

7-06 MO Essay 1 Example 1

1)

(1) Al's affirmative defenses

Al may assert the affirmative defense of **unclean hands**. One must not come to a court of equity with unclean hands. If one acted inequitably with regard to the same transaction or subject matter, one may not assert a claim in equity regarding that subject matter. Here, Pop's promised Al 75% ownership of the business within 3 years, but he later reneged on that promise.

However, Pop's may argue that the computer software is not the same deal as the employment agreement. Al must show that the employment agreement and the computer software are related (perhaps because the software led to the employment), and that Pops acted inequitably by not giving him 75% ownership, so Pops should now be denied an injunction.

Al may also assert the affirmative defense of **laches**. In order to assert this equitable defense, Al must show that Pop's waited an unreasonably long time to bring his claim, and because of this delay Al was prejudiced. Here, Pop's waited 13 months to bring his claim, all the while knowing that Al was using the software. And during that time, Al built up his business and got many customers, and may have come to rely that Pop's wouldn't assert a claim. However, the **statute of limitations** here in a breach of contract action or a fraud action would be 5 years. Where there is a statute of limitations, the courts often presume that the statute of limitations is the correct amount of time in which one may bring a claim, though they may deviate in certain circumstances. Al would have to emphasize Pop's knowledge that he was building up a business to show that the presumed "unreasonable time" isn't the same as the statute of limitations.

(2) Al's Counterclaim for 75% ownership

Al can assert a counterclaim for **specific performance** of the employment agreement. In order to assert this claim, Al must show that (1) there was a valid contract, (2) that all conditions

precedent were met, (3) that there is no adequate remedy at law, and (4) that it is feasible for the court to enforce the agreement. (1) Al would have to prove up that there was a valid contract (an offer and acceptance supported by legal consideration between competent parties). (2) That all conditions precedent were met, i.e. Al worked the 3 years. (3) that there is no adequate remedy available at law... Al would have to show that damages would be too hard to calculate, or the equity in the company is so unique it can't be replaced by damages, or something like that. (4) that enforcement is feasible- Al would have to show that this would not require too much court supervision, and that the court has jurisdiction over the parties.

Al may also have to rebut a defense of the statute of frauds if Pop's raises it, since this was a contract that could not have been performed within a year. To do this, Al would have to show that the contract was performed by him working 3 years, so the absence of the writing doesn't make the contract unenforceable.

(3) Al's counterclaim for damages

Yes. Al may bring an action for **rescission** and **restitution**. In order to get this, Al must show that there was a material breach of the contract, such that Al may reverse the contract and recover restitution for the benefits conferred on Pop's. Here, Al worked for Pop's for 3 years at below market value, so Pop's was **unjustly enriched** by the difference between market salary and what Al was already paid. (It would not technically be "damages" as it is an action in equity and not law, it would be "restitution," but it would still be money).

Al may sue Pop's for **breach of contract**. This counterclaim may be raised because Missouri allows parties to assert all claims against each other through permissive counterclaims and joinder. In order to prevail on the breach of contract action, Al must show that there was a valid contract, that all conditions precedent were met, that there was a breach, and that he suffered damages as a result. If Al is only concerned with the difference in salary, he would not seek an expectancy measure of damages, but rather a reliance measure of damages (he took a lower

paying job relying on the contract and suffered damages as a result).

7-06 MO Essay 1 Example 2

1)

1. Affirmative Defenses

Al may assert the affirmative defenses of laches, unclean hands, and possibly undue hardship. At issue are equitable defenses available to the defendant when the plaintiff seeks an equitable remedy such as an injunction. To prevail on the affirmative defense of laches, Al must prove that Pop's unreasonably delayed in filing suit in light of when Pop's became aware of its potential claim against Al, and that this delay has caused prejudice to Al. Pop's waited for 13 months after it knew that Al had quit his job with it and opened his own payroll business using the payroll program he had designed for Pop's. In that time period, Al has generated a very successful business with a large customer base. To enjoin his actions now would possibly cause him severe economic prejudice since he would be ordered to discontinue his business, or at least the use of the payroll program that has made him so successful. His customer base has relied on him for months and it would be prejudicial to him to enjoin his activities only now. In addition, because it has been over a year since Pop's learned of Al's actions, he may have suffered prejudice in conducting his defense. Potential witnesses or evidence may no longer be available for his use.

