

July 2016 Bar Examination Sample Answers

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QUESTION 1 - Sample Answer # 1

1. Whether the specific acts of the defendant was improperly admitted.

Generally specific acts of the defendant are inadmissible to prove the defendant's character or propensity to behave in a particular manner. However, evidence of specific acts undertaken by the Defendant will be admissible to prove other things such as motive, intent and identity. In this case the evidence admitted related to the other acts involving the defendant include witness description of the defendant and identify the defendant's particular method of undertaking. In each of the events evidenced the Defendant drove a red-dish vehicle to the scene, the victims describe him with "blondish" hair and they not he claimed the vehicle was stopped on the property due to over heating when seen coming from the back of the house. Based on these similarities the evidence would be admissible relevant to identify the defendant to any other crime that occurred in a similar matter or simply to show the Defendant's mode of operation. The evidence will not be admissible to prove that the events occurred or that defendant had a dangerous propensity.

2. Whether the investigator's testimony regarding the statements of the co-defendant are admissible.

Hearsay is defined as an out of court statement being offered for the truth of the matter asserted. The federal rules of evidence provides that hearsay evidence will not be admissible unless it falls within one of many outlined exceptions. Where there is a case of multiple layered hearsay there must be an exception under which each portion of the statement intended to be admitted can be allowed. In this case the statement in question is the co-defendant's statement to the investigator that the defendant burglarized Victim 3's home. In order to determine if the statement can come in we must look at the statement separately and determine if each piece is admissible.

First looking at the Defendant's statement to the co-defendant. The federal rules of evidence allows for an exemption from the hearsay rules where the statement involved is made by a party to the case. Under the statement of a party opponent exemption, any statements or admissions made by a party will generally be admissible during trial. Therefore, the defendant's statement to the co-defendant will be admissible.

Next, looking at the co-defendant's statement to the investigator. The federal rules of

evidence also allow statements made by a co-conspirator to a crime made during the continuance of the conspiracy to be admissible under the exemption as statements by a party opponent. However, in this case the co-defendant's statement to the investigator were not made during the conspiracy and could not be admitted under the exemption. Absent a hearsay exemption, this statement would also prove to be inadmissible as a violation of the Defendant's 6th amendment rights. As a general rule courts will not allow the admission of statement of co-defendants that implicate the defendant in a crime. The courts have generally held that the prejudicial value of such testimony outweighs the probative value and such evidence denies the defendant the ability to freely exercise his rights under the confrontation clause.

3. Whether the judge's expression of negative opinions regarding the defendant following a guilty verdict require that the judge recuse himself.

A judge will be required to recuse himself from a trial where there exists an apparent conflict of interest or other bias that will prevent the judge from rendering a fair and impartial ruling on the facts of the case. Here, the Defendant has been through a trial and was found guilty by a jury of his peers. There is no evidence in the facts that support a finding that the judge's negative opinions about the defendant were formed at anytime prior to the trial, in fact it is stated that the judge's negative opinion of the Defendant was based on the moral character of the defendant as demonstrated by the witnesses in the trial. There is also nothing in the facts that show that the Judge imposed an unnecessarily harsh sentence as it relates to the crimes the Defendant is charged with.

QUESTION 1 - Sample Answer # 2

1. Other Acts:

Yes, the evidence of the first two burglaries - against victim 1 and victim 2 - were properly admitted in trial. Evidence of the victim 3 burglary was most likely also properly admitted. The issue here is whether prior crimes are admissible without having convictions or for some other purpose besides propensity. Character evidence is generally inadmissible in both criminal and civil trials to prove propensity (a person is likely to act a certain way). However, there are several ways in which to introduce character evidence through exceptions to this rule. In criminal cases, a defendant's prior crimes, not convictions, can be admitted if they can prove motive, identity, plan, absence of mistake, intent, etc. In Georgia, in order to get this evidence in as substantive evidence, and not just impeachment evidence, the prosecutor must send notice to the defense attorney of a motion under 404(b). However, where the crime goes to show motive, the notice is implied. Pursuant to R404, the crimes need not be convictions. The prosecutor only has to prove the other acts by a preponderance of evidence for them to be admissible.

Here, the prosecutor would most likely move to admit the other acts to prove motive, plan, and identity. In the first and second burglary, the burglars claimed that their car was running hot and that they were looking for water. They also both mentioned a dog that had jumped out of their car. This evidence goes toward the defendants' plan. The execution of the burglaries used the same ploy against both victim 1 and victim 2. Further, both crimes involved a maroon, or "reddish burgundy" car. This proves identity. A very similar, if not same, car were used in both burglaries. Additionally, both the first and second burglary involved a blonde-ish man. In the first burglary, the witness described the man walking out from behind driveway as having "blondish colored hair." Victim 2 from the second burglary described the man who was inside her house as also being blonde. These descriptions also go to identity.

The victim 3 burglary will be a bit more difficult to get admitted, but the judge has discretion. The third burglary can also go to identity because even though it was not part of the prior scheme of burglarizing with more than one person, the co-defendant told the Investigator that he assisted burglaries in three different jurisdictions, one of which included Dekalb, the location of the third burglary. Geography is a factor into proving whether a crime is admissible under 404b. Additionally, the defendant would also sell valuables from the other burglaries. This victim 3 burglary would also go to the identity of the defendant. Not only did co-defendant claim defendant did this burglary alone, but the pawn ticket for the ring contained defendant's name.

Thus, the court properly admitted all of the prior burglaries.

2. Prior CoD Statements

Yes, the prior co-defendant's ("CoD") statements are admissible through the Investigator over hearsay. The issue here is whether the Investigator can testify to out of court

statements made by the co-defendant. Out of court statements admitted to prove the truth of the matter asserted are considered hearsay and are generally inadmissible. However, hearsay has several exceptions. Hearsay can be admitted if it proves something other the truth of the matter asserted - non-hearsay or can be admitted under one of several exceptions. One of these exceptions is when a hearsay declarant is unavailable, statements against their interest (penal included) can be admitted as an exception. A party admission is also available and does not require the declarant to be unavailable, but does require the statement to be used against party.

Here, the statement that the Investigator would like to admit is the statement of the CoD telling the Investigator that the Defendant told him (the CoD) that he (the defendant) does burglaries solo. The purpose of this admission is for the truth of the matter asserted - that sometimes the defendant does solo burglaries.

This statement would constitute double hearsay. In this case, each level of the hearsay will need to have a separate exception or non-hearsay purpose. Level 1 is the statement of defendant to the CoD and level 2 is the CoD to the Investigator.

Level 1 would be admissible under the party opponent exception. It is also a statement against interest if the defendant chose not to testify. The level 2 statement from the CoD to the Investigator will also be admissible if CoD is deemed an agent of the Defendant. A statement of party opponent / admission can be admitted if the statement is made by an agent of the person who is the party. In a coconspirator case, a statement made by a conspirator can be used against the coconspirator through agency. The issue here is that the burglary the CoD is speaking of, he did not partake in. Thus, the defense may argue the agency is nonexistent in this case. The judge has discretion for admitting 404b acts. The CoD was clearly charged with the same burglaries, and thus, the court will most likely find a party admission through agency and admit the statement over a hearsay objection.

3. Motion to Recuse

Yes, the trial judge's denial of the motion to recuse was proper. Generally, a trial judge will have another colleague on the bench hear a motion to recuse. However, a trial judge does not have to have another judge hear the motion to recuse if the judge believes they can reasonably determine the recusal lacks factual support and is unbiased to the basis of the motion. Further, trial judges are allowed to comment on cases after the jury returns a verdict. During the trial, the judge cannot comment as to the merits of the case, the defendant's guilt or innocence, or character. However, after a jury has returned a verdict and during sentencing, a trial judge has more latitude and can express opinions based on the case.

A judge can be recused or recuse him/herself when there is a conflict in the case, a party believes the judge is biased toward them, etc. However, where the grounds for recusal are not based on conflicts or biased, then the judge is not required to recuse.

Here, the motion would be based on the argument that the judge is biased toward the defendant and thus, cannot decide the motion for new trial because of this bias. The judge made negative comments about the defendant after the jury returned a verdict and not during trial. Thus, the trial court judge did not need to recuse herself from the motion to recuse because her actions did not amount to a recusal or a bias against the party. The trial judge will be able to look at the motion and the legal findings and factual issues of the case because the trial judge is not biased against the defendant.

QUESTION 1 - Sample Answer # 3

1. Other Acts Evidence

Evidence regarding a defendant's prior bad acts is generally not admissible to demonstrate a propensity for improper conduct or as evidence of a defendant's bad character. In other words, the prosecution is not entitled to use evidence that a defendant acted improperly in a prior circumstance to demonstrate that he was likely to act in a similarly improper manner in a subsequent circumstance. The evidence may be admissible, however, if the defendant's character is a necessary element of a crime being charged, evidence regarding a defendant's prior bad acts may be admissible to satisfy that element. Evidence regarding prior bad acts is also admissible if it isn't being used to show propensity, but rather another fact. These facts can include a defendant's motive, intent, lack of mistake, identity, or common plan. Notably, however, courts may exclude prior bad acts evidence even if it isn't being used to show propensity if the defendant can establish that the evidence is unreasonably prejudicial or likely to confuse the jury.

Here, the prosecution introduced evidence that Defendant had previously burglarized Victim 3 and stolen the Class Ring, which the Defendant later pawned for cash. This is unquestionably evidence of a prior bad act, thus in order to be admissible it must fall within one of the exceptions outlined above. At the outset, the evidence is likely inadmissible to prove an element of the crime charged. Defendant was charged with burglary, which under Georgia law has as its elements unauthorized entry into the premises of another with the intent to commit a felony inside. None of the elements of burglary concerns a defendant's character, so prior bad acts evidence wasn't admissible on that basis.

However, as previously discussed, prior bad acts evidence is admissible to prove other factors like intent or a common plan. Here, the evidence is arguably admissible to demonstrate intent or a common plan. For example, Defendant was charged with burglarizing the home of Victim 2, but never actually stole anything from the home. Because the prosecution couldn't prove the Defendant's intent to commit a theft inside Victim 2's house by pointing to stolen articles, prosecution could have introduced evidence of the prior crime to demonstrate that the Defendant intended to commit a felony in Victim 2's house and indeed would have had he not been interrupted. To the extent that the modus operandi of the burglary of Victim 3's house matched that of either Victim 1 or Victim 2, evidence of the burglary of Victim 3's home could be used to establish the Defendant's typical burglary tactics and could be admissible on that basis.

2. Prior Statements

At trial, the prosecution offered the testimony of an investigator who indicated that Co-Defendant had previously stated that Defendant had burglarized a number of homes alone, including the home owned by Victim 3. There are two potential bases on which Defendant could seek to exclude the prior statements of Co-Defendant: hearsay and confrontation. Hearsay is an out-of-court statement being used to prove the truth of the matter asserted. Hearsay is generally inadmissible, but may be admitted if it falls within one of a number of

different exceptions. In deciding whether Co-Defendant's out-of-court statements are admissible we first have to determine whether the statement is hearsay and then determine, if it is, whether it falls within a hearsay exception.

The statement is most likely hearsay. It was made by Co-Defendant out of court to the investigator. It is also being used to prove the truth of the matter asserted: that Defendant had burglarized Victim 3's residence. Thus it is only admissible if it falls within a hearsay exception. It could fall within the exception for co-conspirator statements, but it likely wouldn't because it wasn't made during and in furtherance of the conspiracy. Nor does it appear that any other exception applies. Arguably it could fall within the residual hearsay exception, but application of that exception is rare, and it would be more probative to simply examine the Co-Defendant rather than relying on hearsay statements.

As a quick aside, there is potentially a double-hearsay problem as well. The inspector testified not only regarding Co-Defendant's statements, but also statements made by the Defendant to the Co-Defendant, which the investigator summarized. Thus, there is a hearsay problem with Co-Defendant's out-of-court statements as well as Defendant's out-of-court statement. It is hearsay because it is out of court and being used to prove the truth of the matter asserted (that Defendant burglarized Victim 3's house). But it falls within the hearsay exception concerning admission of party opponents because the statement was made by a party opponent (Defendant) and is being used against him.

There is also potentially a Confrontation Clause problem with the statements. A prior out-of-court testimonial statement is inadmissible under the Confrontation Clause unless the declarant is unavailable and the defendant had a previous opportunity to cross examine the declarant. The statements by Co-Defendant are undoubtedly testimonial, they were made with trial in mind. Thus they are likely inadmissible because the declarant, the Co-Defendant, is available to testify. The prosecution would have been better off simply eliciting the testimony concerning the burglary of Victim 3's house directly from Co-Defendant instead of through the investigator.

