February 2002 Bar Examination Sample Answers

DISCLAIMER
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Question 1 - Sample Answer 1.

1. MDP is completely liable for the malpractice of Dr. B. The conduct, duties, and liabilities of a general partnership and its partners are governed by both agency and partnership law. Dr. B, as a partner in MDP, is an agent. MDP is the principal. Under agency law, the principal is liable for the conduct, including malpractice, of an agent if the conduct occurs while the agent is acting within the scope of the agency. Here, Dr. B is operating within the scope of his agency. Thus, MDP will be liable for Dr. B's malpractice. The assets worth $500,000 are exposed by the liability of MDP for Dr. B's malpractice.

2. As a general partnership, Dr. A will have personal liability for the malpractice of his partner, Dr. B. Partners in a general partnership are jointly liable with the partnership for the torts of their partners, unless the tort was intentional. This means that if Dr. B commits malpractice the injured patient can sue Dr. A as partner, Dr. B as tortfeasor and MDA as the principal.

3. The doctors could operate as a Limited Liability Partnership. Under this form of business, Dr. A could be insulated from liability for Dr. B's negligence. Under an LLP, Dr. A would still be liable for his own negligence and the $500,000 assets of the partnership, of which Dr. A has an interest, would still be at risk. The doctors could also operate as a Limited Liability Company (LLC). This form would also allow Dr. A to be insulated from the malpractice of Dr. B.

The doctors could operate as a professional corporation. Under this business form, the doctors would each be shareholders. Corporations' shareholders are generally not liable for the debts of the corporation. Thus, Dr. A's assets could not be reached (with limited exceptions) in an action against Dr. B, another shareholder, or the corporation.

4. Dr. A can open a new office in Buckhead without giving Dr. B an opportunity to participate, but only if he first dissolves the partnership MDP. A partner in a partnership owes the duty of loyalty to the partnership and its partners. If Dr. A opens another clinic providing some of the same services within a close area (Atlanta, Buckhead), the operations will compete with one another. This competition is a breach of loyalty by Dr. A. Thus, he cannot open the clinic in Buckhead and exclude Dr. B while still a partner in the MDP partnership. Dr. A may choose to include Dr. B as a partner in the new venture as an LLP.

Question 1 - Sample Answer 2.

1. The partnership MDP is liable if Dr. B negligently injures a patient of the partnership. In a general partnership, both the partnership and the individual partners are liable for the negligence of its partners.

2. Dr. A is personably liable to partnership patients on whom Dr. B commits malpractice. Each partner in a general partnership is jointly and severally liable with the partnership for the negligence of the other partners. Should Dr. A be held liable for the negligence of Dr. B, Dr. A will be able to obtain contribution or indemnification from Dr. B.

3. Besides a general partnership, there are several other business forms that can benefit Dr. A. These include a professional corporation, a limited liability partnership or a limited liability company.

The first, a professional corporation, provides protection from personal liability for its directors or shareholders. Unless all of the incorporation formalities are met, and appropriate capitization provided, a corporation can be subject to a piercing of the corporate veil, in which case, Dr. A, as a shareholder, could be personally liable.

A limited liability partnership may be a good alternative for MDP. A limited liability partnership must file a partnership statement and must use “LLP” or “limited liability partnership” as part of its name. This organization structure results in the partnership being liable for the malpractice of its members, with the members being liable only to the extent of their partnership capital contribution. The partner who commits malpractice is still liable for his own torts. An LLP has the same pass through tax advantages as a general partnership.

Finally, Dr. A could consider a limited liability company. An LLC must use “LLC” or “limited liability company” as part of its name. An LLC, unlike a corporation, can be managed either centrally, like a corporation, or by its members, like a partnership.

4. Dr. A cannot open a plastic surgery practice in Buckhead without the approval of Dr. B. Each partner in a general partnership owes each other partner and the partnership a duty of care and a duty of loyalty. To open a competing practice in Buckhead without informing Dr. B would breach Dr. A’s duty of loyalty both to the partnership and to Dr. B. Dr. A may be able to dissolve the general partnership with Dr. B, before embarking on his new practice.

Question 1 - Sample Answer 3.

1. In a general partnership, the partnership is jointly and severally liable for a partner’s negligent acts incurred in partnership activities. Thus, the partnership will be liable if Dr. B. commits medical malpractice. The partnership assets of $500,000 would be fully exposed.

2. A general partnership is not a liability shield. Dr. A would be jointly and severally with the partnership liable for Dr. B’s malpractice.

3. There are several alternative ways in which Drs. A and B could conduct their business. One alternative would be to dissolve their partnership and carry on as a professional association. In a professional association, the two would not share generally in profits or in liabilities. Dr. A would not have personal liability for Dr. B’s malpractice. However, there would be the risk of lapsing into their old habits and being found to be a de facto partnership.