To prevail on the affirmative defense of unclean hands, Al must prove that Pop's engaged in some improper conduct with respect to the same subject matter at issue in the litigation. The improper behavior does not have to be illegal; the test for unclean hands is whether or not the behavior is offensive to the court. This may be a good defense for Al because Pop's refused to honor the oral contract that it made with Al, which caused Al to quit, taking the payroll program with him, and opening his own business. If not for Pop's bad conduct, Al would never have done what he has done. It does not seem fair or right for Pop's to seek to enjoin Al's behavior when Pop's itself has engaged in bad conduct that it at least partially responsible for Al's actions.

To prevail on the affirmative defense of undue hardship, Al would need to prove that an injunction against him would create an undue hardship on him, perhaps that it even requires him to do something that is impossible. When determining whether or not there is undue hardship, the court will weigh the hardship to the defendant against the benefit to the plaintiff and if the hardship to the defendant outweighs the benefit to the plaintiff, the relief the plaintiff is seeking

will often not be granted. Other than the hardship to Al already discussed under the defense of laches, it would be difficult for him to prove other hardship. The payroll program that Al created and that has made him so successful is also the program that made Pop's successful, so the benefit to Pop's is probably not outweighed by the hardship to Al, and this is probably not Al's best defense.

2. Al's Counterclaim

Al could assert a counterclaim for specific performance of the oral contract between him and Pop's to transfer 75% ownership interest in the business to Al after three years. To prevail on this claim, Al must prove that the legal remedy is inadequate, the equitable remedy is feasible, and the specific requirements for the equitable remedy of specific performance. The legal remedy is inadequate if: 1) money damages will not fully compensate the plaintiff; 2) the subject matter is unique or rare; 3) there is the potential for multiple lawsuits; and 4) damages are speculative. The equitable remedy is feasible if there is present in the forum the person who is ordered to act, and, where appropriate, the property that is at issue. In addition, courts will not order equitable relief if it would be difficult for them to enforce it such as where it would require extensive supervision due to a complex or skillful subject, it involves the application of taste, or it would require specific performance of a personal services contract. In this case, the legal remedy for Al is probably inadequate because damages would be speculative, as it is difficult to know how much he should receive since he was promised a large interest in a corporation. It is also a somewhat unique subject matter since it deals with an interest in a corporation and the reason the corporation is successful is because of a one of a kind product that Al himself created. The equitable remedy should be feasible as the parties are present before the court and it would not require extensive supervision to order specific performance.

In addition to the basic requirements for equitable relief, to obtain specific performance, Al must also prove that: 1) there is a valid contract; 2) all conditions have been fulfilled; and 3) mutuality of remedies. All conditions have apparently been fulfilled, as Al accepted a lower salary and stayed with Pop's for three years until asking for his 75% interest. The modern rule is that mutuality of remedies exists where both parties are able to perform and can be compelled to perform by the court. It appears that there is mutuality of remedies, if Pop's could be compelled

to perform an oral contract. This contract was not in writing, so it may be difficult for Al to prove its existence. It was also a contract that could not be performed within a year since the 75% ownership interest would not be transferred to Al until after three years, so it should have been in writing to satisfy the statute of frauds. It may be difficult for Al to prevail on a specific performance claim because of the statute of frauds problem.

3. Al's Counterclaim for Damages

If Pop's gets its injunction against Al, Al may have a counterclaim for damages against Pop's for additional compensation for past services. This claim could be based on either a promissory estoppel or unjust enrichment theory. To prevail on a promissory estoppel theory, Al would need to prove that Pop's made a promise that Al justifiably relied on to his detriment. In this case, Pop's made a promise to Al that he would receive a 75% interest in the corporation after three years, but in return, Al was required to accept a salary way below market rate for his profession. Al justifiably relied on Pop's promise to transfer the 75% interest, and relied on that promise to his detriment, as he accepted the lower salary, relying on the promise of the ownership interest in three years, so he could probably recover damages for past compensation on a promissory estoppel theory. He may also prevail on an unjust enrichment theory and collect damages based on quantum meruit. Arguably, Al working for Pop's for three years at a low salary, after having created a special computer program for Pop's use, unjustly enriched Pop's because it did not compensate Al adequately for his services. Therefore, he could probably recover damages in quantum meruit.

