch with her visitors. Further, in just three months, the dirt piles have reached heights in excess of 20 feet. Run-off and dust from these piles also invades the plaintiff's property, covering her flowers and home with dirt. During rainstorms, the run-off from the dirt piles flows directly on and through plaintiff's yard, onto the street and into neighboring yards, resulting in added cleaning and maintenance costs to Plaintiff.

Plaintiff's is entitled to enjoy her property in a reasonable manner. Gardening, socializing with visitors on one's front porch, and being able to sit outside and read are normal, daily activities homeowners have a right to engage in. While defendant has a need to store its dirt, and zoning regulations do not prohibit its activities on the property in question, an interference with a plaintiff's use of his property can be unreasonable even when the defendant's conduct is reasonable. Further, defendant has managed to cause irreparable harm to the Plaintiff in just three short months. As dirt continues to pile in on a daily basis and the piles reach heights in excess of 20 feet, there is no telling how much more severe the damage will be to Plaintiff's use of her property if the court does not take action. A residential neighborhood with almost no other commercial activity is not the proper locale for storing dirt; in fact, defendant has another 50 acre property outside of the city that would be ideal for the storage of dirt. Finally, while the defendant did agree to cease the transport of dirt after 8 p.m., it has no need to start at 6 a.m., when many residents are still in bed. There also is no evidence of a fence or retaining wall on defendant's property that would prevent the flow of dirt into plaintiff's and her neighbors property, or a fence that

would prevent neighborhood children from climbing on the mounds of dirt at risk of injury to themselves. [Appling Gazette, "Kids like nothing better than big trucks and a huge pile of dirt"] Defendant could be doing a lot more to minimize its interference with plaintiff's property.

Finally, Defendant's interference is intentional because it the neighborhood appealed to it for redress, yet Defendant continues its unreasonable operations.

B. The unrelenting noise from defendant's trucks and the dirt invading plaintiff's property has resulted in irreparable harm for which only equity provides relief.

Land is unique and any severe or serious impairment of the use of land has no adequate remedy at law. [*Davidson v. Red Devil Arenas*] Mere noise has been held a sufficient intrusion for which the law provides no adequate remedy. [*Timo Corp*] Here, plaintiff has suffered not just the banging and screeching of dump trucks, but also the physical invasion of her property by the defendant's dirt and dust. Thus there is no adequate legal remedy available.

C. Defendant, as the owner of alternative property and a corporation with significant financial resources, is best situated to redress the harm it knowingly continues to inflict on the plaintiff.

Here, the respective hardships to the defendant from ceasing its activities is far less than that to the plaintiff. Defendant owns a large property outside the city, away from residential neighborhoods and single-family homes, that is far better situated to the long term storage of mass amounts of dirt. Defendant could easily move its dirt storage activities to this property. Defendant could even continue to store a small amount of dirt on the property for its construction projects in such a way that would not cause noise and dirt to invade the plaintiff's property all day everyday, perhaps by constructing a retaining wall that would prevent washout and covering its dirt piles to minimize the resulting dust (costs that would likely be minimal to a successful construction company). Plaintiff, however, would be forced to abandon the home she has lived in for over three decades or stay and be barred from gardening or enjoying her front porch in a reasonable manner.

Further, plaintiff is the party that has acted in good faith throughout this ordeal. Plaintiff appealed directly to the defendant to address her harms. Even though defendant knew that it was dumping dirt in an almost completely residential area, it made almost no efforts to accommodate their interests or minimize the intrusiveness of its activities. Limited trucks to between 6 a.m. and 8 p.m. is not a significant modification in the interests of fairness, and despite complaints about the dust and the dirt flow, defendant has taken no remedial measures to prevent those activities from occurring again. Instead, defendant continues to act in bad faith, knowing the harm it is causing.