A second alternative would be to form a professional corporation, with each as a shareholder. Vicarious liability in this scenario would be limited to corporate assets, provided that corporate formalities were observed. Drs. A and B may not want the trouble of maintaining the corporate form, however. Also, with only two shareholders who also serve as directors and conduct all the business of the corporation, the likelihood is greater than usual that the corporate veil might be pierced and the owners subjected to personal liability.

Probably the best alternative for Drs. A and B is to form a limited liability partnership (LLP). In an LLP, Dr. A would not be liable for Dr. B's malpractice, but the parties could continue sharing in profits and maintaining assets as partnership assets. Dr. B and the LLP would be liable for Dr. B's malpractice.

4. Under the current arrangement, Dr. A owes fiduciary duties to Dr. B and to MDP. One of these duties is to refrain from competing with Dr. B and MDP prior to dissolution of the partnership. Therefore, Dr. A cannot open a new practice only a few miles away without giving his partner a chance to participate, unless the new practice would not compete with the old. Here, the facts indicate that the current partnership's patients include both trauma victims and people who want to improve their appearance through cosmetic surgery. The facts do not indicate that the clients all or mostly come from one part of town. Because cosmetic surgery is part of the downtown office's practice, and would constitute all of the Buckhead office's practice, it is likely the two would compete. Therefore, Dr. A cannot open his Buckhead office without Dr. B's approval. Concealing his plans from his general partner will likely subject him to a claim for breach of fiduciary duty.

Question 2 - **Sample Answer 1.**
(disclaimer)

(1) Georgia courts will grant specific performance of contracts to the sale of land due to the unique nature of land, however, as a threshold, the existence of a contract must first be proper.

In order to have a contract formed, there must be an offer, acceptance of that offer and consideration. Here, Corrigan may argue that the Authority's advertised price for the tract (assuming it was advertised) constituted an offer. Corrigan's argument will fail because Georgia courts generally hold that advertisements are not offers, but were invitations to bed or offer. Corrigan's application for the option would be considered an offer (if there was an offer) but it lacks specific terms as are required by Georgia law. An offer must contain price, quantity and description of the property. Here, the price and quantity (acreage) are included in Corrigan's application, however, a description of the land sufficient to identify same is lacking.

Even if the court did find that this was an offer, the Authority never accepted it in writing and it would not meet the requirements of the Statute of Frauds. The Statute of Frauds governs contracts for the sale of land and requires that they be in writing, signed by the party to be charged. As there is no contract signed by the Authority, the court will not find that there is a contract (barred by Statute of Frauds). Further, a contract must have consideration (bargained for legal detriment). An option to purchase land (such as the one here) would only be irrevocable if it were supported by consideration. Corrigan did not pay anything or promise anything in exchange for the option (the detriment) so the court will not grant specific performance.

(2) As mentioned earlier, Corrigan was seeking to have an option to purchase land. Corrigan was attempting to enter into a contract with the Authority, but was not successful. The facts do not describe any contract between Corrigan and Jones. A court will only grant breach of contract remedies against parties to the contract. Jones, who is not a party to any contract with Corrigan, will not be liable to Corrigan for any breach. At most, Corrigan may seek relief against Jones for tortious interference with a business relationship which the court will grant if it finds that a defendant intentionally and with knowledge of a contract, induced a party to breach that contract and the other party is damaged thereby. As there was no contract between Corrigan & and the Authority, Jones could not have tortiously interfered with same. Additionally, courts will not grant this if the defendant is participating in privileged conduct such as competition.

(3) Corrigan's wrong. As earlier mentioned Corrigan's option which was unsupported by consideration is revocable by the Authority. Further, Corrigan's offer (which was insufficient) did not specify which of the 25 acres it was purchasing. Corrigan's offer which lacked specificity of which acres it was attempting to purchase will not require the Authority to refrain from conveying any portion of the tract.

If Corrigan did have a valid option to purchase the land (supported by consideration) it would have a viable argument. Because it did not, this argument will be unsuccessful. Further, there was not meeting of the minds. The courts will not enforce the subjective, unexpressed intentions of the parties to a contract such as Corrigan's intention to the southernmost acreage.

(4) Under Georgia law, a court will uphold a contract if it is supported by consideration (bargained for legal detriment). Under Georgia law a court will find consideration if it is even just a mere "peppercorn." In Jones contract with the Authority, Jones promised to assign its option it held for the pig farm (detriment) and the Authority promised to sell the front southernmost acres to Jones (detriment). Thus, this is enforceable consideration more than a mere peppercorn, so there was consideration.