7-06 MO Essay 1 Example 3

1)

1. Al has several defenses to Pop's action for an injunction. In an action for equitable relief, there are several elements that a plaintiff must prove, including proving that legal remedies are inadequate and equitable relief is feasible, in addition to proving the individual elements of the type of equitable relief sought. However, even if a plaintiff proves the elements of his claim, there are several defenses which a defendant can assert to defeat an otherwise proper claim for equitable relief. These defenses include Unclean Hands, Laches, and undue hardship/impossibility to enforce the equitable relief. In this case, Pops is suing Al for an injunction to stop using the computer program -- more than likely a trade secret or trademark action. Al can raise the defense of Unclean Hands first. Unclean hands is an equitable defense that prevents a plaintiff from pursuing equitable relief when the plaintiff himself has a degree of fault in the action giving rise to the lawsuit. In this case, Al left Pops employment with the computer program because Pops failed to make good on his "handshake deal" bargain to give Al a 75% ownership interest in Pops company after 3 years. The facts state that at the end of three years, Pops said that he had numerous retirement investments go bad and that he was no longer willing to transfer 75% of the ownership interest. As a result, Al left. Under these circumstances, Al should argue that Pops should be estopped from seeking an injunction because Pops own unlawful action (i.e. breaching his handshake deal) led to the actions giving rise to the lawsuit. Second, Al should assert the Doctrine of Laches as a defense to Pops' action. The doctrine of laches is a defense that prevents a plaintiff from unreasonably delaying bringing action. The doctrine of laches is not a statute of limitations and in fact can be invoked PRIOR to the SOL running if the facts demonstrate that a plaintiff has unreasonably delaying bringing action. In this case, the facts state that Pops, "wanting to avoid a legal battle, did nothing for the next 13 months in the hope that Al's new business would not be successful[.]" Only after Al's business did become a success did Pops sue Al. Under these circumstances, Al should argue that Pops' delay was unreasonable and that Pops could have and should have sued Pops a lot earlier and should therefore be barred from bringing the current action.

2. For an action in equity, Al could assert a counterclaim for specific performance of the

employment "contract." Specific performance is an equitable remedy that has several requirements. In addition to legal remedies being inadequate and equitable relief being feasible, Al must prove (1) the existence of a valid contract; (2) all conditions thereto have been met; and (3) mutuality of remedy exists. In this case, Al "accepted a salary way below the market rate of computer programmers because [Pops] in a handshake deal, promised that Al would be given a 75% ownership interest in the business after three years." To recover for specific performance on the "handshake deal," Al is first going to have to show legal remedies are inadequate and equitable relief is feasible. Although Al may have trouble proving that legal remedies are inadequate (i.e. since it's an employment contract a court could probably put a money value on any supposed lost income to Al), assuming that Al can prove these first 2 elements, a court will then look to see if (1) a valid contract exists; (2) if all conditions to that contract have been met; and (3) mutuality of remedy exists. It appears that a valid contract exists. While at common law a contract for the performance of a task over one year should have been reduced to writing (i.e. under the Statute of Frauds) a court will probably find that to the extent Al commenced performance and had actually relied on the promise (i.e. taking a lower income in reliance of the promise) a court will probably find a valid contract. If there's a valid contract, then all conditions have been met, as the only condition outlined in the "handshake deal" was Pops promise to pay after three years of employment. The facts state that Al had his three year anniversary with Pops' company. Therefore, all the conditions appear to have been met. Finally, a court will see if mutuality of remedy exists. Mutuality of remedy can be affirmative or negative, but the idea is that if one party could enforce the contract then the other party can as well. In this case, there does not appear to be any barrier for either party to pursue a remedy under the circumstances. Therefore, mutuality of remedy also appears to exist. Therefore, Al may be able to bring a counterclaim for specific performance.