3. Motion to Recuse

At sentencing the trial judge made several statements expressing strong negative opinions about the moral character of the Defendant based on the testimony of witnesses at trial. Defendant argued that these statements evinced a bias against the Defendant and that the judge should be recused from deciding his motion for new trial. The trial judge rejected the Defendant's motion for recusal and that was likely the proper result. Although judges must remain neutral and unbiased, the law is typically most concerned with outside bias infecting judicial proceedings. Here, the judge's opinion and statements were based on evidence within the judicial record and do not reflect any kind of bias demonstrating that Defendant received an unfair hearing. Indeed, sentencing is often more an art than science, and in tailoring a sentence based on a defendant's unique background and the particular circumstances of the crime, judges will inevitably have to form opinions about the defendant's character in order to determine if, for example, the defendant is likely to recommit an offense or whether he is likely to be deterred by a harsher sentence. The

mere fact that a judge has formed an opinion about a defendant, even a negative one, is not indicative of bias warranting recusal.

QUESTION 2 - Sample Answer # 1

1. The issue in the first question is what major felony crimes and in what county or counties would Butch and Shane likely be indicted.

Crimes: Armed Robbery in Georgia is the theft from a person of any items through the threat of force or violence. Aggravated assault in Georgia is the unlawful use of any offensive or defensive weapon which can reasonably cause death or great bodily injury where such use places the victim in reasonable apprehension of such injury. Assault is the placing a person in fear of immediately receiving a battery, which is the offensive or injuries contact from another. Burglary is the breaking and entering of a dwelling place for the intent of committing a felony therein. In Georgia, crimes must be charged in the proper location; crimes must be indicted either where the crime occurred or where some significant act of the crime was perpetrated. Party to the crime occurs where one party, with knowledge, assists the criminal conduct of another and takes substantial steps to do so.

In this example, the following crimes were committed:

Shane:

- a. committed armed robbery when he utilized the .38 caliber revolver to rob the victim in the restroom in Monroe County, and obtained \$77.00 in cash from him. This crime should be prosecuted in Monroe County, as that is the location it occurred.
- b. Shane may also be charged with party to the crime of the other crimes committed by Butch, even though it appears he stayed in the car as its driver. If he had knowledge that Butch intended to commit further crimes, he could be considered as a party by taking the substantial step of driving the car to transport him to the scene and aid in his get away.

Butch:

- a. Butch committed the offense of Burglary when he broke into and entered the hotel room of victim B and C with the intent to commit a felony, armed robbery. This was further completed in a tumultuous manner and may also meet the elements of Georgia's home invasion statute. This offense occurred in Macon, which is located in Bibb County. This is the location where the crime should be indicted.
- b. Butch committed the crime of Aggravated Assault when he fired his pistol into the headboard near victim C. This was committed in the same location as above, and should be indicted in Bibb County.
- c. Butch committed the crime of armed robbery when he again utilized the threat of his pistol to rob victim B and C in the hotel room, again, in Bibb County where it should be indicted.

d. Butch committed the crime of assault when he threatened to kill Victim B and C if they opened their door. This also in Bibb County.

2. The issue in this question regards the legality of the search and whether the evidence seized from Butch and Shane should be suppressed.

The 4th amendment states that only reasonable search and seizures are permitted. Katz v. US indicates that, unless meeting an exception, any search without a warrant is presumptively unreasonable. There is an automobile exception, which states that a motor vehicle or other similar movable object may be searched without a warrant with probable cause. Probable cause exists where there are sufficient, articulable facts to conclude that a crime has been committed and the suspect committed it, or that evidence of it is in a specific place. Brief investigatory stops by the police may be made where there is reasonable suspicion that a crime has occurred (Terry v. Ohio). Under the plain view doctrine, evidence viewed by an officer when they are lawfully present and the items are obvious contraband or evidence is permitted. Upon lawful arrest, an officer may search the person and surrounding area for weapons or evidence (with some limitation - Arizona v. Gant limits the ability to search the interior of a car incident to arrest where the suspect is detained in the back of a police car without access to the car). The exclusionary rule states that illegally obtained evidence is not admissible, and the fruit of the poison tree doctrine states that other evidence that flows from an illegal seizure will not be admitted.

Here, the stop by the police was based on reasonable suspicion, based upon the 911 call of victim 1, who described the car, the coat, and the hat worn by the suspect. The officer stopped the car based on the description, and upon seeing the items in the car in plain view, had probable cause to believe that these subjects were the suspects involved in the robbery. The arrest was based on this probable cause, and therefore their search incident to arrest was also lawful. The car, while not lawfully searched incident to arrest once the suspects were detained, could be searched as there was probable cause to search for evidence of the crime of armed robbery within the car, which meets the automobile warrant exception.

In conclusion, the evidence obtained in the search of the defendants and their vehicle were lawful as noted above and will not be subject to the exclusionary rule.

3. For an identification to be valid, it must not be overly suggestive and it must be shown to be reliable.

To determine reliability, the courts will look to factors including whether the witness had an opportunity to see the defendant, whether they were paying attention at the time, the time elapsed since the incident, how certain the witnesses are, and others. In this case, B and C could clearly see Butch and were clearly paying attention. A substantial time likely elapsed, however, which brings into question the reliability of the identification. The facts seem to indicate that the witnesses were certain of their identification. Further, both subjects were handcuffed in the back of a police car when viewed by the witnesses, which is highly suggestive. It is my conclusion that if contested the state would argue that the

factors here would indicate the identification was reliable in spite of the suggestiveness of the identification. The court would likely hold the identification to be admitted.

QUESTION 2 - Sample Answer # 2

1. Both Butch and Shane could be charged with armed robbery in Bibb County as well as aggravated assault. Armed robbery is robbery while armed; robbery being the intent to permanently deprive someone of their property through force or intimidation. In Bibb County, Butch clearly intended to deprive Victims B and C of their property permanently through force with a weapon. Butch kicked down the door and fired a shot and demanded the two men's property. This fits the definition of armed robbery perfectly. Shane would be guilty of the same offense under accomplice liability. When a person helps another to commit a crime, either before, during, or after the fact, they are considered an accomplice and can be charged with the same offense as the principle perpetrator. Shane took Butch's place at the wheel in Bibb County, allowed Butch to use his field jacket and baseball cap, and helped Butch to escape. All of this would allow Shane to be charged as an accomplice. Butch could also be charged with aggravated assault, which is causing the fear of an imminent battery through extreme force, such as threatening someone with a gun. Not only did Butch threaten Victim's B and C with a gun, but he also fired a bullet that almost hit Victim C. This would clearly be aggravated assault and Shane would be guilty of the same offense under accomplice liability following the same reasoning as for the armed robbery.

Shane and Butch could both be charged in Monroe County with at least robbery. The facts clearly state that Shane robbed Victim A, but there is no indication as to whether he threatened Victim A with his gun. Depending on whether Shane threatened Victim A with his gun, Shane could be charged with robbery at the very least, but potentially armed robbery. Butch would be an accomplice for driving the get away car and helping Shane flee the scene. Therefore, Butch would be an accomplice to Shane in Monroe County and be charged with the same offense.

2. There are several issues where seizure of evidence can be a problem. The first snag is whether or not an initial stop was valid. The Bibb County Sheriff's Deputies were valid in stopping Butch and Shane's car because it was swerving and speeding. There is also the fact that the car matched the description, creating more justification for the initial stop. During questioning, the ball cap and field jacket were seen, which matched the description in the BOLO. These facts created the necessary probable cause to justify the arrest. This arrest allowed the officers to search Butch and Shane's immediate person as well as anything within their wingspan to ensure the safety of the officers. This would allow the two wallets from Victims B and C to be admissible as evidence as well as the \$77. While loose money is not in itself suspect, the police did know that they were looking out for robbers and this money could be potential evidence and would also be admissible.

The main crux is the search of the car after Butch and Shane had been arrested. Police can always ask to search a car if they have a reasonable suspicion that evidence of a crime will be found. Consent can be given and limited if the police ask for permission to search. Shane did not own the car, but he had been driving it, which could create a reasonable assumption in the officers that he could consent to a search of the vehicle. There is also the fact that Butch could have objected at anytime since the car was his. Butch could have prevented the officers from searching the car, but did nothing, which acts

as a kind of acquiescence. This would allow Victims B and C's clothing and Victim A's wallet to be admissible evidence. The guns however, would likely not be admissible because the officers had only received consent to search the trunk. When an officer receives consent to search a vehicle, they can typically search any part of the vehicle as well as containers therein. In this instance though, the officers only asked to search the trunk of the car. The officers most likely knew that the suspects had a gun and could have asked to search the entire vehicle but did not. Once the car was in the impound lot, it could have been searched completely without any problem. However, because of the specific consent the officers asked for, the guns may not be admissible evidence.

3. The main issue with the identification was whether or not it was valid. Generally, an identification has to be done either in a photo array or a line up with similar looking individuals to avoid any sort of prejudice. If you simply walk up with the defendant and ask if he is the criminal it is too prejudicial because the victim is more likely to identify the suspect as the perpetrator. The justice system wants this variety because it makes an identification stronger. Butch's attorney's motion would be based on the prejudicial nature of the show up identification. The state would most likely respond that there are exigent circumstances; if these are not the criminals, then there are two armed robbers out driving around committing all sorts of havoc and potentially more serious crimes. The state should probably grant the motion to suppress the identification because the show up identification was too prejudicial.

QUESTION 3 - Sample Answer # 1

To: Senior Partner
From: Examinee
Date: July 26, 2016
Re: Smith Property

Memorandum

1. What ownership interest was created pursuant to the devise in Mrs. Smith's will?

In Georgia, absent language to indicate otherwise, when two persons become joint occupants of property, they become tenants in common. Tenants in common are the most common form of joint tenancy. The only interest in a tenancy in common is possession. Each co-tenant has the right to possess all the property.

Here, when Mrs. Smith left the property to her children she did so by will. The devise read "I leave my Lake Oconee property to my children, Sam and Laura." Both Sam and Laura took the property by the same instrument. Sam or Laura may try to argue that they took the property as joint tenants with the right to survivorship, because they took the property at the same time. However, this argument will fail. While the parties did take the instrument in time, title, interest, and possession, there is no language to indicate that Mrs. Smith wanted to leave the property to her children as anything other than tenants in common. As such, absent language that creates the right to survivorship, the parties have taken the property as tenants in common.

Sam and Laura have taken the Smith Property as tenants in common.

2. Whether the Jones have any property rights or interest in the Smith Property.

In Georgia, a person can acquire property rights in another person's land by way of an easement. There are various forms of easements, such as an affirmative easement, a negative easement, an easement by necessity, as well as many others. A prescriptive easement can be acquired over another person's property by way of action that is open and notorious, hostile, exclusive, continuous. A license is an interest in land that is personal to the recipient and not transferable unless it has become irrevocable. A license may become irrevocable if the owner of the license has paid value to improve the license.

Here, the Joneses were given a license to cross the Smith property. In 2011, Sam and his wife divorced. When Sam divorced his wife, he told the Joneses that they could use the pool and fish in the private lake on the Smith Property. Moreover, Sam told the Jones that they could continue to use the shortcut over the Smith Property for direct access to Lake Oconee. First, the Joneses do not have a prescriptive easement over the Smith Property. Their use was not notorious to the true owners, the Smiths. Sam granted the Joneses permission to use the shortcut. It is immaterial that Laura did not agree to the continued use of the shortcut. One co-tenant's consent is enough. Second, the Jones' license has

not been made irrevocable. Generally, a license is freely revokable at will. Here, the facts indicate that the Joneses decided to turn the property into a bed and breakfast. The Joneses were excited by the prospect of allowing the guests to swim in the Smith's pool, fish in the Smith's private lake, and allow the guest's to use the walkway in order to reach Lake Oconee. There is no evidence to indicate that the Joneses ever paved the walkway for easier access to the Lake. As such, the license never reached the stage that it became irrevocable. Sam may revoke the license at anytime.

At best, the Joneses currently have a license to cross the Smith Property at their pleasure; however, that license is freely revokable at this stage.

3. Whether Sam is obligated to pay Laura any portion of the rents that Sam collected from the weekly and monthly rentals of the Smith Property.

A co-tenant owes various duties to his other co-tenants and is obligated to them. Co-tenants are not entitled to rent from another co-tenant's occupation of the premises absent an ouster. Co-tenants are entitled to rents from third parties. Co-tenants are required to pay any upkeep and maintenance that is required.

Here, from 2011 to 2014, Sam regularly rented the Smith Property on a weekly or monthly basis. These rents were derived from third parties. As such, Laura is entitled to her ½ share of the rents. However, for any period of time that Sam stayed at the property for any period that was not rented to third parties, Laura would not be entitled to a rent against Sam. There is no evidence of an ouster. Laura and her family relocated to Key West on their own terms. The facts do not indicate there was any hostility between the brother and sister. Sam will be required to produce receipts and show what income he received from third parties. Whatever that amount is, Laura will be entitled to half.

Sam will be required to pay Laura half of the rent obtained from third parties.

4. Assuming the sale of the Smith Property is consummated, how much of the net proceeds is Sam entitled?

The general rules for co-tenants are as stated above. More specifically, when a piece of property is sold parties are entitled to their share of the profits. If there is any unpaid maintenance at the time of the sale, the co-tenant who has paid that share is entitled to be indemnified that portion from the other co-tenants profits. Additionally, any co-tenant who lived on the premises is required to account for the beneficial use and enjoyment he or she obtained by using the property.