Question 2 - Sample Answer 2.

(1) In order for Corrigan to be able to recover against Authority for specific performance, he will have to establish the following elements: (i) that there was a valid contract (K) between them; (ii) that all conditions precedent to performance under the K have been met; (iii) that there is mutuality between the performance of the parties' obligations; (iv) that the available monetary remedies are inadequate (met since land is unique); (v) that the equitable remedy requested is feasible (met, since court would have jurisdiction over parties and land); and (vi) that Authority lacks any equitable defenses (no evidence of any wrongdoing on the part of Corrigan). Here the element that will be tough to prove is that this is a K for the sale of land, thus, the statute of frauds (S.O.F.) applies (i.e., there must be a written document signed by the party to be charged). The facts indicate that there was no written agreement, and no $ were paid. Nevertheless, Corrigan may rightly allege that the elements of compliance with the S.O.F. are met by the option form (which contains the material terms) and the minutes of the meeting (which are signed by an authorized agent). Another possible problem with this element, is whether or not the parties had an agreement, since the absence of identification of the acres could lead to mutual mistake: re: a material fact. As discussed in answer (3) below, that mistake should not void the K.

(2) Corrigan seems to assert a claim for tortious interference by a 3rd party with Authority's contracted obligations. As with any other tort, Corrigan will have to show the elements of duty,

breach of such duty, causation (actual and proximate) and damages. The problem with this claim is that there is no indication of intent on the part of Jones (there is no evidence that Jones had knowledge that Authority had a contracted obligation towards Corrigan with regard to the 5 acres Jones was negotiating. Absent proof of knowledge and intent, there would be no valid claim. If such evidence is obtained, on the other hand, then the claim would be valid. Notice that under the facts there is no evidence of any privity between Corrigan and Jones, as such, they do not owe contracted duties to each other. Jones is nevertheless required not to intervene or encourage Authority to breach its K with Corrigan.

(3) The problem with this assertion is that there is no evidence that either the option K or the subsequent resolutions identify the land (i.e., the specific acres being subject to the option). To be valid, a K for the purchase of land has to identify the land. That stems from the K law principle that an offer must be certain enough, so that an ordinary person would understand the nature of the transaction, obligations, etc. Here that offer took the form of the option K supplied by Authority. That is an important fact, since this was basically a K of adhesion; Authority prepared the form. As such, Corrigan has the benefit that any ambiguities should be solved in his favor, not in Authority's favor. Another argument in support of his contention is the fact that Corrigan had no notice that the 5 acres were taken (since he performed a diligent title search). Against Corrigan's contention, however, is the fact that Jones seems to be an innocent 3rd party (without knowledge that the land was subject to the K with Corrigan), and equitable remedies, (e.g., specific performance) are not enforced against innocent parties. I admit, that if the argument re: K of adhesion fails, then there is the possibility that the K between Corrigan & Authority would be void due to mutual mistake of a material case. But even in the case, I would argue that Authority had the duty to settle this issue, since it had control over the property (i.e., it was in reality a unilateral mistake, and the other party knew re: the material facts — Thus, mistake solved in favor of Corrigan).

(4) Corrigan's argument is not valid. Consideration (one of the 3 elements of a K, together with offer and acceptance), is defined as a bargained for legal detriment by each party to the K. For consideration purposes, any legal detriment suffices (even a peppercorn) and there is no need for mutuality (the exchanged considerations do not have to be of legal value). Here, both sides negotiated for some legal detriment from the other; Jones for the right to acquire the 5 acres of land; and Authority for the assignment of Jones' option (note, this right to acquire property is valid consideration). Also, the fact that the Authority land was valued at approximately $50,000 vs. the pig farm at $25,000 is irrelevant (no need for mutuality involved). Thus, the sales K between Jones and Authority has valid consideration.

Question 2 - Sample Answer 3.

1. No. Corrigan may not recover against the Authority for specific performance. Specific Performance is a remedy in contract law for the breach of a valid contract. It requires the parties to perform their duties under the contract. To have a valid contract, there must be an offer, acceptance (mutual assent), consideration and no defenses. In this case, the parties purport to enter into an option contract. Under the Statute of Frauds (S.O.F.), the contract for a sale of land must be in writing, must be signed by the parties charged, the parties must be included as well as price and most essentially the description of land to be sold. An option contract must be supported by consideration. Nothing in the exchange between the parties evidences a valid contract or a valid option contract. There is no writing that describes the land to be sold. The option contract fails because it is not supported by consideration. Substantial improvements, or

payment of some or all of the purchase price would take the contract out of the Statute of Frauds, but Corrigan has only started title search, preparing building plans, and made preparations to build the warehouse. This would not likely be substantial enough to take the contract out of the S.O.F. Because there was neither a valid option contract or contract for the sale of land, Corrigan cannot compel specific performance from Authority.