3. Finally, if Pops is successful in getting an injunction, Al probably has a counterclaim for damages. At issue is Al's remedy for additional compensation for past services to Pops. If Al cannot sue on their employment contract, Al should sue off the contract in an equitable action for quantum meruit for the value of his services rendered. Because quantum meruit is an equitable

action, the standard requirements apply. (Legal remedy is inadequate and equitable relief is feasible). Additionally, a person claiming quantum meruit must prove that he gave value, that value was accepted, and that the person taking that value would be unjustly enriched if allowed to walk away. Because the question states that Al seeks "additional compensation" he may have trouble proving that legal remedies are inadequate for purposes of equitable relief. nonetheless, assuming that the court does not find this to be a problem, courts generally allow actions in quantum meruit where a person has been unjustly enriched at the expense of another. In this case, Al accepted the job with Pops at a much lower salary and performed those services for three years under the assumption that Pops would transfer a 75% interest to Al at the end of the 3 years. Pops did not do so. Therefore, Al should argue for the value of his services rendered to Pops during those three years, less the compensation he has already received, in order that Pops would not be unjustly enriched. Of course, as quantum meruit is an equitable action, Pops is free to assert the defenses such as unclean hands since Al took the computer program when he left and now has a successful business and arguably took a trade secret. However, assuming that defenses will not work, Al should be entitled to the value Pops' unjust enrichment under the circumstances.

07-06 MO Essay 2 Example 1

1. Mary Smith's trust was properly funded. At issue is whether designating a trust a beneficiary of a life insurance policy satisfies the res requirement of a trust. Generally, to have a valid trust a settlor must transfer title of property to trustee to manage for the benefit of the beneficiaries, among other things. Here, the requirement is satisfied by naming the trust as the beneficiary of the trust. Both were executed on the same day so the requirement is met. Also, in a self-declaration of trust the delivery of title requirement does not apply. Thus, Mary's trust met the res or corpus requirement this way as well.

2. Who is entitled to CD #1? Ann Smith's two children are entitled to the CD. At issue is what happens when the named beneficiary of a CD dies 1 day after holder of the CD. Under the contract with the bank (which controls over the trust's designation) Ann Smith was to take the CD in the event of Mary's death. However, Ann Smith died 1 day after Mary from the same accident that caused Mary's death. In this circumstance, the Simultaneous Death Act (if did not survive for more than 120 hours) operates to make a legal fiction that Ann predeceased Mary. However, the Missouri anti-lapse statute will operate to save this because Ann is a child of Mary and Ann left issue (her two children). Thus, Ann's two children will take the CD #1.

Who is entitled to CD #2? Probably the people who take under Mary's trust, discussed below, will take CD #2. At issue is what happens to a CD when the named beneficiary, designated before a divorce, is a former husband. Before giving the client a definite answer I would research the Non probate Transfer Law of Missouri since that governs the CD. However, the law probably operates to take Bob Smith out of the beneficiary. Here, the CD was designated to Bob while Bob & Mary were married. They subsequently divorced. Mary did not change the CD beneficiary. The law operates to construe the designate as if Bob predeceased Mary. Hence, Sally Brown would take. However, Sally died the day after Mary. As stated above, the Simultaneous Death Act operates to change this as if Sally had predeceased Mary. As there is no other contingency, the CD goes to Mary's probate estate, which was a pour over will to Mary's trust. Pour-over wills are valid. Hence, the taker of CD #2 will be the takers of the trust. Note: the trust's designation of who takes the CD's does not control. The CD's transfer by the contract between Mary & the bank Who is entitled to Mary's Trust? Ann and Tracy will take equal shares of the trust. Ann's portion will be distributed via Ann's will or intestacy.

Bob does not take under the trust because Mary's trust was created while Bob and Mary were still married. They subsequently divorced. Under Missouri law, the trust is construed as if Bob predeceased Mary.