Here, assuming the sale of the Smith Property is consummated, Sam will be entitled to half of the proceeds. There is no evidence to indicate that Sam ever failed to pay any upkeep charges and Laura was required to cover his expense. Thus, Laura cannot dip into Sam's proceeds that way. Laura could potentially argue that Sam has unclean hands by way of keeping third party rents and not sharing those. Generally, Georgia courts require a party who seeks equity to do equity. However, that action is likely independent and separate

from the sale of the property. Alternatively, Laura could have the court set up a constructive trust in the third party rents she is owed from the sale of the property. Laura could seek her rent from Sam's proceeds. A constructive trust where a defendant has title to property that actually belongs to the plaintiff, there was a special or fiduciary relationship between the plaintiff and defendant which resulted in the defendant obtaining the property by fraud or some other inequitable means, and there would be unjust enrichment if the defendant was allowed to keep the property. Here, Sam has Laura's rent, they are family members and are likely considered to be in a special relationship, and allowing Sam to keep 50% of the sales in light of the 3 years rent that he has withheld from Laura, it would be unjust to allow him to keep the rent. Thus, Sam will be entitled to $\frac{1}{2}$ of the proceeds of the sale, minus any money that he owes Laura.

Sam is entitled to $\frac{1}{2}$ of the proceeds; however, Sam will likely be required to reimburse Laura the rent that she is entitled to which can be done by way of a constructive trust.

QUESTION 3 - Sample Answer # 2

TO: Senior Partner
FROM: Applicant
DATE: July 26, 2016
RE: Smith Property

MEMORANDUM

You asked me to look into several questions that Mr. Smith ("Sam") has regarding his property on Lake Oconee ("Smith Property"). Specifically, you asked (1) What ownership interest was created by Mrs. Smith's devise of the Smith property to Sam and Laura; (2) What property rights or interests do the Joneses have in the Smith property; (3) Is Sam obligated to pay Laura any portion of the rents he collected from the weekly and monthly rentals of the Smith property; and (4) If the deal goes through with the hotel, how much of the net proceeds is Sam entitled to?

(1). The property interest created in Mrs. Smith's devise of the Smith property to Sam and Laura is a tenancy in common. Generally, in Georgia, a conveyance to more than one grantee creates a tenancy in common by default unless the conveyance indicates the co-tenants are to enjoy a joint tenancy with the right of survivorship. In that case, a joint tenancy is created and title would pass automatically to the other in the event of one joint tenant's death. Mrs. Smith's devise contained no such language, so Sam and Laura each own an undivided one-half interest in the Smith Property with no right of survivorship. This means that upon the death of either Sam or Laura, their interest in the property would pass to their statutory heirs or will beneficiaries.

(2). The Joneses no longer have any rights in the Smith Property, and they never had any interest in the Smith Property. The Jones' claim that they have easement rights in the Smith Property is unfounded. The Statute of Frauds requires that any conveyance of an interest in real property be memorialized in writing, for precisely this purpose. An easement is an interest in land, and the grant of such must be in writing. The Joneses have no easement to cross the property, use the pool, or fish the private lake, neither by conveyance nor by prescription.

To have an easement by prescription, the use of the land must be hostile, open and notorious, and continue through the statutory prescribed period, which in Georgia is 10 years for wild lands and 7 for improved land. The Joneses had no prescriptive easement in any capacity that they claim because (a) their use was not hostile, as they used the land with Sam's permission; (b) it was open and notorious; and (c) it did not continue for the prescribed statutory period because Sam gave them permission to use the path, pool, and lake when he divorced in 2011. Even if they had used the pool and lake since they moved in next door in 2009, they still would not satisfy the requirements for the statutory period because consent of the owner to use the premises destroys hostility and resets the clock. Therefore, the Joneses did not have an easement of any kind on the Smith Property.

At best, the Joneses had a license to use the path to the lake and the pool and a profit to fish the private lake on the Smith Property. A license to use one's land is personal to the holder of the license and can be revoked by the owner at any time, assuming no consideration was paid for the license. Here, Sam granted the Joneses verbal permission to use the path and pool and to fish the lake. There is nothing in the facts to indicate the Joneses provided any consideration for this license. Therefore, Sam may revoke their license at any time he chooses. Furthermore, since a license to use one's land is personal to the holder of the license, the Joneses would not have been able to let their Bed & Breakfast guests use their license to exploit the Smith Property for their own financial gain.

(3). Sam has to pay Laura half of the amount of rental income he collected from the weekly and monthly rentals of the Smith Property. Co-tenants must pay their fair share to maintain and upkeep their property. If one of the co-tenants fails to pay her fair share, she is owed nothing on any income another co-tenant derives from the use of the property. However, if the co-tenant does pay her fair share, she is entitled to reap any of the income derived from renting the property out. Here, Laura has dutifully paid her share of the expenses to maintain and upkeep the Smith Property. Sam should have told Laura about his renting out the property, but perhaps he assumed since she was out of state and since he was the one taking care of the property, he should be the one to reap the benefits of the property. Unfortunately the law is not on his side on this matter, so he must share with Laura half of the proceeds he collected from renting the Smith property.

(4). When the sale of the Smith Property to the hotel is completed, Sam would be entitled to one-half of the proceeds minus one-half of the aggregate rental income he collected from renting out the property. Since Sam owes Laura half of the rental income, he could just subtract that from his portion of the sale proceeds instead of coming out of pocket with it.

Conclusion

Please let me know if I can be of further assistance or if you have any questions. I am happy to draft up a letter to the Joneses' attorney outlining the weakness in their claim to the Smith property if needed.

QUESTION 3 - Sample Answer # 3

To: Senior Partner
From: Applicant
Date: July 26, 2016
Re: Smith Property Matter

1. What ownership interest was created in Mrs. Smith's Will to Laura and Sam

The issue is what ownership interest was created to Laura and Sam pursuant to the devise in the will of Mrs. Smith. The devise at issue is: "I leave my Lake Oconee property to my children, Sam and Laura." In Georgia and at common law, the will provision will be construed as a tenancy in common. A tenancy in common is the fallback. A tenancy in common gives each co-tenant an undivided interest in the whole of the property. Thus, Laura and Sam have the right to possess the whole property. Laura and Sam each have an undivided one-half interest in the property. In a class gift, the members of the class share equally. Because Sam and Laura are the only children of Mrs. Smith, they will share equally--each receiving $\frac{1}{2}$.

The interest is not a joint tenancy with right to survivorship. A joint tenancy must be evidenced by express words that contain at least "right to survivorship." Because the will devise does not contain this language, the court will construe Laura and Sam's interest as a tenancy in common.

2. What property rights or interests do the Joneses have in the Smith Property

The issue is what property rights or interests do the Joneses have in the Smith Property. The Joneses hold a license, which is neither a property right nor interest.

Here, the Joneses claim that they have an easement in the property. An easement is a non-possessory interest in the property of another. An easement may be express or implied. An express easement must be in writing, so as to satisfy the statute of frauds since it is an interest in land. An implied easement does not have to be in writing but may arise in quasi-easement or by necessity. There is no evidence that the Joneses have an express easement. There is no writing. Sam merely told the Joneses that they could feel free to use the pool, fish in the lake, and cut through the Smith Property to reach Lake Oconee. Thus, there is no express easement. Moreover, there is also no implied easement. A quasi-easement arises in favor of the grantor, which is inapplicable on the facts. An easement by necessity is the Joneses's best argument. The Joneses will argue that the easement is a necessity because they do not have a lake frontage of their own and that the only way to reach Lake Oconee is by way of the Smith Property. This argument would be unavailing because necessity easements are created where the property is landlocked and the easement holder has no reasonable means of reaching a public road from his property. The same necessity does not arise because the Joneses do not have a lakefront property and cannot access Lake Oconee. Moreover, even if there was an easement, Sam and Laura would have a cause of action for an injunction against the

Joneses because the easement use for the guests of their bed and breakfast would be excessive use.

Where an express easement fails for lack of a writing, the courts have found a license. A license is not an interest in land. A license may be revoked at any time unless certain conditions are met. An irrevocable license arises when the license holder improves the property of another in reliance on the license. No such facts for an irrevocable license are given here. The fact that the Joneses planned to use their license to advantage their business would be irrelevant. Thus, the Joneses have no property rights or interests in land--they merely have a license to use the Smith Property which could be properly revoked at any time.

The Joneses may also claim that they have a profit since they have a right to fish in the lake. A profit is a non-possessory interest in the land of another whereby the profit holder can come onto the land of another and take away resources. Like easements, profits also must be in writing to satisfy the statute of frauds. Here, there is no writing. Thus, the Joneses do not have a profit.

3. Sam's obligation to pay Laura any portion of the rents Sam collected from the weekly and monthly rentals

The issue is what, if any, obligation Sam has to pay Laura a portion of the rents Sam collected from the weekly and monthly rentals of the property. Joint tenants have an obligation to share income made from the property where the property is rented to a third party.

Here, the facts state that Sam regularly rented the property to third persons on a weekly or monthly basis. Although Sam did this without the consent of Laura, this is irrelevant to whether Sam has an obligation as a co-tenant to share the rent income with Laura. The facts also state that Laura continued to pay her share of the expenses for the maintenance and upkeep of the Smith property. Thus, it is obvious that Laura still paid half of the expenses of the property yet did not share equally in the property's profits. As a result of the rental to third persons, Laura is entitled to half of the rental income. This credit for rental income should be deducted from Sam's net proceeds of the rental property should Laura and Sam decide to sell the property.

4. Net Proceeds to which Sam is entitled

The issue is the amount of net proceeds to which Sam is entitled should the sale of the property be completed.

Because Laura and Sam are tenants in common, in order to sell the entire Smith Property, they must both agree to the sale since they are each entitled to possess an undivided one-half interest. Assuming Laura and Sam both agree to sell the property, Sam and Laura would ordinarily be entitled to share in the net proceeds of the property equally. However, because Sam has wrongfully retained the entire rental income of the property, Sam's

portion of the net proceeds will be reduced to credit Laura for half of the profits from the rentals to third persons.

QUESTION 4 - Sample Answer # 1

1. John may seek a temporary restraining order or a preliminary injunction to prevent Bill from delivering the painting to the shipping company. Both of these remedies are forms of equitable relief designed to maintain the status quo until a trial on the merits may be held. Injunctions prohibit a party from taking some specified action for a specified period of time prior to trial on the merits. Equity will act where there is an inadequate remedy at law and the equitable relief sought is feasible because the defendant or property is subject to the court's jurisdiction. A temporary restraining order (TRO) is a remedy that may be used on a short-term basis to prevent irreparable harm. The party seeking the TRO must establish that irreparable harm will result if the requested relief is not granted and that the harm to the party seeking the TRO will outweigh the harm to the party whose conduct will be restrained by it. A TRO may be obtained without notice or a hearing to the opposing party, provided that the party seeking the injunction provides an affidavit to the court explaining that he attempted to provide such notice or that he cannot do so due to the imminent nature of the harm. In Georgia, a TRO is effective for 30 days, although a hearing for a preliminary injunction should be held as soon as it becomes practicable to give notice to the defendant. The TRO preserves the status quo until such time as the preliminary injunction hearing may be held. Similarly, a party seeking a preliminary injunction must show that equity is feasible, that the harm to be avoided would be irreparable, that the balance of hardships favors the party seeking the injunction, and that the party seeking the injunction is likely to succeed on the merits. A preliminary injunction maintains the status quo until such time as a trial on the merits may be held, and the defendant must be given notice of the preliminary injunction hearing.

Here, equity is feasible because the remedy at law is inadequate. A legal remedy may be inadequate where the subject matter is unique. Bill is preparing to deliver the painting to a shipping company, and the painting may then leave the jurisdiction of the court, at which point John would be limited to monetary damages. Money damages would be inadequate here because the painting is unique; it is a previously unknown painting by a renowned artist who is now deceased and cannot create another like it. Moreover, John hopes to use this painting to win the competition. Under these circumstances, a TRO is appropriate and may be granted without notice or a hearing, provided that John cannot give Bill notice upon due diligence before Bill ships the painting. The TRO is appropriate because the harm will be irreparable: if Bill ships the painting to Frenchie, not only may the painting leave the court's jurisdiction, it might come into the hands of Frenchie, a bona fide purchaser (BFP) for value without notice of John's claim to the painting. At that point, equity would not act to deprive the innocent BFP of the benefit of his own bargain. Additionally, John has already spent \$10,000 in reliance on his contract with Bill, and this fee is non-refundable, demonstrating the imminent harm to John. Imminent harm will also exist because the painting competition is set for October 1. Moreover, the harm to John absent the TRO would be significant, while the harm to Bill would be slight if he had to wait a few weeks before fulfilling his contract with Frenchie. Finally, John is likely to succeed on the merits because Bill breached his contract with John by selling the painting to Frenchie. For the same reasons, a preliminary injunction would be appropriate to maintain the status quo

until trial, although in that case, Bill must be given notice and an opportunity to be heard on the issue of whether such an injunction should be granted.