2. No. Corrigan cannot recover against Jones for breach of contract. To have a valid contract, there must be mutual assent which includes an offer that creates a power of acceptance in a specific offeree. Between these parties (Jones & Corrigan) this element fails. Neither party has created a power of acceptance in the other. Breach of contract is a cause of action available to one party of a valid contract against a non-performing party. Jones and Corrigan were not parties to a contract together. Even though Jones knew of Corrigan's alleged option, the Authority's action towards Corrigan does not give rise to a breach of contract claim by Corrigan against Jones.

3. Corrigan is wrong. The exchange between Corrigan and the Authority even if it did amount to a valid option contract does not allow Corrigan to elect the property he wishes to purchase after an agreement is made. This gives rise to the issue of necessary terms in a contract for the sale of land. A contract for the sale of land should include the parties, the price, but most importantly, it must include a description of the land to be purchased. A court will supply certain missing terms, but no the description. While the description needs to be specific, it must give a reasonable idea of the boundaries. The alleged option contract only described 20 out of 25 acres from the tract. The land had very specific landmarks on all boundaries; i.e., pig farm, paved roads, four-lane road, or a railway track. None of these landmarks were used to describe the specific 20 acres contemplated by the parties. Under the circumstances, absence of the essential term-description, the contract is not valid. No party has a duty to perform.

4. Corrigan is once again wrong. The contract between Authority and Jones is valid. There is a valid offer and acceptance, supported by consideration. In this case Jones at closing will assign to the Authority an option it holds to purchase the pig farm, valued at $25,000. The issue is sufficiency of consideration. Courts will not usually consider the sufficiency of consideration, unless there is no value given, or a sham consideration. In this case, Jones will assign the option to purchase the pig farm, which has value, to Authority before closing, therefore creating a valid contract between Jones and Authority. All of the essential elements are included in the terms of the agreement. Consideration is the bargained for exchange of legal value. The parties bargained to exchange the option for the 5 acres and as mentioned above, the sufficiency of the legal value is not usually considered unless an exchange is devoid of value.

Question 3 - **Sample Answer 1.**
(disclaimer)

To: Justice Wisdom

FROM:Law Clerk

RE: State v. Jesse & Frank

Issue of Bias

The first issue is whether the court abused its discretion in failing to excuse Mr. Friend as a juror on the grounds of bias, which was the challenge raised to the defense for cause. In Georgia, criminal defendants are entitled to be tried by a fair and impartial jury. If counsel feels that a juror will not be able to satisfy his obligations, to decide the case based only on the evidence and the law, the attorney may attempt to remove that juror for cause. Here, voir dire was conducted, and it was established that Mr. Friend knew the victim of the murder and even served as a pallbearer at his funeral. Furthermore, he had discussed this case with others and even visited the crime scene. This demonstrates strong evidence of jury bias, which is a ground for removal. The Court did attempt to inquire into this matter and after some questioning did eventually state he could be fair and impartial. Normally, this type of inquiry by the court could rehabilitate the juror, that is an establishment that he could be fair and impartial. However, when the evidence of bias is so strong a court abuses its discretion when it fails to grant the challenge. Here, the witness initially states he was unsure he could be impartial. The court's inquiry should have stopped there. The witness was a friend of the victim, and said initially he wasn't sure he could be impartial, and based on this strong evidence the court abused its discretion in denying the challenge for bias.

The second issue is whether the court erred in refusing to direct a verdict of acquittal to the felony murder charge. In order to be guilty of felony murder, the defendant must be engaged in a dangerous felony during the commission of which there was a murder. The murder must be in the commission of the felony. If there is no underlying felony, or a lack of proof to establish one, there can be no felony murder. Here, there were no facts to support the armed robbery charge, the predicate offense to the armed robbery charge (we are told to assume this). Nevertheless, the judge decided to allow an instruction for felony murder to be given to the jury. This was error. If there is no proof of the underlying felony, then by operation of law there can be no felony murder. It is the judge's responsibility to decide these matters of law, the jury is the finder of fact. Because there was no proof of a predicate felony, or any evidence of one for that matter, and thus no felony murder by operation of law, the instruction was erroneous. More to the point, the refusal of the directed verdict was also erroneous. The state must prove each element of the crime beyond a reasonable doubt. Here there had no evidence for the predicate felony. The directed verdict should have been granted.