Mary's descendant's take, per stirpes. Tracy is still alive so she will take. The issue is what happens to Ann's share since she died within a day of Mary. Because, under the express terms of the trust Ann took if she survived Mary, the Simultaneous Death Act does not apply. Since there is evidence that Ann survived for a day after Mary, Ann takes a share. Ann's share will be distributed by Ann's will or the laws of intestacy. Thus, Ann will take 50% and Tracy will take 50% of the trust. Per stirpes means each person at the same generation level takes equally.

07-06 MO Essay 2 Example 2

1) Yes, the trust estate was properly funded by the pour-over clause in Mary's will. In order for the res requirement to be satisfied, the res must be definite and ascertainable. Here, Mary's trust was funded by a pour-over clause in her will leaving her entire estate to the trust. Normally, an expectancy is not sufficient to fund a trust. However, in the case of a pour-over clause, the expectancy becomes definite because the testator's entire estate is used to fund the trust. Here, all of Mary's property funded the trust. All of her present and future property is definite and ascertainable because of the doctrine of independent legal significance, which says that lifetime acts that have an independent significance can affect the disposition of estate assets upon the testator's death. The doctrine has validated such bequests as "all of the belongings in my house."

2)a) CD #1 will be distributed to Ann's two children equally. Under Missouri wills law, a contractual disposition of property outside of probate, such as a life insurance beneficiary designation or beneficiary designation on a CD, will control over a disposition of such property made in a trust or will. Here, Sally's estate will certainly argue that Mary's intent was to have Sally take through the trust because the trust was completed closer to her death than the CD, POD designation, but this argument will probably fail because the contract controls (except in the Totten Trust situation - not relevant here). Sally's estate may also argue that the POD (Pay on Death) designation on the CD to Ann lapsed when Ann did not survive Mary by more than 120 hours. This is accurate, however, because Ann was Mary's daughter, the anti-lapse statute acts to save the bequest and transfer interest in the CD to Ann's children (issue) equally.

B) CD #2 goes to Sally Brown's estate through the trust. Under Missouri will's law, a gift to an ex-spouse lapses as to that ex-spouse. Here, there is some question as to whether that should apply to a contractual designation on a CD. The anti-lapse statute applies to POD designations, so the rule against ex-spouses taking as a beneficiary should also apply. The gift to an ex-spouse is treated as though the ex-spouse predeceased the Testator. In this case, Bob Smith's gift will lapse to Sally Brown. However, Sally Brown did not survive Mary either under the 120 day rule so her gift through the POD designation lapses also. Neither gift is saved by the anti-lapse statute because neither Bob nor Sally is considered a relative of Mary's. CD #2 thus goes into Mary's entire estate and through the pour-over clause is passed to the trust. The trust calls for "all CDs to be distributed to Sally Brown, if she survives me." The "if she survives me language makes the 120 day rule inapplicable because Sally did in fact survive Mary. CD #2 is passed to Sally's estate.

C) Tracy receives half of Mary's residuary estate and Ann's estate will receive $\frac{1}{2}$ of the estate. As discussed above, Bob's gift lapses because of the divorce. Mary's "descendants" are Ann & Tracy according to the facts because they are her daughters. Ann will be treated as surviving Mary and she will take before her daughters, so Ann's estate will take $\frac{1}{2}$ of Mary's residuary estate, and Tracy will take $\frac{1}{2}$ of her residuary estate.

07-06 MO Essay 2 Example 3

1. The Mary Smith Trust was validly funded. In order to form a trust that is valid, a settlor must deliver trust property ("the res") to a trustee with duties to be administered for the benefit of certain beneficiaries. Here, the res requirement was satisfied by including with the other trust documents the policy of insurance, properly designated to the trust. The fact that the insurance funds will come into the trust later is irrelevant. A life insurance policy like the one involved here can be the res of a valid trust.

2. A) Ann's two children are entitled to CD #1. Under the Non probate Transfer Law, a POD designation controls over language in a will or trust instrument. Therefore, Mary Smith's daughter Ann is entitled to CD #1 over Sally Brown, because the POD designation controls over the trust instrument. However, Missouri also has a 120 hour survival statute that states that where a donee fails to survive the decedent by 120 hours, she is deemed to have predeceased. Application of this rule would cause the gift to lapse. The gift is saved, however, by application of the Missouri anti-lapse statute.