Although defendant has contributed substantially to the creation of jobs and homes for young families, this is not a direct result of the storage of dirt behind plaintiff's home. In fact, the benefits defendant has brought to the Appling community occurred before it purchased this lot and began storing its dirt there. Thus, there is no reason to believe that the defendant cannot continue to contribute meaningfully to the community or would be hindered in its efforts or stifled in its business if it was required to store the majority of its dirt outside the community on a larger property it already owns that is far better suited to its needs.

Finally while defendant's property does not violate any applicable zoning laws, even a business that exercises the utmost care to minimize the harm it causes, or one that serves society well, may still be required to stop its harmful uses if they are so unreasonable or undesirable that simply absorbing the costs of altering the activity would not be enough. Here, the defendant is not just causing noise to invade plaintiff's property to the point she can't think or sleep, it is causing dust to cover her garden and destroy her flowers, cote her home and windows, and flood into her property when it rains. Defendant can easily redress this problem, at little cost to itself, by transporting its significant dirt storage activities to property outside the city. This is not like a restaurant or bar that loudly serves patrons on the weekends, where an injunction would put the bar out of business and stifle legitimate business activity; this is a daily and continuous activity that physical impacts the plaintiff's property in an unreasonable way that can be easily redressed by a preliminary injunction, ordering the defendant corporation to be aware of and respect other property owners, and take its dirt elsewhere.

MPT 2 - Sample Answer # 3

The standard for granting a preliminary injunction is well established in this jurisdiction. The Court has found that the moving party must show a likelihood of ultimate success on the merits, the prospect of irreparable injury if the provisional relief is withheld, and that the balance of equities tips in the plaintiff's favor. Otto Records Inc. v. Nelson. For the following reasons, Plaintiff Margaret Ashton should be granted a preliminary injunction preventing Defendant Indigo Construction from depositing dirt in the vacant lot at 154 Winston Dr. pending final disposition of this suit.

1. Plaintiff has a strong likelihood of success on the merits, because she can show that Defendant intentionally and unreasonably interfered with her use and enjoyment of her land.

In a suit for private nuisance, the plaintiff must show that "the defendant's conduct was the proximate cause of an unreasonable interference with the plaintiff's use and enjoyment of his or her property, and the interference was intentional or negligent." Restatement 2nd of Torts.

In the present case, Defendant's conduct has proximately caused an interference with the Plaintiff's use and enjoyment of her land. Plaintiff has lived in her present home for 32 years. Her home is in a neighborhood that consists entirely of single family homes. In fact, this neighborhood is one of the few in the city that remains free from commercial establishments. In April, however, the Defendants began to dump dirt into the vacant lot behind the Plaintiff's property. This activity has interfered with the Plaintiff's use and enjoyment of her land in a number of ways. First, the drivers and the vehicles they are using have created a pervasive noise disturbance consisting of roaring engines, screeching brakes, crashing, grinding, and beeping sounds. These continual noises have prevented the Plaintiff from enjoying spending time on her porch or gardening or reading outside, all activities that the Plaintiff enjoyed prior to introduction of the Defendant's trucks. Further, the dirt pile has reached upwards of 20 feet high, effectively blocking the Plaintiff's view of anything besides a dirt pile. Additionally, this dirt blows onto the Plaintiff's property whenever there is even the slightest of breezes. These dirt deposits entering the Plaintiff's property have destroyed the Plaintiff's flowerbeds and required the Plaintiff to spend additional funds to clean the outside of her house. Finally, when it rains, the dirt pile turns to mud, which runs into the Plaintiff's backyard, preventing her from using and enjoying the outside land of her property.

Mere interference with use and enjoyment is not enough to show private nuisance, however. That interference must be unreasonable. Whether the interference is unreasonable rests on a number of factors, including "the nature of both the interfering use and use and enjoyment invaded; nature, extent, and duration of interference; the suitability for the locality of both the interfering conduct and the particular use and enjoyment invaded; and whether the defendant is taking all feasible precautions to avoid any unnecessary interference with the plaintiff's use and enjoyment of his or her property." Parker v. Blue Ridge Farms, Inc.