This brings up the question if James and Frank may be retried for felony murder based on a predicate offense of "attempted armed robbery." This in turn brings up a question of Double Jeopardy. Pursuant to the Double Jeopardy clause a criminal defendant cannot be retried for the same offense when there has been a final judgment on the matter. A directed verdict is considered to be a final judgment on the merits. The prosecution would argue that because the predicate crime is a different one and that there are additional elements to prove with attempt, that the Double Jeopardy clause should not apply. However, here the predicate offense is a lesser included offense to the armed robbery charge. Being a lesser included offense, the Double Jeopardy clause would apply. This is not a new crime with new elements. The defendants cannot be retried. The Double Jeopardy clause will prohibit retrial for this offense because it is not new and there has been a final judgment on the merits.

Finally, there is an issue as to the DA's remarks during closing. A motion for mistrial was made because the DA stated that Frank & Jesse should have taken the stand to rebut a witness that said Jesse confessed to the crime. Generally, silence will not be held against a criminal defendant and more importantly a criminal defendant has a constitutional right not to testify. If the defendant so chooses, the court should provide a written instruction to the jury at the end of the trial. Here, however, the prosecution would argue that the defendants had a responsibility to deny the allegations or run the risk of having their failure to deny used against them. In some

situations a criminal defendant does have such a responsibility. However, here, in court, the defendants constitutional right not to testify controls. The refusal of mistrial was an error.

Question 3 - Sample Answer 2.

TO: Justice Wisdom

FROM:Applicant

A) The trial court abused its discretion in refusing to excuse Juror, Mr. Issac Friend, on grounds that he was biased. At issue is the discretion of the trial court judge in ruling on a juror strike for cause. Generally, a trial judge has broad discretion in deciding whether it is proper for a juror to serve. This discretion, however, is not unfettered and a judge must strive to empanel a fair and impartial jury. In this case, there are two independent reasons why Mr. Friend should not have been allowed to serve as a juror. (1) Mr. Friend knew the victim; (2) Mr. Friend initially stated, when asked, that he was not sure if he could be a fair juror or not. As to the first issue, Mr. Friend not only knew the victim but obviously was a close friend of the victim as he served as a pallbearer at his funeral. Based on this evidence alone, the judge has no choice but to dismiss Mr. Friend as a juror. AS to the second issue, Mr. Friend initially conceded that he did not know if he could be a fair juror. While the trial court has more discretion in this case, and reformed Mr. Friend until he stated that he could be fair and impartial, allowing him as a juror based on this issue was also improper. Frank & Jesse have a right to a fair and impartial jury in their murder trial. There is no situation where a juror who served as a pallbearer at the victim's funeral, and expressed reluctance about his ability to be fair, should serve as a juror. The trial court impinged on Frank & Jesse's constitutional right to a trail by a fair and impartial jury and the conviction against them must therefore be overturned.

B) The court erred in refusing to direct a verdict of acquittal to the charge of felony murder because it is uncontroverted that there was no evidence to support the predicate offense of armed robbery. At issue is the state's burden of proof on the crime of felony murder. Felony murder is the killing of a person during the commission of a serious felony. Such felonies include robbery, burglary and rape. In order for the defendants to be guilty of felony murder, it is essential that the state prove the commission of the underlying felony. The burden of proof is on the state to prove the felony beyond a reasonable doubt. The state must then prove that the homicide occurred during the commission of the felony. In this case, it is undisputed that the state proved no elements of their prima facie case. The trial court is without discretion in such a situation and cannot "allow the jury to work it out."

C) Frank and Jesse cannot be retried for felony murder based on the predicate offense of attempted armed robbery. At issue is whether double jeopardy would attach in such a situation.

Frank and Jesse have a constitutional right not to be tried twice for the same offense. This concept is referred to as "double jeopardy." However, defendants can be tried twice without double jeopardy attaching if the crime they are charged with on the second occasion requires the state to prove a different element than the charge they were tried on on the first occasion. In the instant case, however, double jeopardy would attach because Frank and Jesse are being tried for felony murder. Felony murder requires the commission of a homicide during the commission of a felony. These are the same elements from the first trial and therefore double jeopardy attaches. Moreover, to prove attempted armed robbery, the state does not have to prove any different

elements than it would have had to prove in the first trial to show armed robbery. That is, to prove armed robbery, you necessarily have to prove all of the elements of attempted armed robbery. After all, attempted armed robbery is a lesser included offense and is normally merged with an armed robbery charge.

Since double jeopardy clearly attached to Frank and Jesse's first trial as they were convicted by a jury, they cannot be retried for felony murder based on a lesser included defense.