2. John may seek specific performance to force Bill to honor the sales contract. Specific performance requires a party to a contract to fulfill his obligations under the contract. Specific performance, once sought and obtained by the non-breaching party, may be enforced by means of an injunction. Under the UCC, which governs the sale of goods, specific performance is appropriate where the goods are unique--literally one of a kind--or in other appropriate circumstances. To obtain specific performance, the non-breaching party must first establish that equity is feasible, on the same grounds referenced above (inadequate remedy at law and jurisdiction). Moreover, the non-breaching party must prove the existence of a valid contract containing all the necessary elements of a contract (e.g. offer, acceptance, and consideration), that all conditions precedent have been fulfilled, that mutuality of remedies exist, and that the breaching party has no valid defenses. Here, the sale of the painting is governed by the UCC because the painting is a movable good. Moreover, as established above, the painting is unique because it is literally a one-of-a-kind work by a famous, deceased artist. Moreover, equity is feasible due to the inadequate remedy for John if Bill sells the painting to a bona fide purchaser, and the painting and Bill are currently before the court's jurisdiction. The facts establish that a valid written contract existed between John and Bill; the contract had to be written to satisfy the Statute of Frauds because the painting was sold for more than \$500. The facts do not indicate that any conditions precedent needed to be fulfilled before the sale could take place. Finally, mutuality of remedies exists because John is ready, willing, and able to tender his own performance as required by the contract: he apparently has the money that he was required to pay Bill and is prepared to tender it in exchange for the painting. Finally, Bill has no defenses. The only relevant defense here would be the Statute of Frauds, which, as noted, was satisfied when the parties entered a valid written contract for the sale of a good for over \$500. Consequently, John can obtain specific performance, and the court will issue an injunction forcing Bill to tender the painting. This injunction may be enforced by holding Bill in contempt for its violation.

3. If John fails to obtain the painting from Bill by an order for specific performance, he may receive money damages based on the value of the painting but not any consequential damages. At issue is whether the breaching party to a contract is liable for consequential damages. As a general rule, contract damages are compensatory. That is, they serve to compensate the non-breaching party by placing him in the same position he would have been in had the contract been performed. This is known as the non-breaching party's expectation interest because that party's expectation is that the contract will not be breached. Where expectation damages are too uncertain, reliance damages (i.e. out of pocket expenses) may be awarded instead. However, consequential damages are more difficult to obtain. Under the UCC, only the buyer of goods may obtain consequential damages. Moreover, the buyer can only recover such damages where they were reasonably foreseeable to the breaching party. The UCC thus codifies the rule of *Hadley v. Baxendale*. Here, if John cannot recover the painting itself, he may recover his expectation interest. Because Bill, the seller, retains the painting, John may recover the market price of the painting at the time he learned of the breach minus the contract price.

However, John cannot recover either his \$10,000 entry fee or the cash prize from Bill because Bill had no reason to know of those consequential damages. At any rate, the cash prize would be too speculative.

4. John may seek breach of contract damages in either state court or superior court, but he may seek an injunction, TRO, or specific performance only in superior court. At issue is subject matter jurisdiction. In Georgia, the state courts of the 62 most populous counties have general jurisdiction except where exclusive jurisdiction is given to another court, and the superior court has concurrent jurisdiction with the state court. However, only the superior court can hear actions regarding land title, divorce, felonies, or equity. Accordingly, John can seek contract damages in state or superior court, but he can only seek a TRO, injunction, or specific performance (all forms of equitable relief) in superior court.

5. The court is likely to grant both a TRO or preliminary injunction and specific performance. As noted above, an injunction is appropriate to maintain the status quo until a trial on the merits may be held. At that point, the court will likely grant specific performance based on the unique nature of the painting and the existence of a valid contract. Even if the court declines specific performance, however, John is entitled to expectation damages for breach of contract, but not consequential damages.

QUESTION 4 - Sample Answer # 2

1. To prevent Bill from delivering the painting to the shipping company, John may ask a court to grant a temporary restraining order, a preliminary injunction, or a permanent injunction. A temporary restraining order (TRO) is an order by the court to maintain the status quo. In Georgia, a temporary restraining order can take effect for a maximum of thirty days. A temporary restraining order may be granted ex parte, without notice to the opposing party and without a full hearing on the matter, if the attorney provides a sworn statement as to why notice is impossible or not warranted in the circumstances. The party petitioning for the TRO must show that without the order to maintain the status quo, he is likely to suffer imminent and irreparable loss. The benefit of a TRO is that it does not require a full hearing, so that it can be issued relatively quickly. Because Bill plans to deliver the painting within one week, seeking a TRO would likely be a good idea, given time is very limited.

Alternatively, John may ask a court to grant a preliminary injunction. An injunction is either a prohibitive or affirmative injunction, meaning the court orders a party to either refrain from doing something or to affirmatively do something. Here, John would be seeking a prohibitive injunction, petitioning the court to order that Bill not deliver the painting to the shipping company. To obtain a preliminary injunction, the moving party must show that failure to grant the injunction will likely cause him to suffer irreparable loss, that the balances of the equities favor the injunction (meaning that the risk of loss to the moving party from failing to grant the injunction is greater than the risk of loss to the enjoined party from granting the injunction), that the moving party is likely to succeed on the merits, and that public policy would not disfavor the granting of the injunction. A preliminary injunction may issue after notice is given to the party to be enjoined, as well as an opportunity to be heard on reasons the injunction should not issue. A permanent injunction has the same requirements as a preliminary injunction, except for the requirement of likelihood of ultimate success on the merits. A permanent injunction may issue after full hearing and consideration of the facts and circumstances of the case.

Here, John may argue that allowing Bill to dispose of the painting by delivering it to the shipping company, will result in irreparable injury to John, because the painting is a unique good that cannot be replaced. John would have to show that the loss he would sustain were the painting to be disposed of is greater than the loss Bill would sustain by being forced to retain the painting, in potential breach of the contract he assumedly formed with Frenchie. Finally, John would have to show the likelihood of success of his claim, and the reasons that forcing Bill to retain the painting would not be against public policy.

2. John may petition the court for the equitable remedy of specific performance on the contract. Equitable remedies are to be granted only in the rare circumstances where damages would not serve as an adequate remedy to breach of a contract. For contracts concerning real property or unique goods, a court may be more likely to grant specific performance instead of or in addition to damages, because specific parcels or property as well as unique goods are irreplaceable, and presumptively inadequately covered by a monetary award of damages alone. To obtain an order of specific performance by a court,

the moving party must show (i) the existence of a valid contract; (ii) that the moving party has fulfilled all conditions precedent he was obligated to fulfil under the contract; and (iii) that specific performance would be feasible for the parties, without the excessive monitoring or oversight of the court.

Here, John had a valid, written contract with Bill to buy the painting for \$500,000. Furthermore, John relied on Bill's performance of the contract terms when he signed up for the competition and paid the non-refundable entry fee. The facts did not indicate the existence of any precedent conditions John had to perform under the contract. Unless otherwise stated in the contract terms, payment for goods under the UCC is presumed due upon delivery of the goods, and there is no evidence that John was obligated to pay for the painting before delivery was tendered. Finally, compelling specific performance under the contract is likely feasible, because it requires only one transaction to take place between the two parties, John and Bill. Though compelling specific performance may have the effect of breach of Bill's contract with Frenchie, even if Frenchie were to bring a suit for damages, this would still only constitute one additional claim a court would have to hear. Ongoing and indefinite monitoring of Bill's performance would be unnecessary.

3. A non-breaching party to a contract is entitled to damages that occur as a result of the contract breach. Expectation damages are the most typical form of recoverable damages. Expectation damages seek to put the non-breaching party in as good a position as he would have been had the contract been performed as promised. Damages must be reasonably certain to be recoverable. Furthermore, damages that were not foreseeable or that the breaching party had no reason to know of as resulting from a potential breach, are not typically recoverable under contract law. Here, John would likely not be able to recover the \$1,000,000 he expected to win, as well as any additional profits he expected to reap from increased magazine publicity, as a result of his successfully obtaining the rare painting, because these expectation damages are far too speculative.

John will definitely be able to obtain his reliance damages - the \$10,000 non-refundable fee he paid for entry into the contest, in reliance on Bill's promise to perform under the contract, if John does not receive the painting under a specific performance award.

If John does not succeed in compelling specific performance, and thus does not receive the painting, he would normally be entitled to the market price minus the contract price. Here, he would be entitled to \$250,000, the difference between what Frenchie was willing to pay and what John was obligated to pay on the contract.

4. John may seek relief in any Superior Court in Georgia that has personal jurisdiction over Bill.

5. The Court is most likely to award damages, because as a remedy at law, damages are generally the preferred remedy. However, if John can offer sufficient evidence that the painting was so unique as to be irreplaceable, then there is a good chance that the Court will grant specific performance. The Court would demand that Frenchie return the painting to John, if Frenchie paid for the painting in good faith and without notice of John's claim

under the valid contract. As an innocent purchaser for value, Frenchie would be entitled to keep.

QUESTION 4 - Sample Answer # 3

1. John could seek a temporary restraining order (TRO) and/or preliminary injunction (PI) to prevent Bill from delivering the painting.

A temporary restraining order and a preliminary injunction are intended to preserve the status quo until a dispute can be resolved. A temporary restraining order can be obtained without notice to the other party, but will be limited to 30 days. John would then need to seek a preliminary injunction, which can last until trial. The preliminary injunction requires that Bill receive notice and a hearing.

In order to obtain a TRO or PI, John must demonstrate that there will be irreparable injury if the sale to Frenchie is not enjoined. This he should be able to do: the painting is unique, and especially valuable given that it is long-lost. Although John's claim that he will win the Meilleure Peinture is speculative, the painting is nonetheless of such a unique character that its loss cannot be compensated solely by damages. John would therefore be able to demonstrate irreparable harm.

In addition, John must also show that there is a likelihood of success on the merits of the case. Given that he has a valid written sale contract that predates the sale to Frenchie, and that Bill seems to have no justification or defense that would excuse performance under the contract, John would likely succeed, and therefore will be able to obtain a TRO and subsequently a PI.

Finally, the court will also consider other equitable factors, such as the balance of hardships between the parties, the public interest, and whether John has done anything wrong or has clean hands. None of these factors give any reason not to issue the TRO/PI. Bill stands only to lose \$250,000 which he has no right to receive anyway because of his prior contract, whereas John would lose a unique painting and an opportunity to win a coveted art price. There is nothing in the public interest that would suggest an injunction is inappropriate. And John has not, on these facts, contributed in any way to his potential hardship.

In sum, a TRO and later PI should be issued by the court.

2. Bill has a claim for specific performance.

Bill will be able to claim specific performance in a breach of contract action. Specific performance is a remedy ordered on a successful contract suit, so John will need to file (and win) a claim for breach of contract. As explained above, the contract is valid and John is likely to win.

Specific performance is available in contract cases where the contract is for unique goods and monetary damages are an inadequate remedy. Artwork is often unique, and a long-lost painting by a deceased painter would be especially likely to be unique. If the artwork

has not even been catalogued or referenced, it is especially unique and hard to value, and therefore appropriate for specific performance.

Following a successful suit, the specific performance would be ordered in the form of a mandatory injunction.

3. Bill will most likely be able to recover reliance damages, though expectation damages are also possible.

The usual measure of damages for breach of contract is expectation damages--an amount of money that puts the plaintiff in the same financial situation as he would have been had the contract been performed. This would be hard to measure here, though. It is possible that John would win the Meilleure Peinture prize, which would carry with it a \$1,000,000 award and the possibility of a much greater magazine circulation. However, these amounts are all based on speculation: there is no guarantee that John would win. Furthermore, although the cash prize for the Meilleure Peinture award is a fixed sum if he were to win, the amounts he would gain from additional advertising and increased circulation of his magazine are a matter of further guesswork. Thus, the damages he would suffer from not winning the prize are too speculative to be obtainable.

There is a potential further problem with the prize award as a measure of damages. Under the expectation damages measure, consequential damages are limited to those which are foreseeable to the breaching party at the time of breach, either because they are objectively foreseeable or because the breaching party has reason to know of some special value to the non-breacher. John would have to prove that Bill either knew of John's intention to enter the competition or could have reasonably foreseen it given the rarity of the painting. John may be able to argue that at least some form of competition entry was foreseeable any time you have the sale of a rare artwork, but this will be a different argument to win.

John would be able to recover, under expectation damages, the difference between the sales price and the fair market value of the painting. The fair market value of the painting would also be difficult to ascertain, though given that there is at least one buyer out there willing to pay \$750,000, John would probably be able to recover at least \$750,000 - \$500,000 = \$250,000.

A second measure of damages that is more suitable when expectation damages are speculative is reliance damages. Reliance damages put the non-breaching party back into his ex ante position, as if he had never entered the contract at all. Here, John relied on the contract by paying \$10,000 to enter the Meilleure Peinture competition. That entry fee is non-refundable, so there is nothing he can do at this point to mitigate. The question would be whether John's reliance was reasonably foreseeable. Here, for the same reason described above, I do not believe the \$10,000 entry fee would be reasonably foreseeable to Bill when he entered the contract.