This statute provides that where a gift to a close family member would otherwise lapse because the donee has predeceased, the gift will go instead to the donee's issue, if any. Here, Ann was survived by her two children. They will therefore take CD #1 by operation of the Missouri anti-lapse statute.

B) CD #2 will be distributed to Sally Brown's estate. As stated in subpart (a), a POD designation controls over trust language. CD #2 would therefore go to Bob Smith under normal circumstances. However, a gift in a will or trust to a spouse who then becomes divorced from the donor will fail. The divorced spouse is deemed to have predeceased the donor. CD #2 would then go to Sally Brown, per the terms of the POD. However, as discussed above, Sally has also been deemed to have predeceased by operation of the 120 hour rule. The CD thus becomes part of the decedent's probate estate, the POD designations having lapsed. The pour-over will directs that all of Mary's property go to the trust. The trust, in turn, directs that all CD's be distributed to Sally Brown, "if she survives me." This language takes the gift out of the operation of the 120 hour rule. Therefore, because Sally survived Mary by one day, her estate will be entitled to the proceeds of CD #2.

C) The trust instrument directs that the remainder of Mary's estate to her husband, if he survives, or to Mary's descendant's per stirpes. As discussed above, Bob was deemed to have predeceased Mary upon their divorce. The gift to Bob therefore fails. The remainder of Mary's estate is then directed to be given to her surviving descendants, per stirpes. This requires that the remainder of the estate be split into two shares between Mary's daughters Tracy and Ann, with Tracy taking her full 1/2 share because she survived and Ann's two daughters each taking 1/4 share of the remainder because they survived their Mother Ann.

7-06 MO Essay 3 Example 1

3)

1. Procedural Requirements

There are several procedural requirements that the Commission must follow in order to properly promulgate a new rule. As noted, the commission should first file a notice of proposed rulemaking with the Secretary of State of Missouri. With the proposed rule, the agency must show based on substantial evidence that the rule is necessary to further the commission's purpose under its organic act, and that the cost of implementing the rule was taken into account when considering the need for the rule.

Next, the commission must certify whether the new rule will constitute a taking of private property for which just compensation would be required.

The commission must have proper notice of the proposed rule published in the Missouri Register that will give:

- The time and place to receive comments OR

- The time and place of a hearing (if any)

- The statutory authority under which the rule is being promulgated

- The complete text of the proposed rule

- The reason the authority believes the rule is necessary

- A computation of the expected cost of implementing the new rule.

Following the notice, the commission must allow for either thirty days to receive comments on the new rule or allow for a legislative style hearing on the new rule.

After the thirty days for comments or thirty days following the legislative hearing, the commission has 90 days to promulgate a final rule. This should be done by sending a revised version of the rule with complete text to the Secretary of State. If comments were received, the commission must respond to any relevant comments. If there was a legislative hearing, the commission must submit the opposing arguments made against the rule at the hearing. Furthermore, if the cost of the compliance with the final rule has changed by more than 10%, the commission must submit a new expected cost of compliance for the final rule.

The Rule must be published in the Missouri Code of Regulations, and cannot take effect

until it has been published for at least 30 days.

An additional hurdle before the rule can be in effect is that the committee must have submitted the rule for approval to the Joint Committee on Administrative Rules. If the JCAR does not approve the rule, the rule can not go into effect for 30 legislative days, to give the legislature time to disapprove the rule. The legislature has disapproved a rule if it passes legislation that disapproves the rule.

2. Evidentiary requirements for a new rule?

There is an evidentiary requirement that there be substantial evidence for the need of a proposed rule. The substantial evidence test requires that there be reasonable evidence in light of the whole record. The committee must have substantial evidence to show that the rule is necessary to address problems that fall under the committee's authority. That means that since the committee is responsible for "assuring that the companies engaged in the mining and distribution of the material do so in a manner that does not endanger the safety of either the customers or the employees of the respective companies," the commission must show that there is substantial evidence that the rule will fulfill this purpose.

There is also the requirement that the commission submit the proposed cost of compliance with the new rule, and that the compliance cost is reasonable in light of the effect of the rule.