D) The trial court erred in refusing to grant Jesse and Frank's motion for a mistrial based on the District Attorney's remarks in closing arguments. At issue is a defendant's constitutional right to remain silent and not to testify at his trial. The Fifth Amendment of the Constitution provides that a defendant has the right to remain silent. Further, a prosecutor cannot remark on the defendant's right to remain silent in order to make an inference that the defendant is guilty. This is a steadfast rule and such behavior will only be allowed if the defendant has first brought up the issue of his silence and somehow used it to infer that he is not guilty. No such fact pattern exists in this case. The prosecutor clearly infringed on the defendant's right to remain silent. Moreover, the statement the prosecutor refers to be Jesse was clearly hearsay. Although it may be admissible as an admission of a party opponent, which is an exception to hearsay in Georgia, Jesse did not testify at the trial and neither he nor Frank were required to under the Constitution. The Prosecutor cannot use such evidence to support his case. Such a statement is not harmless error, and a mistrial should have been granted.

Question 3 - Sample Answer 3.

TO: Justice Wisdom

FROM:Law Clerk

(A) During the voir dire, the juror, Mr. Issac Friend revealed his bias in that he knew the victim of the murder, he served as a pallbearer at the victim's funeral, he discussed the case with other individuals at the funeral, he had visited the crime scene, and when asked by the Judge if he could disregard his personal feelings about the victim, he initially stated that he was unsure whether he could be fair and impartial. The Federal Rules of Evidence provide that a juror cannot be excused on the basis of race, a juror can be excused for bias in that he could not be fair and impartial. While the peremptory challenge in voir dire does not allow a juror to be excluded on the basis of race, the Federal Rules of Evidence provide that if it is clear that a juror is bias during voir dire they can be excluded. If the juror is not excluded by the trial judge, it would violate the defendant's right to a fair trial, and would constitute an abuse in the trial judge's discretion. It is my opinion that the trial judge abused its discretion in refusing to excuse Juror, Mr. Issa Friend, in view of the fact that during voir dire Mr. Friend stated that he knew the victim personally in that he served as a pallbearer at the victim's funeral, he discussed the case with other individuals prior to being called for jury duty, he visited the crime scene, and he initially stated to the trial judge that he didn't know whether he could be fair and impartial. In view of the afore mentioned and the Federal Rules of Evidence, the juror was biased and the trial judge abused its discretion in refusing to excuse Juror, Mr. Issac Friend, on the ground that he was biased.

(B) Pursuant to the Federal Rules of Evidence, the prosecution has the burden of proving every element of the crime charged beyond a reasonable doubt. Further, for a defendant to be guilty of felony murder, he also must be found guilty of the underlying felony (inherently dangerous felony;

burglary, arson, rape, robbery and kidnaping). In the instant case, the prosecution failed to present evidence to support an armed robbery charge against the defendants. While the state presented evidence that the defendants orally planned a robbery, they failed to prove the elements of robbery (a trespassitory taking of personal property of another in the presence of the person, with the intent to permanently deprive the person of their property, and the taking was by force and/or intimidation, or placing the person in imminent fear). The evidence presented by the state failed to prove that a theft or taking property from another occurred, and thus, an essential element of armed robbery was not proven. Therefore, the court erred in refusing to direct a verdict of acquittal to the charge of felony murder because the state failed to support the predicate offense of armed robbery in that the state did not prove all of the elements in the underlying felony (armed robbery).

(C) If reversed on the ground set out in (B), the defendants cannot be retried for felony murder based on the predicate offense of attempted armed robbery because it is a lesser included offense of armed robbery. Double jeopardy prevents the defendants from being retried because attempt crimes and armed robbery are specific intent crimes. Moreover, the state would still have the burden of proving every element of the crime armed robbery, and as previously stated, the state cannot meet that burden in that there was no evidence that a theft or taking of property from another occurred. Thus, the defendants cannot be retried because it would constitute Double Jeopardy in violation of their constitutional rights.

(D) The Court erred in refusing to grant the defendant's motion for mistrial. According to the Federal Rules of Evidence, the prosecution cannot make remarks about the defendants not testifying. The defendants have a right under the 5th Amendment – self- incrimination, not to testify. It is a violation of their constitutional right for the prosecution to reference them not testifying in the prosecution closing arguments. Therefore, the court erred in refusing to grant the defendant's motion for mistrial based on the District Attorney's remarks in closing arguments.