4. John would seek relief in Superior Court in whichever count jurisdiction and venue are proper.

Superior courts have jurisdiction over most cases in Georgia, including breach of contract actions. Further, since the distinction between courts of law and courts of equity has dissolved, John would only need to go to one court to seek relief.

There is no information as to where Bill is domiciled, but assuming he is domiciled in Georgia, Georgia courts will have personal jurisdiction over him. In addition, venue is proper in the county where the defendant resides or in a county where all parties consent. The case would therefore be properly brought in Georgia Superior Court in the county in which Bill resides, unless he and John agree to another forum.

5. The court would most likely order specific performance.

For the reasons explained above, a court would be unlikely to order monetary damages. The damages from the competition and increased advertising revenue are too speculative for a court to order, and the reliance is at least arguably not foreseeable.

Instead, this case is a great candidate for specific performance. Because of the unique nature of the subject of the contract, a court will likely order Bill to convey the artwork to John. This is the most appropriate remedy in this case. Further, once specific performance is granted, further expectation damages would not be ordered because they would be duplicative.

MPT 1 - Sample Answer # 1

To: Della Gregson, Partner
From: Examinee
Date: July 26, 2016
Re: Barbara Whirley Matter

Memorandum In re Whirley

Barbara Whirley (BW) is a tenant of a three bedroom house at 1254 Longwood Drive, Franklin City, Franklin 33015 belonging to Sean Spears (SS). She has been experiencing problems since late February, and she is looking for options for how to resolve them. Each problem she is experiencing is noted below with a discussion of her options.

In order for her to be able to receive any remedies for the damages, BW must show that the damage renders the property untenantable. There is an implied warranty of tenability in lease contracts established in *Gordon v. Centralia Properties Inc.* as well as a statutory duty of landlords to repair conditions that render property untenantable in Franklin Civil Code (FCC) § 540. If a property is rendered untenantable, then SS would be responsible for repairs of the conditions.

1. The Leaking Toilet

First, BW will need to establish that a leaking toilet renders the property untenantable. A leaking toilet is likely to be determined to be an untenantable condition. FCC § 541 lists lacking "plumbing and gas facilities...maintained in good working order" as an untenantable dwelling. The tenant in *Burk v. Harris* had a leaking shower, which was deemed untenantable as well. This shows generally that a leaking plumbing system (i.e. sinks, showers, toilets) can render a property untenantable. Maybe at the beginning of the leak it was not untenantable with just a little water on the floor and an unsurety if there even was a leak. However, it became apparent rather quickly that it was indeed leaking and worsened as the problem was not resolved. BW now has to put a bucket underneath the leak to catch the water and empty it a couple times a day. There is also no evidence that BW caused these damages. This should be deemed an untenantable condition.

Second, BW will need to establish that she notified SS of the leak and it was not addressed within a reasonable time. BW first notified SS of the leak on Feb. 19th. She notified him again on March 4, March 31, and May 26. These are all by email. She also alludes to calling the office in her emails a few times, so she might have left messages there notifying him even more times. A tenant is presumed to act within a reasonable time if he makes repairs after 30 days of notifying the landlord pursuant to FCC § 542©, so SS has had plenty of time to repair the damage. BW should be able to make the repairs herself if she so wishes.

BW's options include: she may make the repairs herself and deduct the cost from the next month's rent, paying \$1000 since the cost of fixing the leak is \$200 and her rent is \$1200.

The advantage to this solution is that she may have her toilet fixed now instead of waiting for an indefinite time for SS to fix it. It will end up being deducted from her rent, so her costs do not change. If SS decides to start eviction proceedings, she may use this justifiable reduction in rent as an affirmative defense because she did not cause the violation.

BW may vacate the premises and be discharged from paying further rent after vacating. This has the disadvantage of the fact that she would have to move, which she explicitly does not want to do. It has the advantage that she might be able to find lodging elsewhere in better condition or even lower rent if she opted for a two bedroom.

BW may withhold a portion of her rent until SS makes the relevant repairs if the conditions substantially threaten her health and safety. This is unlikely to be an option here because a leaking toilet is unlikely to affect her health and safety unless it was maybe causing mold. There is another bathroom as well that she may use in her house, so it does not seem likely that she would be able to do this.

2. The Broken Sprinkler System

BW will again need to establish that the broken sprinkler system renders the property untenable. In this case, there is nothing in the FCC that statutorily establishes a broken sprinkler system as untenable. It does not seem to fall under plumbing, which would be the closes possible thing under the statute. Under the lease, it seems that Yard Maintenance is under the responsibility of the tenant (BW) and that it is done at tenant's expense. Both of these facts lead to a conclusion that BW will likely have a hard time showing that a broken sprinkler system that causes her 15-20 minutes of inconvenience a couple times a week will not be deemed untenable. Unless there is other evidence that during these phone calls and voice mails SS agreed to repair the sprinkler system and a valid contract was formed she will have to pay for it herself or leave it broken.

BW's option here is to repair the sprinkler system herself at a personal cost of \$300. BW may not force SS to cover this cost. She may also leave it broken as it does not appear to affect her ability to keep the yard maintained, but she will need to continue to maintain the yard appropriately.

3. The Damp Carpet, Broken Door, and Mold

BW will need to establish that these conditions render the property untenable. It seems fairly obvious that these conditions would render the property untenable because the room itself is not even usable due to the mold. Also, FCC § 541 lists lack of "effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors" as an untenable feature. Something is wrong with the door or wall to allow water inside the house like it is, which would put this issue easily within this category. The tenant in Burk also had a leaking roof and windows, which are similar enough here that the establishment of untentability should not be a problem.

BW notified SS of this problem on May 26. It has now been more than 30 days since that notice, so she should be able to repair it herself. The problem is that she must show that she did not cause this issue herself. A tenant is not able to recover if she does not show that she was not at fault for the damages as established in *Shea v. Willowbrook Properties LP*. There could be evidence here that either a guest or maybe even her dog caused the damage to the door that is letting water in. Even if BW does establish that she was not at fault for the damage, she did not notify SS until May 26 after the room had already gotten smelly and mold started to grow. Tenants have a duty to mitigate by notifying the seller promptly upon discovery of the damage, and BW did not do so. BW might be relieved of this if it is shown that she reasonably believed that SS would not respond due to the nature of their relationship so far, but it seems unlikely. It is a major problem that has just gotten worse that she did not notify about until it entered into the worst state.

If (a big if) BW can establish a right to recover something under this section, she would be able to recover \$1800 from the landlord because it is more than a month's rent (assuming she pays this and not SS). She would also be able to vacate (although that is not her wishes apparently). And, unlike in leaking toilet situation, she should be able to withhold a portion of her rent until the landlord makes the repairs because these conditions should show that the mold threatens her health and safety pursuant to FCC § 542(a)(4).

4. The Chewed Baseboards

The chewed baseboards are likely to be deemed untenable under FCC § 8 because floors should be kept in good repair, assuming baseboards are considered part of the floor. The problem here mostly arises from the fact that her dog did the damage. It would not matter whether she was allowed a dog or not because it was her dog (similar to if it were herself, a guest, a child) that did the damage, so she will be liable for it herself. Furthermore, unless it can be established that she did have a separate written Pet Addendum for her golden retriever, she might be liable under her lease's Pet section to her landlord for keeping her dog there. Lastly, she did not notify her landlord of this problem, so at the moment she would not be able to pursue any remedies under FCC § 542 until a reasonable time has passed after notification IF she was even able to recover generally (which she is not).

MPT 1 - Sample Answer # 2

Memorandum

To: Della Gregson, Partner

From: Examinee

Date: July 26, 2016

Re: Barbara Whirley Matter

Please find below a memorandum analyzing Whirley's options regarding the unrepaired conditions in her home and the potential advantages and disadvantages of each option.

I. Unrepaired Condition 1: Leaking Toilet

Regarding the leaking toilet condition, Whirley is entitled to make repairs and deduct the cost of repairs from rent when due, vacate the premises or withhold a portion or all of the rent until the landlord makes the relevant repairs.

Pursuant to a controlling decision by the Franklin Supreme Court in *Gordon v. Centralia Properties Inc.* (Fr. Sup. Ct. 1975) and the Franklin Civil Code (Section 540) which codified such decision, in every residential lease, there is an implied warranty of tenantability. Section 541 of the Franklin Civil Code sets forth what conditions will make a dwelling deemed untenable. Under Section 541, a dwelling shall be deemed untenable for purposes of Section 540 if it lacks, among other things, "plumbing or gas facilities...maintained in good working order." Here, the leaking toilet would qualify as plumbing facilities that are not being maintained in good working order. Whirley has had to put a plastic bucket behind the toilet to catch the dripping water. The leak has become so bad that she must now empty the plastic bucket twice a day and sometimes the toilet will not flush.

Section 542 provides that if the landlord neglects to repair conditions that render a premises untenable within a reasonable time after receiving written notice from the tenant of the conditions, the tenant has a number of options for each condition. Here, Whirley provided written notice to the landlord of the leaking toilet condition by emailing him on February 19, 2016. The landlord acknowledged receipt of the notice on February 27, 2016. Despite several follow up emails over the next 3 months, the landlord failed to repair the leaking toilet. One option for Whirley is to make repairs and deduct the cost of repairs from the rent when due if the cost of such repairs does not exceed one month's rent of the premises. The estimated repair cost for the leaking toilet condition is \$200, which is less than her monthly rent of \$1200. Section 542© provides that if a tenant makes repairs more than 30 days after giving notice to the landlord, the tenant is presumed to have acted after a reasonable time. Here, it has been over 5 months so she will be presumed to have acted after giving the landlord reasonable time. The advantage with this approach is that Whirley can have the condition repaired immediately and remain in the house. The disadvantage is that the landlord could bring an eviction action for breaching the lease agreement by not paying the full monthly rent. However, Whirley can raise the breach of warranty of tenantability as a defense in an eviction case. [*Burk v. Harris*, 2002] Pursuant to the

controlling decision in *Gordon v. Centralia Properties*, if such a breach of warranty defense is raised, the trial court must determine whether a substantial breach occurred. A substantial breach is one where the landlord fails to maintain the premises with respect to those conditions that materially affect a tenant's health and safety. [Franklin Code, 550(d)] The Franklin Court of Appeals in *Burk v. Harris* (2002) found that a leaking shower was not merely a cosmetic defect or matter of convenience but affected tenant's health and safety. Here, a leaking toilet would be even more likely to be considered as more than a cosmetic defect and instead as a condition that affects health and safety since it deals with waste and can pose a bio-hazard.

Another option is to vacate the premises, in which case she would be discharged from further payment of rent or performance of other conditions. [Section 542(a)(3)]. The advantage to vacating the premises is that she can find a new house in which all the plumbing is in good working order. However, given that Whirley would like to remain in the house, this is probably an option that Whirley would not want to exercise.

A third option is to withhold a portion or all of the rent until the landlord makes the relevant repairs if the conditions substantially threaten the tenant's health and safety. As noted above, the leaking toilet would likely be deemed as substantially threatening the tenants's health and safety. She may only withhold an appropriate portion of the rent. The court in *Burk v. Harris* found that a court may either measure the difference between the fair rental value of the premises if they had been as warranted and the fair rental value as they were during occupancy in unsafe or unsanitary conditions or reduce a tenant's rental obligation by the percentage corresponding to the relative reduction of use of the leased premises caused by the landlord's breach. The advantage with this option is that Whirley could remain in the house. The disadvantage is that she would have to wait for the landlord to make repairs. Given that it has already been 3 months and the landlord has failed to do so, her better option would be to go with option 1 and do the repairs herself immediately. This option also raises the risk of an eviction action as in Option 1 but as described above, she will have a good defense based on breach of warranty of tenantability.

The option to make repairs and sue the landlord for the cost of repairs would not be available because the cost of repairs does not exceed one month's rent.

II. Unrepaired Condition 2: sprinkler system

Whirley will not have any options against the landlord regarding the broken sprinkler system. Her residential lease agreement provides that the tenant must water the yard and maintain the yard at her expense. Additionally, the Franklin Civil Code would not deem a broken sprinkler system as one of the conditions that would make a dwelling be deemed untenable in violation of the requirement of tenantability. It does not fit into one Section 541's categories. Whirley will be responsible for fixing the sprinkler system. If she does not and the yard is not maintained, she will be found in violation of the residential lease agreement and the landlord could sue for breach of the lease agreement.

III. Unrepaired Condition 3: guest bedroom sliding door and carpet

Under Section 541, a dwelling shall be deemed untenable for purposes of Section 540 if it lacks, among other things, "effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors." Here, there is a gap between the door and the door frame causing rain and other water to come into the guest bedroom, which has caused mold to grow around the door and the carpet to become increasingly discolored and moldy. The gap between the door and door frame does not provide effective waterproofing and weather protection and would fall within Section 541.