These factors also weigh in favor of the Plaintiff. The nature of the interfering use is merely that of a dirt dumping ground, while the use and enjoyment invaded is that of a private citizen living in their private home. The interference is continual. The noise and dumping activities occur continually from 6 in the morning until 8 at night, and the trespass of dirt

and mud on the property occur whenever there is even the slightest bit of unfavorable weather. This interference is extensive and is of potentially unlimited duration. As discussed above, this locality is completely unsuitable for creation of a commercial dirt pile. This is a private neighborhood, filled primarily with lots zoned for single family use. Finally, the Defendant has not taken all feasible precautions to avoid unnecessary interference. Initially, the Defendant was running its trucks all day and all night. Even after limiting the time of trucking, the trucks run continually for more than 12 hours per day. Additionally, the Defendant has not taken any precautions to prevent the dirt and mud they are creating from encroaching onto the Plaintiff's property, despite her continued complaints. These taken together clearly demonstrate that the Defendant's interference was unreasonable.

Finally the conduct was not only unreasonable and interfering, it was intentional. The Court in Timo Corp. v. Josie's Disco, Inc., found that "intentional action can be inferred from evidence that the defendants were aware of the intrusion and chose to continue their behavior." The record is uncontested that the Defendant's have received numerous complaints from not only the Plaintiff, but also from other homeowners in the affected neighborhood. Their refusal to mitigate the damage they are causing, knowing about the interference, is clear evidence that their actions were intentional. Because the Plaintiff can clearly make out a case for private nuisance, she has satisfied the requirement of probable success on the merits.

2. Land is unique and interference with the Plaintiff's use of her land will have no adequate remedy at law, so the Plaintiff will suffer irreparable injury if provisional relief is withheld

The Court has long held that "land is unique and any severe or serious impairment of the use of the land has no adequate remedy at law." Davidson v. Red Devil Arenas. Because Plaintiff will have no adequate remedy at law for the serious impairment of the use of her land caused by the Defendant's aforementioned conduct, she will suffer irreparable injury if this relief is withheld. Therefore, the Plaintiff satisfies the requirement of irreparable injury.

3. The Defendant's use is so unreasonable that it should be stopped completely, causing the balance of the equities to tip in the Plaintiff's favor

When balancing the equities, the court must seek to distinguish between those uses which should continue while paying costs, and those which are so unreasonable or undesirable that they should be stopped completely. Timo. When determining this, the Court must balance the social value, legitimacy, and reasonableness of defendant's use against ongoing harm to the plaintiff. Factors to consider include: respective hardships to the parties from granting or denying the motion, good faith or misconduct of each party, the interest of the general public in continuing the defendant's activity, and the degree to which the defendant's activity complies with or violates applicable laws. Timo.

In this case, the Defendant's are engaging in an activity that does have social value. They are a construction company that has certainly offered jobs and opportunities for housing for those who may not have gotten them normally. However, the legitimacy of the Defendant's general use must be weighed against the unreasonableness of their conduct in so using. The Defendant's own a parcel of land that is outside of the city and is nowhere near a residential area. Therefore, the social value of the Defendant's overall conduct is outweighed by the fact that they would be able to engage in this socially responsible

conduct without interfering with anyone's land. Again, although the Defendant's conduct is within the legal and zoning requirements for the vacant lot, the Defendant could be dumping the dirt in an area of land where the activity would not interfere with anyone's use and enjoyment of their land, making the conduct unreasonable. Because of this additional land, the Defendant will not gain any unreasonable hardship from moving its dumping operations, while the Plaintiff will continue to be unable to use her land if the injunction is not granted. The Defendant's possession of the additional plot of land means that the Defendant can continue its legitimate operations and can continue to provide social value, while the Plaintiff and the rest of the neighborhood can have their use and enjoyment of their land returned as well. Because of this, the Defendant's use of the vacant lot is so unreasonable that it should be stopped completely, causing the balancing of the equities to favor the Plaintiff.

For the foregoing reasons, this Court should grant the Plaintiff a preliminary injunction pending outcome of the nuisance trial on the merits.