Question 4 - **Sample Answer 1.**
(disclaimer)

1.(a) I would name Mr. Green, Mr. Wonder and Davie Jones Boat Co. ("Davie Jones"). I would name Mr. Green because he was negligent in running the red light and entering the intersection against the light. Furthermore, his negligence, was a contributing cause to the injuries suffered by Mr. Smith as Ms. Smith would not have been injured had the car not run the light. I would also name Mr. Wonder as he was negligent in driving the car too fast and in driving while over the legal alcohol limit and his negligence contributed to the injuries. If he had not been drinking and driving too fast, he may have been able to see Mr. Green's car in time to avert the collision. I would also sue Davie Jones due to Mr. Wonder's actions. As Mr. Wonder's employer, Davie Jones was in a master-servant relationship with Wonder. A master is generally liable for the negligence committed by a servant acting within the scope of his employment. Here Wonder was clearly within the scope of his employment as he was traveling to a customer meeting. The fact that he was inebriated did not detract from this as he drank during a luncheon with a business client, not while on a frolic from work.

(b) No. You could not bring this action in federal court in Georgia as there is no basis for federal jurisdiction. The two most common basis for federal jurisdiction are diversity of citizenship and federal question jurisdiction. This case clearly does not involve a federal question as it is a motor

vehicle accident between Georgia residents. Jurisdiction also does not exist on the basis of diversity. In order for diversity jurisdiction to exist there must be complete diversity of citizenship between the plaintiff and all defendants and there must be in excess of $75,000 of damages involved. Although the jurisdictional requirement is met, the defendants are all Georgia residents and that would destroy diversity.

(c) Camden - The case against the defendants may be filed in Camden Co. In Georgia, venue would be proper in this case in the county where any defendant resides as all of the defendants are jointly liable to the plaintiff as a result of the accident. If there is joint liability, the action can be brought in the county of any of the defendants' residences. As Mr. Green lives in Camden County the action could be brought there.

Glynn – The action could probably not be brought in Glynn County. Although the accident occurred in Glynn County, all of the defendants are Georgia residents and venue will only be proper where one of the defendants resides. No defendants reside in Glynn County.

Ware – Venue would be proper in Ware County for the reasons discussed above as Wonder is a resident of Ware County.

Chatham County – Chatham County would not be an appropriate county for venue in this action as none of these defendants reside there for the purposes of the venue rules and the transaction or occurrence giving rise to the action did not occur there. Although the defendant Davie Jones has its principal place of business in Chatham, it has its registered office in Fulton and thus resides there for venue purposes. If Davie is subject to liability for tort, it can be sued in the county in which the tort occurred, if it has an office & conducts business there. But here the action did not occur in Chatham either, thus venue is not proper in Chatham

Fulton – venue is also proper as to the action in Fulton County as it is the registered office of Davie Jones. A corporation is a resident of the county, for venue purposes, where it's registered office is located, so the action could be brought there.

2.(a) Yes. The action can remain in the county in which it was brought, but can be removed by any of the defendants upon motion. Due to recent amendments to the Georgia code, the vanishing venue problem has been eliminated. If venue becomes improper due to the discharge prior to the commencement of trial, the defendants can move for a change of venue. If they so move, venue can be changed to any county in which any defendant resides. If they do not move to change venue, venue remains proper in the county where the action was filed.

(b) If trial is commenced, venue can only be moved upon joint motion and consent of all parties, even if the original defendants giving the basis for venue are no longer in the case. The first day of trial constitutes the commencement of the action, so after the first trial witness is called (or opening statement made, if applicable) the case has commenced for purposes of the vanishing venue amendments and consent of all parties will be necessary to change venue. If venue is changed, it can be to any of the counties of residence for the remaining defendants.

Question 4 - Sample Answer 2.

1.(a) At issue is what defendants may be liable for the injuries sustained by John Smith.

First, Bill Green may be named as a defendant in this action as he was the driver of the automobile in which John Smith was injured. Since the facts state that Green was negligent; namely, he failed to observe a red light and entered an intersection on same, he is liable to Smith. Green owed a duty of reasonable care to Smith when he invited him to ride home in his car. Green breached the duty by going through the red light; proximately and actually caused Smith's injuries and Smith suffered extensive injury.

Second, William Wonder may be named a defendant for driving in excess of the speed limit and driving in excess of the acceptable blood alcohol limit of (.08). Wonder could have perhaps avoided the consequences and had the last clear chance (he hit Green) to avoid the collision. His negligence could be based on negligence per se (by statute) or common law negligence.

Third, Davie Jones may be a defendant because it is the employer/master of its employee/servant and the injury was done in the scope of employment with the company vehicle. Thus, the corporation can be held vicariously liable under Respondent Superior of the torts of its employee.

1.(b) This action could not be brought in federal court. There is no federal question or constitutional issue present and diversity jurisdiction is not present - i.e., although a resident of Florida, the corporations headquarters and principal place of business is in Georgia. All plaintiffs are not completely diverse from defendants even though over $25,000 is in controversy, exclusive of interests and costs ($200,000). In sum, there is no subject matter jurisdiction.