Section 542 provides that if the landlord neglects to repair conditions that render a premises untenable within a reasonable time after receiving written notice from the tenant of the conditions, the tenant may exercise certain options. Here, Whirley provided written notice to the landlord of the leaking door and carpet condition by emailing the landlord on May 26, 2016. One option for Whirley is to make repairs and sue the landlord for the cost of repairs if the cost of repairs exceeds one month's rent. The estimated repair cost to replace the door, door frame and insulation and replace the carpet is \$1800, which is more than her monthly rent of \$1200. Section 542© provides that if a tenant makes repairs more than 30 days after giving notice to the landlord, the tenant is presumed to have acted after a reasonable time. Here, it has been over 2 months since she provided notice so she will be presumed to have acted after giving the landlord reasonable time. The advantage with this approach is that Whirley can have the condition repaired immediately and remain in the house. The disadvantage is that she will have to bring an action against the landlord which will cost her time and money.

Another option is to vacate the premises, in which case she would be discharged from further payment of rent or performance of other conditions. [Section 542(a)(3)]. The advantage to vacating the premises is that she can find a new house in which all the plumbing is in good working order. However, given that Whirley would like to remain in the house, this is probably an option that Whirley would not want to exercise.

A third option is to withhold a portion or all of the rent until the landlord makes the relevant repairs if the conditions substantially threaten the tenant's health and safety. The mold caused by the leaking door and the damp carpet would be a health hazard. Furthermore, the court in *Burk v. Harris* found that when premises were not properly waterproofed from the outside elements, it affected tenant's health and safety. She may only withhold an appropriate portion of the rent. Based upon the standard described in *Burk v. Harris* described above, she could withhold \$200 since that is the difference between the average fair rental value of a three bedroom house and two bedroom house in the same area. The mold and smell have rendered one of the bedrooms useless so she effectively only has use of two bedrooms not three bedrooms. The advantage with this option is that Whirley could remain in the house and not have to expend any initial up front costs. The disadvantage is that she would have to wait for the landlord to make repairs. Given that it has already been 2 months and the landlord has failed to repair, her better option would be to go with option 1 and do the repairs herself immediately. This third option also raises the risk of an eviction action but given that the mold and smell would constitute material

health and safety risks, she will have a good defense based on breach of warranty of tenantability.

IV. Unrepaired Condition 4: laundry room wall and baseboard

Whirley will not have any options against the landlord regarding the laundry room wall and baseboard and will have to pay for the repairs herself. The Franklin Civil Code would not deem a chewed through wall and baseboard as one of the conditions that would make a dwelling be deemed untenable in violation of the requirement of tenantability. It does not fit into one Section 541's categories. Furthermore, Section 543 provides that no duty on the part of the landlord to repair shall arise if the tenant is in violation of the affirmative obligation not to permit any person or animal on the premises to destroy, deface, damage, impair or remove any part of the dwelling unit. Here, the tenant permitted her dog to be in the laundry room. Though she did move the washer farther back to prevent further damage, by allowing her dog to remain in the laundry room, she permitted it to destroy or damage the premises. Unless her pet addendum to the lease provides that the landlord will repair and pay for the costs of damages caused by the animal, Whirley will be liable for the repairs herself or risk a deduction from her security deposit.

MPT 1 - Sample Answer # 3

Memorandum

TO: Ms. Della Gregson
FROM: Examinee
DATE: July 26, 2016
RE: Barbara Whirley Matter

Barbara Whirley has a one year residential lease for a three bedroom home from Mr. Sean Spears. This memorandum addresses her options regarding four unrepaired conditions on her premises. Some of the unrepaired conditions in Ms. Whirley's rental home are subject to Franklin Civil Code §540, which provides an implied warranty of tenantability in every residential lease. This warranty was originally set forth in Gordon v. Centralia Properties Inc. by the Franklin Supreme Court and was later codified in the Franklin Civil Code. When a landlord breaches this warranty of tenantability, a tenant may maintain possession of the premises and is also entitled to an appropriate reduction in rent that is proportional to the reduced value of the premises (Burk v. Harris). However, a tenant is only entitled to this reduction in rent if the violations are substantial. Violations are substantial if they materially affect the tenant's health and safety. When a court finds that a substantial breach has occurred, it must order the landlord to make repairs to correct the breach, reduce the tenant's monthly rent by an appropriate amount, and award the tenant possession of the premises. To determine the reduction of rent, a court may measure the difference between the fair rental value of the dwelling as warranted and the fair rental value of the dwelling as it actually was during the occupancy or may reduce the tenant's rental obligation by a percentage that is proportional to the reduction of the use of the premises due to the landlord's breach. As discussed below, Ms. Whirley has several options under this implied warranty for the unrepaired conditions of her toilet and the glass door.

I. Options Regarding Ms. Whirley's Unrepaired Toilet

Ms. Whirley's toilet in her second bathroom began leaking two months after she moved into her rental house. The condition of the unrepaired toilet is a substantial violation of the implied warranty of tenantability. Franklin Civil Code §541 states that a residence is untenable if it lacks plumbing facilities in good working order. Here, Ms. Whirley's toilet is not in good working order and has been leaking since February. By March, the leak was so bad that she had to empty a plastic bucket catching the leak twice a day. She also noted that the toilet sometimes did not flush. Under Franklin code §542, a landlord must repair conditions that make the premises untenable within a reasonable time after receiving written notice from the tenant. The Franklin Court of Appeal also noted in Shea v. Willowbrook Properties LP that a tenant must mitigate his damages by promptly notifying the landlord to give him an opportunity to resolve the problem. Here, Ms. Whirley notified Ms. Spears on February 19, 2016 of the toilet, and again provided notice on March 31 and May 26. The toilet remains unrepaired. Franklin Code §542 also provides that a tenant is presumed to have waited a reasonable time to make repairs if the tenant makes repairs more than 30 days after giving notice. Since Ms Whirley gave Mr. Spears notice more than

30 days ago, she may now make repairs to the premises. Franklin Code §543 also provides that the landlord will have no duty to repair an untenantable condition if the tenant does not keep the premises clean and properly use and operate all plumbing fixtures. Here, there is no indication that Ms. Whirley misused the toilet or did not keep the bathroom clean. Ms. Whirley has four potential remedies when an unrepaired condition in her home is untenantable. She may 1) repair and deduct the cost of repairs if the costs is less than one month's rent; 2) repair and sue if the cost of repairs exceeds one month's rent; vacate the premises and be discharged of the duty to pay rent; or 4) withhold some of the rent if the landlord does not make the repairs, but only if the conditions substantially threaten the tenant's health and safety.

A. Repair and Deduct

Ms. Whirley may repair and deduct the cost of repairs if the costs is less than one month's rent. The estimate for the repair of Ms. Whirley's toilet is \$200. Since \$200 is less than Ms. Whirley's rent of \$1,200 per month, she may go ahead and hire JBHandyman Services to repair the toilet and deduct \$200 from her rent. This is a good option for Ms. Whirley since she does not want to vacate the premises and has already considered making repair arrangements herself. If Mr. Spears attempts to evict her for not paying all of her rent, she may raise the implied warranty of tenantability as an affirmative defense to avoid eviction. Ms. Whirley also gave Mr. Spears proper notice of the broken toilet, and now may make repairs.

B. Repair and Sue

Ms Whirley may not repair and sue in these circumstances, since the cost of the toilet repair is not more than \$1,200.

C. Vacate the Premises

Ms. Whirley may vacate the premises and be discharged from further rent. This is true despite the clause in her Residential Lease Agreement holding her liable for rent if she vacates before the end of the lease. However, Ms. Whirley has indicated that she would like to stay in the home because it is close to her workplace, and there are limited rental options. Therefore, this would not be a good option for her.

D. Withhold Some Rent Until Mr. Spears Repairs

Ms. Whirley may withhold some or all of her rent until Mr. Spears makes repairs. She may only do so under Franklin Code §542 if the unrepaired conditions substantially threaten her health and safety. Because plumbing is specifically mentioned the code as making the premises untenantable, the toilet defect is substantial and affects Ms. Whirley's health and safety. The Franklin Court of Appeal in *Burk v. Harris* determined that a dwelling that lacked sufficient waterproofing, which is also specifically mentioned the code, was a substantial breach of the implied warranty. Therefore, Ms. Whirley may withhold a portion of rent . Under *Burk*, she may either withhold the difference between the fair rental value

of the dwelling as warranted and the fair rental value of the dwelling as it actually was during the occupancy or may reduce the tenant's rental obligation by a percentage that is proportional to the reduction of the use of the premises due to the landlord's breach. Because the toilet is unusable, she may therefore withhold the amount proportional to the second bathroom. This is not as good of an option as her option to repair and withhold, since it is much more complicated to figure out the amount of withholding, and repair would be relatively simple.

II. Options Regarding Ms. Whirley's Unrepaired Glass Door

The leaking glass door also renders Ms. Whirley's home untenable, and is also a substantial violation. Franklin Code §541 states that a home is untenable if it lacks effective waterproofing and weather protection of "unbroken windows and doors." The issue here is whether the door is broken or just leaking. The door will not open, and there is a half inch gap between the bottom of the door and the door frame. This indicates that the door may be broken. Furthermore, Ms. Whirley indicated that she did not know if a guest had used the door and perhaps broken it. Franklin civil Code §543 and *Shea v. Willowbrook Properties LP* make it clear that a tenant will be liable if he permits any person on the premises to destroy a part of the dwelling. Therefore, if a guest broke the door, Ms. Whirley will be liable, not Mr. Spears.

If Ms. Whirley is not responsible and the door is not broken, but merely lacking waterproofing, Mr. Spears will be liable under the implied warranty. This is a substantial violation because it clearly affects Ms. Whirley's health and safety, since there is mold growing in the room and the carpet is damp. Furthermore, she notified Mr. Spears of the problem on May 26, 2016. Since it has been more than 30 days since she notified him, she has waited a reasonable time for him to repair. Ms. Whirley has the following options.

A. Repair and Sue

Because the cost of the repair is \$1,800, which is more than her \$1,200 rent, she may repair the door herself and sue Mr. Spears for the cost of the repair. This is a good option since Ms. Whirley wants to stay in the home and has already received an estimate for repairs.

B. Withhold Some or All of the Rent Until Mr. Spears Repairs.

Ms. Whirley may withhold the rent since the condition materially affects her health and safety. She may reduce her rent to \$1000, the average cost of a two bedroom home in the area, since the bedroom where the door is located is unusable.

C. Vacating the Premises and Repair and Deduct

Ms. Whirley has indicated that she does not want to vacate. She may not repair and deduct. This option is not available since the cost of repair exceeds one month of her rent.

III. Options Regarding the Sprinkler and Damage Caused by Bentley

Ms. Whirley will likely not be able to invoke the remedies under the implied covenant for tenantability for the broken sprinkler and the damage to her walls and baseboards. She may be able to argue that the sprinkler invokes the remedies under the warranty since it is a plumbing facility, but the condition will not be a substantial breach because the lack of the sprinkler does not threaten her health and safety. Under Franklin Code §550, if Mr. Spears instituted an eviction proceeding because Ms. Whirley availed herself of the remedies of the implied warranty, judgement would be entered for him because there is no substantial breach and Ms. Whirley's health and safety are not affected. Ms. Whirley may hold Mr. Spears liable under the Lease Agreement since she notified him in writing of the needed repair in accordance with Section 14. She is responsible for maintaining the yard, "at Tenant's expense," so Mr. Spears may argue that she will be responsible for the sprinkler system.

As for the damage to the baseboards, Ms. Whirley had an affirmative obligation not to permit an animal to destroy any part of the dwelling. Therefore, Mr. Spears does not have a duty to repair since Ms. Whirley violated this obligation. Under the lease, however, Ms Whirley may still be able to hold Mr. Spears liable since she has a separate Pet Addendum. The lease only holds the tenant liable for damage caused by unauthorized animals. Since Bentley is authorized, Mr. Spears may be liable as long as she notifies him of the needed repairs. However, this repair may come out of her \$1,200 security deposit.

Conclusion

Ms. Whirley may exercise the remedies set forth under the implied warranty for her toilet and glass door, but probably not for the sprinkler system and the baseboards since those conditions are not substantial breaches under Franklin law .

MPT 2 - Sample Answer # 1

Orders of the FDR are presumed correct and valid, and the burden of proof is on the taxpayer to demonstrate that the challenged order is incorrect. *Nelson*. The applicable law in Franklin is the IRC and CFR for determining taxable income. *Stone*. The arguments here demonstrate that the FDR's order was factually and legally invalid in regards to the denial of both deductions, and that the order should be reversed.

I. Under CFR § 1.183-2, a majority of the factors weigh in favor of the Nash's, and therefore they should be found to have the objective of making a profit.

The FDR limited the Nash's business deduction from their Christmas tree business to the amount of income they received from purely that Christmas tree business over the past five years on the grounds that the Nash's allegedly lacked a profit motive. Under IRC § 162, deductions are permitted for any ordinary and necessary business expense incurred in the taxable year. IRC § 183 clarifies that if any "activity is not engaged in for profit, no deduction" will be allowed generally, but rather limited to the income earned by that activity. The nine factors outlined in CFR § 1.183-2 are used to objectively determine what activities may be considered "for profit." *Cf. Stone*. These factors are not exclusive, nor is one factor or a combination of factors determinative of the issue of profit motive. *See Stone*.