3. Argument for all bauxite companies?

The best argument for all bauxite companies is that the rule is not based on substantial evidence that it is necessary throughout the industry. It appears that the commission is proposing a regulation that will affect the entire industry but that is only designed to remedy problems of one company, Old Corp. Specifically, it should be noted that none of the other companies engaged in the distribution and/or mining of bauxite has engaged in any unsafe conduct or experienced any accidents. This would support the companies' argument that in light of evidence based on the whole record, the rule is not necessary to address a problem that is widespread

throughout the bauxite distribution and/or mining industry. Instead, the companies should argue that the commission should take specific action in either a contested or noncontested case against Old Corp. individually. The other companies should not have to follow new regulations that are unnecessary to deal with safety problems that were not occurring.

4. Administrative Relief for the customers and employees of Old Corp?

The customers and employees of Old Corp should file a safety complaint with the Bauxite Commission. This would allow the Commission to begin an investigation of whether Old Corp is behaving improperly. The commission has the authority to use a contested hearing that would be a formal trial type procedure to determine whether Old Corp has violated safety standards or a noncontested hearing that would not involve formal trial type procedure. At the exhaustion of administrative remedies against Old Corp -- after the agency has issued a final decision about the conduct of Old Corp, customers and employees of Old Corp would still have standing to appeal the actions of Old Corp to a circuit court. The customers and employees would have standing because the decision of the agency was final, the customers and employees have been injured by the actions of Old Corp, they are within the zone of people the commission and statute is designed to protect, and if the agency did not adequately address their injuries, the circuit court would be able to provide a remedy to address the injuries that have been suffered by the customers and employees of Old Corp.

7-06 MO Essay 3 Example 2

Question 3

1. What procedural requirements must be met before the Commission may finally adopt the proposed rule?

The procedures by which rules are adopted by agencies in the State of Missouri is governed by MAPA. The requirements of the Act provide that agencies are to adopt rules under the "notice and comment" procedure unless formal rulemaking is required. Assuming in this case that formal rulemaking is not required, the necessary procedures that must be met before the rule may be finally adopted are as follows:

(1) As noted in the question, the agency must file notice of the rulemaking with the Secretary of State; however, they **MUST ALSO FILE A COPY OF THE PETITION** of the proposed rulemaking with JCAR and the Committee of Administration. (2) Once notice of the petition and information regarding what steps with respect to the rule the agency intends to take, it must next determine whether the proposed rule is **BOTH NECESSARY** to achieve the agency's delegated purposes or the purpose indicated in their enabling statute and that there is **SUBSTANTIAL EVIDENCE** indicating that the rule is necessary. This means that the agency must find that the rule will achieve an interest that is within their powers (not ultra vires based on their enabling act) and must also include evidence, including information regarding the cost of compliance and administration of the rule, that the rule will be feasible. (3) Next, the agency must certify to the Secretary of State as to whether the application of the rule will or will not result in a taking or partial taking as defined under the US Constitution. (4) Next, the agency must publish in the MO REGS and also provide a copy to the Secretary of State of the **NOTICE OF RULEMAKING**. This notice must include information regarding the time for comments (and where they should be submitted to), the time/date/location of a hearing if one is going to be provided, the full text of the proposed rule, explanations and reasons for the rule, the legal basis

for the rule, and FISCAL NOTES regarding the public and private cost of compliance with the rule. The comment period must be at least 30 days and the notice must be in the MO REGS for at least 90 days before the next step. (5) The final step is to either PROMULGATE THE RULE OR NOT. This must occur within 90 days of the close of the comment period, or the date of the hearing if one is provided. This must also be published in the MO REGS and must include a summary of the rule, the text of any changes made to the rule and explanations for them, the legal basis for the rule, and additional fiscal notes if the cost has been altered more than 10% due to the changes.

2. Are there evidentiary requirements?

There are evidentiary requirements associated with the adoption of a rule. In Missouri, the agency must determine that a rule is necessary and supported by substantial evidence before it adopts a rule. This finding must be based on evidentiary information--including what the intended application of the rule is, cost analysis as to how much it will cost for private compliance, and a public cost analysis as to how much it will cost the government to ensure compliance and full administration. This is a REQUIREMENT and a rule cannot be adopted without this finding.