1.(c) Under Georgia law, if all defendants are residents of Georgia, the "multiple defendants doctrine" is applicable and the case can be filed in any of the defendants counties.

Here, Green is a resident of Camden County, Georgia. Wonder is a resident of Ware County, Georgia. Davie Jones is a resident of Chatham County and Fulton County, Georgia. The corporation has its corporate headquarters and principal place of business in Chatham County but also has a registered office and registered agent in Fulton County, Georgia, which are sufficient to constitute residency.

As all defendants are Georgia residents the multiple defendants rule applies and one suit could be brought in any of the counties stated above.

2.(a) When a case's venue is based on one of the defendants and that defendant is dropped from the case, an issue of vanishing venue arises.

The determination of whether the case can continue in that venue is based on the stage of the case. If the defendant is dropped before commencement of trial, upon proper motion of the parties, the case can be transferred to a proper venue. However, if the defendant is dropped after the commencement of trial, then the consent of all parties left in the case (defendants) must consent to the transfer.

Here the facts indicate that trial has not begun, so therefore, upon proper motion the court will transfer the case to a proper venue. If the defendants file a joint motion to transfer venue, the court will transfer venue.

Generally, venue is proper in the county of the defendant resident; however, where multiple defendants are residents of Georgia venue becomes difficult. The judge may look to factors as the county where the injury arose or upon agreement of all defendants the chosen venue of the parties.

As such, since settlement occurred before commencement of trial (no jury had been selected or witness sworn), upon motion venue may be transferred.

2.(b) As stated above in 2(a), if the settlement occurred after trial commenced, namely after the jury is sworn or the first witness is sworn (bench trial), then venue may be transferred only upon consent of the remaining defendants.

Options for proper venue could be Camden County, Chatham County, Ware County or even Fulton County. In addition, Glynn County could also be selected if consented to by all parties left, because the injury arose in that County. However, that option is probably unlikely as the corporation will want to have its home counties and Green will want his resident County.

In sum, venue could only be transferred by motion of all parties consenting to a new venue, since after the first day of trial a jury will have been selected (jury trial) or a witness would have been sworn in (bench trial).

Question 4 - Sample Answer 3.

1.(a) I would name the following as defendants:

1. Mr. Green: Because Mr. Green failed to stop at a red light, the evidence suggests that his negligence may have caused Mr. Smith's injuries. The driver of an automobile in Georgia owes his guest passengers a duty of reasonable care.

2. William Wonder: Because Mr. Wonder was both drunk and speeding at the time of the accident, the evidence suggests that his negligence may have caused Mr. Smith's injury.

3. Davie Jones: Mr. Wonder was an employee of Davie Jones. Moreover, at the time of the accident Williams was (a) driving a company car, (b) to a company meeting, from (c) another company meeting. Thus, Davie Jones may be vicariously liable for Mr. Smith's injuries. Moreover, if Davie Jones knew, or should have known, of William's propensity to drive drunk, Davie Jones may be liable for its own negligence.

2.(b) The lawsuit could not be brought in federal court in Georgia as presented. Mr. Smith only has state law claims against the defendants. Thus, subject matter jurisdictions would have to be based on diversity of citizenship. For there to be diversity of citizenship, no opposing party can be domiciled in the same state as the plaintiff. Here, all of the plaintiffs are Georgia residents. Even Davie Jones, which is incorporated in Florida, is a Georgia resident because it has both its corporate headquarters and principal place of business in Georgia. Accordingly, the Federal District Court would not have jurisdiction over this case.

1.(c) Under Georgia's venue rules, when each of the defendants is a Georgia resident, venue is proper in any county in which one of them can be found. Here, the defendants are residents of either Camden, Ware or Fulton county (Davie Jones is a Fulton County resident because that is where its registered office and agent are located.) Thus, one lawsuit against all of the defendants could be filed in either Camden, Ware or Fulton County.

2.(a) Georgia recently amended its laws with respect to the so-called "vanishing venue" problem. If, before the trial began, the case is dismissed as to the defendant whose presence in the case

made venue proper, venue can still be proper provided all the parties consent. If, however, any of the defendants file a motion for change of venue, the court would have to grant it. The case would be transferred to a county in which venue would be proper against one of the defendants, in accordance with Georgia's rule that venue is proper against multiple Georgia residents in any county where venue is proper against one of them.

2.(b) Once the trial begins and the party whose presence made venue proper is dismissed, the remaining defendants are not entitled to a change in venue unless all parties agree. Again, the case would be transferred to a county in which venue would be proper under Georgia's rule with respect to cases in which all of the defendants are Georgia residents.