The FDR's conclusion in applying these factors was driven by conclusions that the Nash's had "no profit in the tax years in question; a regular history of losses; no plan to recoup those losses; a history of similar activity without any deductions; and no evidence of operations in a businesslike manner." These conclusions were reached incorrectly, and to the extent that some parts are true, are outweighed by the totality of the circumstances here. Each factor is presented below in order that the CFR presents them. A majority of the factors weigh in favor of the Nash's.

1. Manner in which the taxpayer carries on the activity - For the past five years, the Nash's manner of operations have been professional and businesslike. Although their operation was a mere hobby earlier, their conduct shows a marked shift in approach. In the past five years, they have maintained scrupulous records of their business activities, modeling other Christmas tree operations. Mr. Nash researched raising trees, spent time observing other operations, replanted his trees in a professional manner, and had another farmer walk him through how to run a larger operation. Further, the Nash's invested in specialized equipment, expanded their operations, and dedicated an area for the business records and activities in their home office. They also reached to a previous operation that was closing down customers in order to bolster their commercial sales. They also insured their equipment and kept records on the trees. In contrast in *Stone*, the appellant could not produce any business records, lacked a business plan, conducted limited advertising only at horse shows, and did not insure any assets. The Nash's conduct went far beyond this in gaining expertise, maintaining scrupulous records in a dedicated space, investing in equipment and insuring it, and reaching out to a targeted customer base that needed a new supplier (much more than attending a mere show). Although it is true that the trees themselves were not insured, on balance, this evidence is persuasive and therefore this

factor should be viewed in their favor.

2. Expertise of the taxpayer or his advisors - The Nash's had some existing expertise before starting their business, but undertook significant steps to bolster it when starting the business. Mr. Nash read books on raising these particular types of trees, took a series of classes on forest management, observed another tree farm for a significant amount of time, and was advised by another tree farmer closing his business on how such an operation should be run. In contrast in *Stone*, the appellants had no formal education or expertise, but merely recreational experience - they merely consulted with others on a few small issues, none of which had to do with profitability. The Nash's conduct went far beyond this in gaining educational and business expertise and therefore this factor should be viewed in their favor.

3. Time and effort expended by the taxpayer in carrying on the activity - As detailed above, Mr. Nash has spent significant time and effort crafting this operation into a professional business. Mr. Nash spends full-time on the business in summers, and weekends year round. Mrs. Nash works full-time year round on the operation. This is far above the time and effort expended in *Stone*, where only 30-40 hours per week without records were viewed as "neutral." Mrs. Nash works full-time and is supplemented by weekend help and seasonal full-time support from Mr. Nash. Withdrawal from another occupation is specifically described in the CFR as indicative of profit motive. This factor should be viewed in the Nash's' favor.

4. Expectation that assets used in activity may appreciate in value - The Nash's expected their assets would appreciate in value, and insured their equipment as evidence of such intent. They replanted their trees in a manner to ensure better growth and consistency. Their newly planted trees are growing currently, and will soon be large enough for harvesting -- a clear appreciation of invested value. In contrast in *Stone*, the appellants conceded no assets would appreciate in their favor. Therefore, this factor should be viewed in the Nash's' favor.

5. Success of the taxpayer in carrying on other similar or dissimilar activities - This is admittedly the Nash's' first attempt at such a business and this factor is conceded.

6. Taxpayer's history of income or losses with respect to the activity - There is admittedly so far no history of profitability with this venture. However, it is a startup business that is quite literally growing its assets in anticipation of future profits. New businesses of this sort take time to turn profitable, and the Nash's have manifested intent to become profitable in the future. This factor should be viewed neutrally in light of its being explainable due to customary business risk, and the downturn in the economy that was beyond Nash's' control as recognized by the CFR.

7. Amount of occasional profits, if any, which are earned - As stated in (6), not profits have been earned. This factor is conceded.

8. Financial status of the taxpayer - Mrs. Nash retired to take on this business full-time. Part of her retirement includes a pension, but retirement benefits should not be held against the taxpayer in this case. Mr. Nash works as a teacher, but spends significant time on the business. In contrast to *Stone*, the appellants both worked full-time for other businesses outside of their home. Therefore, this factor should be viewed in favor of the Nash's, or at least neutrally due to Mrs. Nash's full-time commitment and Mr. Nash's partial commitment.

9. Elements of personal pleasure or recreation - The Nash's do not hide a love for their farming of Christmas trees, however, their passion should not be conflated with recreational purpose. As the CFR states, deriving "personal pleasure" from the activity is *not* sufficient to classify it as lacking in a profit motive. The intention reflected in the Nash's actions clearly reflect an intent to profit. In contrast to *Stone*, the appellants operated a horse farm recreationally for their own pleasure of using the horses. Here, the Nash's operated the tree farm not for their own recreational use, but to produce a product they hoped to sell. Although they enjoyed producing such a product, it was produced commercially. Therefore, this factor should be viewed in favor of the Nash's.

For aforementioned reasons, 5 factors should be viewed in favor, 2 against, and, at best, 2 neutrally. Such a balance of factors - a majority of which are in favor of the Nash's conduct being viewed as in pursuit of profit in regards to this venture - as well as these facts considered in their entirety, as no factor or combination thereof is conclusive, indicate that the FDR's determination should be reversed and the deduction allowed.

II. Under IRC § 280A, the Nash's' home office was exclusively used on a regular basis as the principal place of business for their business and therefore deduction should be permitted.

IRC § 280A allows a deduction for business use of the home when it is exclusively used on a regular basis as the principal place of business for any trade or business of the taxpayer. Exclusive use is an "all or nothing" standard, and the claimed area must be used solely for business. *Cf. McBride; Lynn.*

The Nash's indeed used this area of their home exclusively as the principal place of business for their tree farming business. They set aside a room of their home exclusively for this purpose. They keep all business records there; they keep their tree catalogues there; and they keep their books they consult for running the business there. The room is not designed for personal use, but rather has only a desk and two chairs - the bed in the room was removed. There is no indication that anything but business is conducted in the room.

The FDR will likely argue that the office was not exclusively used for business purposes for several reasons, all of which fail. First, there is a TV in the room. However, this TV is tuned exclusively to the Weather Channel, and provides live updates that are quite necessary for maintaining a weather-dependent business like a tree farm. Second, the computer in the room is connected to the Internet. However, this would be preposterous

to use against the Nash's - an Internet connection is absolutely essential to running a modern business in order to maintain records, communicate with clients, and communicate to receive and send business supplies. Third, there is a fireplace and one of the chairs is a recliner. Although these fixtures and furniture may make the room more comfortable, there is no indication that they remove the exclusive business use from the room. Lastly, the FDR may argue that sometimes the Nash's' dogs lie in the room with them. A dog's presence does not indicate that the room is not used for business though; the Nash's are merely being responsible pet owners. The room is not designed for the dogs and it has no furniture for the dogs or feeding areas. Indeed, many offices throughout the country have various owners' pets make appearances in them from time to time in order to raise business morale. This should not be construed against the purpose of the room, particularly in light of the other evidence.

This conclusion is bolstered in comparison to *Lynn*. In *Lynn*, the Franklin Tax Court found that an area's physical separation and its physical conversion was informative to finding it as an exclusive area that was the principal place of business. Similarly here, the Nash's converted the room to an office, removing the bed, and separated its contents and use from the rest of the home. Although it does not have a separate entrance, it seems sufficiently separated from the rest of the house both physically and in its use. In *Lynn*, the court also found that another purported home office did not qualify for deduction because it lacked details and was used for personal tasks including watching his daughter and letting her watch TV. In contrast, the Nash's had their dogs accompany them - a far cry from babysitting as any parent could attest to - and did not have the TV for the dogs' use. Rather, the TV's use was clearly explained as a business purpose for live weather updates, again in contrast to *Lynn* where the appellant could offer no details of business use to convince the court.

Therefore, the FDR's determination that the Nash's' home office was not used exclusively for business purposes should be reversed, and the deduction awarded to the Nash's.

MPT 2 - Sample Answer # 2

To: Sara Carter

From: Examinee

Date: July 26, 2016

Re: Tax Appeal of Joseph and Ellen Nash - Legal Argument Portion of Brief

I. Under the Internal Revenue Code and Regulations, the appellants may deduct the full amount of losses incurred while carrying on the trade or business of Christmas tree farming.

"[O]rdinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business" are deductible by the taxpayer. IRC § 162. These deductions are not allowed if the activity is not engaged in for profit. An objective standard is used to determine whether "the taxpayer entered into the activity, or continued the activity, with the objective of making a profit." 26 C.F.R. § 1.183-2(a). While the Regulation delineates nine relevant factors to consider, they are not exclusive, nor is any one factor or combination of factors determinative. *Stone v. Franklin Department of Revenue*. "[A]ll the facts and circumstances of each case" must be considered. The facts and circumstances of the appellants' activity of selling Christmas trees indicates that they had a profit motive. They are therefore entitled to deduct the full amount of their business losses, offsetting their other income.

A. The Appellants carried on the activity in a businesslike manner by maintaining a business plan with a plan to recover losses.

Nash's testimony provides evidence that the Christmas tree farm was run like a business. He knew details about the money spent on the property planting trees and purchasing and maintaining equipment. They met with another commercial Christmas tree farmer to discuss a business plan and what they would need to do to convert from a hobby farm to a commercial farm. The appellants have not yet drawn a salary from the business, but this is typical when a business is first starting up. Although they have not commercially advertised, they have no need; personal consumers hear of them through word of mouth, and commercial customers were obtained via business contacts obtained from a former commercial Christmas tree farmer. Although they had substantial losses in the first five years of the business, they had a plan to recoup those losses. The trees first planted five years ago when they decided to convert to a business have not yet reached maturity; once they do, the appellants will have a greater stock to sell and an ability to recover their losses incurred starting up their business.

In *Stone v. Franklin Department of Revenue*, the appellant's horse farm was deemed to be recreational only, but it was run in a manner differently from Appellants' farm here. Although neither advertised commercially, the business contacts maintained here made advertising unnecessary. Neither insured nor drew a salary, but unlike in *Stone*, the Appellants here have a business plan and a plan to recoup their losses. Thus, this factor is in favor of the Appellants.

B. The Appellants obtained expertise through research and training.

Evidence of a profit motive can be shown by "extensive study of its accepted business, economic, and scientific practices, or consultation with those who are expert therein...where the taxpayer carries on the activity in accordance with such practices." 26 C.F.R. § 1.183-2(b)(2). Nash's testimony indicates that he read many books on raising Christmas trees, took a series of classes on forest management, and met with a Christmas tree farmer and spent time on that farm learning the trade. When the farmer indicated an intent to go out of business, the Appellants again met with the farmer, who instructed them on how to expand to a commercial farm, including keeping records and books. The Appellants have continuously followed his advice. This is unlike the appellants in Stone; while they did consult with others on raising horses, they never consulted on the business aspects of a horse farm. Since Appellants obtained expertise by study and meeting with the farmer, an expert, this factor is in favor of Appellants.

C. The Appellants have spent substantial time and effort in carrying on the Christmas tree farm.

While the Appellants have spent a lot of time on this business (Mrs. Nash treats it as a full time job, and Mr. Nash spends holidays and weekends working on it), it does also have a recreational aspect since they enjoy the work that they do. Additionally, neither Appellant withdrew from another occupation to devote most of their energy to the activity. Mrs. Nash was already retiring, and Mr. Nash is still employed. However, Mrs. Nash's retirement did mean that she had the ability to devote all of her time to the business. Thus, this factor is neutral.

D. The Appellants expect that the assets used in their farm will appreciate in value.

When Appellants decided to convert their farm into a business, they cut down several acres of forest for additional fields. The Christmas trees planted in these fields five years ago have not yet matured enough for sale. Once they do, they will have appreciated in value. Unlike in Stone, where the farm was passively kept, Appellants have actively worked to improve more and more of their land each year, causing the farm to appreciate. This factor is thus in Appellants favor.

E. This is the Appellants first attempt at carrying on this type of activity.

Although prior engagement in similar activities in a profitable manner indicates a motive for profit despite the current activity being presently unprofitable, the Appellants have never before attempted to commercially farm their land. They are teachers by trade who saw an opportunity to convert their property to a profitable use and have been working diligently to make that a reality.

F. The Appellants have experienced a series of losses in the past five years, but these occurred during the initial start-up stage of the business.

Although Appellants have not had a profit in the last five years, the losses during this time were during the initial stages of the converting the Christmas tree farm into a business. Losses in the first year amounted to \$35,000, which included cutting down several acres of forest, planting a larger number of trees than usual, and purchasing equipment. Losses in subsequent years were less; they were incurred while maintain equipment, planting even more Christmas trees, and hiring additional hands to help with the influx of labor required by the expanded farm. Additionally, the economy has been unexpectedly poor during these five years. As the regulations state, "[i]f losses are sustained because of unforeseen or fortuitous circumstances which are beyond the control of the taxpayer, such as...depressed market conditions," the losses are not an indication the activity is not engaged in for profit. In Stone, the appellants incurred losses of \$132,751 over seven years with a profit of only \$4000. In contrast, Appellants' profit to loss ratio is very reasonable for the initial years of a business. Losses have ranged between \$7500 and \$5000 per year, discounting the first year with start up costs. This is much more in line with the initial years of a business than the \$33,901 in losses in a single year in Stone. Since losses have occurred during the initial years of the business and due to unforeseen market forces, this factor is in favor of Appellants.

G. The Appellants have not yet made a profit on the Christmas tree farm.

The Christmas tree farm has not yet created a profit for the Appellants since it is in its initial years. However, profits have increased each year from an initial \$1500 to \$5000 in 2015. Although the horse farm in Stone also never showed a profit, it did not show any opportunity to generate a profit either. In contrast, the Christmas tree farm's yearly increase in profits suggests that it will soon become profitable.

H. Although Mr. Nash still received a salary, Mrs. Nash only received a pension.

Substantial income from sources other than the activity may indicate that the activity is purely recreational. Although Mr. Nash is still employed as an assistant principle, Mrs. Nash only receives a pension since she has retired. While this factor is in favor of the Department, it is substantially outweighed by factors favoring Appellants.

I. Although Appellants enjoy working on the Christmas tree farm, this is insufficient to classify the activity as recreational.

When an activity is not enjoyable, it suggests that it will only be engaged in for profit. However, "personal pleasure from engaging in the activity is not sufficient to cause the activity to be classified as not engaged in for profit" when the other factors show that it was engaged in for profit. Mr. Nash has described the pleasure he gets from working outside on the land in this business, but this is merely an example of a entrepreneurial man who has found away to turn something he loves into a business. His love and fascination means he works harder to make the farm a success. This factor thus does not count against Appellants.

In conclusion, the nine factors, considered together with all the circumstances, show that the Christmas tree farm is an activity for profit. Appellants should therefore be allowed to take deductions for all the expenses incurred for the business, even those that exceed profit earned.

II. Under the Internal Revenue Code, the appellants may deduct for the use of their home office used as the principle place of business for their Christmas tree farm.

Although generally a residence may not be deducted by a taxpayer (IRC § 280A(a)), a portion "exclusively used on a regular basis (A) as the principal place of business for any trade or business of the taxpayer" may be so deducted. IRC 280A(c)(1). This is an all or nothing standard. *Lynn v. Franklin Department of Revenue*. Appellants have used their home office exclusively and on a regular basis as the principal place of business for their Christmas tree farm. They should therefore be allowed to deduct for its use.

In *Lynn*, the taxpayer's use of the first floor of his home met this standard because it was physically separated from the living areas, he had physically converted it from a mother-in-law suite to an office, and it had a separate entrance. His "computer room," however, did not meet the standard. Although he testified he kept files and books there, he testified as to no details about what was in the room and he used the room to watch his infant daughter by entertaining her with the TV.

Here, the home office is more like the first floor of the *Lynn* taxpayer's home. Initially, the home office was a guest bedroom. At the start of the business, Appellants removed the bed and put a desk and chairs in the room. The room also contained a computer, books, and files relevant to the business. Although the computer room in *Lynn* having a computer was insufficient, there the computer was used for both personal and business tasks. Here, the computer was exclusively used for business purposes. Additionally, the TV in *Lynn* was problematic. Here, however, the TV was kept on the Weather Channel. Since Appellants run a farm, the weather is highly relevant to their business, and this information is necessary for its success. Although Appellants' dog will come into the home office while they were there, its passive presence is different from *Lynn* where the taxpayer had to actively watch his infant to ensure her safety. While the home office here is not physically separated from the living areas of the house, the lack of physical separation in *Lynn* was not the deciding factor; it was instead his mixed use of the room for personal and business reasons and his lack of testimony as to its contents. Here, Nash testified as to the contents of the room, which are all for business purposes. He and his wife designed the room purely for a business use, and they only conduct business within. Thus, Appellants meet this all-or-nothing standard, and they should be permitted to deduct for the room.

MPT 2 - Sample Answer # 3

Memorandum

To: Sara Carter

From: Examinee

Date: July 26, 2016

Re: Nash Tax Appeal

I. The deductions for operating expenses should be allowed, as the Nash's' tree farm was operated with a profit motive in mind

Internal Revenue Code §183 bars tax deductions for activities not engaged in with a profit motive in mind. In making its determination that the Nash's' tree farm was not a for-profit operation, the FDR found that the Nash's' had failed to meet the standards set forth in several sections of federal tax regulation 26 C.F.R. §1.183-2(b)(1-9), which controls determination as to an enterprise's profit motive, or lack thereof. An examination of these requirements, and the Nash's' management of their tree-farming operation, will indicate that they have engaged in tree farming with a profit motive in mind.

26 CFR§1.183-2(1) states that "the fact that the taxpayer carries on the activity in a businesslike manner...may indicate that the activity is engaged in for profit...where an activity is carried on in a manner substantially similar...to other activities of the same nature which are profitable...a profit motive may be indicated." The FDR cited this element in particular as evidence that the Nash's' operation was not run for profit; we argue that this finding was in error. In the present case, the Nash family maintained a businesslike collection of records and books, in a manner which had been recommended by another farmer, who told Mr. Nash "how to keep the records and to keep good books." Mr. Nash's habit of keeping records for his farm, as well as his adoption of methods learned from a successful tree farmer, indicate a profit motive for the Nash's' farm. Mr. Nash also substantially altered the nature of his prior tree-growing operation to accommodate the requirements of a more extensive tree-farming business.

Subsection (2) states that "preparation...by extensive study of...accepted business...practices, or consultation with those who are expert therein...may indicate...a profit motive. In the present case, Mr. Nash testified that he had devoted considerable time and effort to the study of tree farming, including taking classes on forest management, the reading of related texts, and extensive consultation with a successful tree farmer. Mr. Nash's efforts here should be contrasted to the efforts of a similar party in the Franklin Tax Court case *Stone v. FDR*, wherein taxpayer Stone's attempts to claim deductions for his horse farm failed, in part due to his lack of formal education in horse husbandry, and his failure to consult with experts as to how to make his farm profitable. Mr. Nash, in this case, undertook formal forestry education and consulted about the nature of a "bigger" operation, and its attendant management, with an experienced farmer.

Subsection (3) states that "the fact that the taxpayer...devotes much of his personal time and effort to...an activity...may indicate an intention to derive a profit." Mr. Nash testifies that his wife has worked "pretty much full time year-round" on the farm, and that he has

spent summers, weekends, and "a lot more time during the harvest" working on the farm. Compare this, again to the Stone case, where the Stone family claimed to work "30 to 40 hours" a week on their farm, while still keeping full-time jobs. The fact that Mrs. Nash is retired makes her alleged full time contribution to the Nash's' tree farm much more believable, and Mr. Nash has specified that he devotes much of what would otherwise be his leisure time on weekends and over holidays to maintenance of the farm.

Subsection (4) states that a profit motive may be indicated when there is "an expectation that assets used in activity may appreciate in value." The trees that will form the backbone of the Nash's' tree crop have been growing for five years. A tree field of mature trees will likely have a greater associated value than a field of saplings. As a result, it could be argued that the land used to grow the trees has appreciated in value throughout the duration of the Nash's operation.

Subsection (5) states that "the fact that a taxpayer...has engaged in similar activities in the past and converted them...to profitable enterprises...may indicated that he is engaged...for profit." This is the first attempt by the Nash's' to run a commercial tree-growing operation for profit. The fact that they do not have any prior history of attempting to run a for-profit tree farm, however, should not be considered a substantial bar to their claims for tax deductions, considering their meeting the requirements of multiple other subsections.

Subsection (6) states that "a series of losses during the initial...stage of an activity may not necessarily be an indication that the activity is not...for profit. However, where losses continue...beyond the period which customarily is necessary...[this] may be indicative the activity is not...for profit." The FDR argues that the Nash's' lack of a demonstrable profit during the first five years of their farm's operation is proof-positive that this is not a for-profit operation at all. However, Mr. Nash has testified that the "crop" of trees that was planted at the beginning of operation is only now beginning to mature, and that the maturation of this crop of trees will be conducive to a more profitable enterprise. This is a classic example, then of a startup period: the period which is required for a crop to mature. The Stone case again provides a useful contrast: in the seven years of the Stones' horse farming operation, income only amounted to \$4,000, set against an aggregate loss of \$132,751. The Stones' income, furthermore, was irregular (consisting only of a single sale), despite the fact that the horse farm had not apparently undergone any major changes or transition during the 13 years that the Stones' had operated their farm without claiming deductions. The Nash's, in contrast, can claim a regular and increasing amount of income from year to year, and can explain an initial lack of income as the result of the customary "starting up" phase of agricultural activity as they transitioned a more organized and commercial farm.

Subsection (7) states that "[the] amount of profits in relation to the amount of losses incurred, and in relation to the...investment and value of assets used in the activity, may provide useful criteria in determining...intent." The FDR holds that the Nash's' lack of profit during any year in which they have claimed a deduction demonstrates that they are not operating with an intent to make a profit. As discussed above, however, Mr. Nash has stated that the maturation of the planned tree crop planted five years ago will lead to the farm becoming profitable. Mr. Nash has also indicated that he has learned how to "keep costs down", which is evidenced by a subsequent stabilization of deducted expenses after

the initial year of operation. The large deduction in year one of the farm's operation can be attributed to a substantial investment in tree-farming equipment by the Nash's. In contrast to Stone, where the court determined that it seemed "unlikely" that the Stone's horse farm "ever had the opportunity to generate a profit", the incoming crop on the Nash's' farm will likely demonstrate the profit potential thereof.

Subsection (8) states that "the fact that the taxpayer...does not have substantial income or capital from sources other than the activity may indicate that an activity is engaged in for profit." Mr. Nash continues to be employed during the school year as an associate principal, but contributes to the management of the farm during weekends and holidays. Mrs. Nash, who is retired, works on the farm full-time, but receives a pension from prior employment. The Nash's do not rely upon their farm financially, and do not draw a salary from the management thereof. This alone should not be dispositive as to the existence of a profit motive however, and it is possible that, as the farm grows more profitable through incoming crops, the Nash's may rely more heavily on the income provided by their farm. Finally, subsection (9) states that "the presence of personal motives in carrying on of an activity may indicate that the activity is not...for profit, especially where there are recreational...elements involved...[it] is not, however, necessary that an activity be engaged in with the exclusive intention of deriving a profit." The FDR asserts that the Nash's' prior history of selling Christmas trees without claiming deductions, along with Mr. Nash's professed enjoyment of tree farming, indicate the lack of a profit motive for their recent activities. This, however, ignores the substantial changes made by the Nash's in the nature of their operation. While the sale of trees already on their property and the small-scale cultivation of those trees that existed before deductions were claimed may be indicative of the activities of a mere hobbyist, the drastically increased scale of the Nash's' farming activity indicates a substantial change in the nature of their motivation. The Nash's may enjoy farming, but that enjoyment is not "sufficient to cause the activity to be classified as not...for profit" considering that their enterprise has clearly demonstrated a profit motive by the substantial change in their operating methods.

For the above reasons, we argue that the FDR's finding that the Nash's' farm was not a for-profit operation to be in error, and that the Nash's' deductions should be applied as claimed.

II. The Nash's' deduction for the business use of a room should be permitted, as the room was exclusively used for business purposes per the Internal Revenue Code

The Internal Revenue Code §280A© provides that certain deductions can be made for use of a portion of a "dwelling unit" pursuant to the "exclusive" use of that portion on a "regular basis" as the principal place of a taxpayer's business. In this case, the Nash's have set aside an old guest bedroom, removed the furniture that the room contained, and kept business records, various books and catalogues related to agriculture, and a computer used exclusively for business in the room. The room also contained a television, which Mr. Nash maintains was kept on the Weather Channel, "for business reasons." We argue that the FDR erred in its determination that this room was not used exclusively by the Nash's for business.

It is useful to compare the Nash's' case with that of the Tax Court case *Lynn v. FDR*. In *Lynn*, taxpayer Lynn claimed a deduction for the use of both a floor of his home and a room of an apartment as a principal place of business. The court, specifying that such determinations are made by an "all or nothing" standard, granted Lynn the deduction with regards to the floor of the house, but not with the room of his apartment. In making this determination, the court noted that the successfully claimed deduction was made for a floor which was "separated from...living areas", and that it had been "physically converted" from a guest suite to an office. In finding that expenses for the apartment room could not be deducted, the court noted that Lynn offered few details about the business uses room, and that he would occasionally let his daughter watch TV in the room. The Nash's have physically converted a guest suite to an office, setting the room aside from the living areas of the house. Mr. Nash also testified that the TV in the office was only used for business purposes, the weather being substantially related to an agricultural enterprise. Mr. Nash also specified the nature of the records and other materials that he kept in the room. A fireplace is in the room, but it is not used; the dogs do not impede business. The details that Mr. Nash provided regarding the room's use, as well as the lack of any attested non-business uses, mean that the Nash's should be able to successfully claim a deduction for the room's use as a place of business.