With respect to the notice of rulemaking, FISCAL NOTES must be included in the MO REGS notice publication. The agency must provide financial information as to the estimated total cost of compliance with the rule--both for private citizens and companies and the public cost. This information must be included in the MO REGS publication of notice so that the public has an idea of what the rule will involve and will have an adequate opportunity to make informed comments based on that information.

3. What is the best argument to all bauxite companies for avoiding application?

The other companies could argue that the rule is not necessary and is overinclusive

(because it is meant to deal with the problems of only one company) and could also argue that compliance with the rule constitutes a taking because the cost of compliance is so high as to render their businesses virtually without value or with severely reduced value.

Government rules generally must be related to a legitimate state interest and can sometimes be attacked on the basis that the rule was adopted with a discriminatory intent or that its application is discriminatory. In this case, the rule is being adopted to deal with the problems of ONLY ONE COMPANY. It is only the Old Corp that is the problem. The rule is being adopted merely to address the safety issues posed by the Old Corporation. Its purpose is discriminatory--in that all businesses are being "attacked" because of one business' problems--and its effect is discriminatory. The effect is to require additional and perhaps unnecessary compliance by ALL COMPANIES when the problem is just one company. The other companies could certainly argue that these specific rules that will likely cause lots of cost for purposes of compliance IS NOT NECESSARY TO ADDRESS THE CURRENT PROBLEM. The problem that the agency is faced with is safety issues of one corporation. Not all corporations should be affected when the vast majority of the industry is adequately complying with the safety regulations and is not having any problems with injuries to employees and/or customers.

The other companies might also argue that COMPLIANCE with the rules is so expensive as to render their businesses partially or almost wholly valueless. If they could successfully provide evidence to that effect, they might have a valid argument that they should be compensated if they are going to be forced to comply.

4. What relief is available to the customers and employees of Old Corporation to require compliance?

The individuals who were HARMED BY THE NONCOMPLIANCE WITH THE RULE COULD BRING CASES TO THE AGENCY FOR ADJUDICATION. Depending on what the statute provides, those cases might be contested (if a formal trial-type procedure is required), or uncontested. Where these cases were uncontested, the agency would have to decide whether a

formal trial type process was required under the US CONSTITUTION. Where a case affects individuals' personal property rights or liberty interests, constitutional notions of due process indicate that some type of notice/hearing is required. This may be a situation where the INDIVIDUALS who have been adversely affected by the company would be able to get a hearing if their property rights have been harmed. The agency would make the decision according to MAPA or case-precedent procedures and would then decide what relief for the customers or employees was appropriate.

7-06 MO Essay 3 Example 3

3)

1) To adopt these rules, the Bauxite Commission (BC) must comply with the rule making procedures of the Missouri Administrative Procedures Act (MoAPA). Under MOAPA, to promulgate a rule the administrative agency must show that the rule is supported by substantial evidence on the record and is necessary by evaluating available empirical data and cost. Additionally, before submitting the rule to the Secretary of State and the Joint Commission on Administrative Rules (JCAR), a takings analysis must be conducted. Once these requirements are met, the proposed rule may then be submitted to the Secretary of State and JCAR. The rule must also be submitted to the Missouri register for publication as a proposed rule. The publication must include the reason for the rule, the legal authority for it, the text of the rule and the costs of the rule both privately and publically to allow for public comment, and if required a legislative style hearing. This process must be given of 30 days. At the completion of the hearing, the agency has 90 days in which to either adopt or reject the rule. The agency must also give a copy of the final rule 30 days prior to giving it to the secretary of state to JCAR. JCAR can hold the rule in abeyance for 30 days and may invalidate the law, if it chooses by full resolution to avoid constitutional issues concerning separation of powers. When the final rule is approved by all of these processes, it must then be republished in the Missouri Register with the full text of the law and reasons for adopting or denying comments and a new cost analysis if it has changed by more than 10 %. The rule will not be effective for 30 more days.

2) To adopt a new rule, as mentioned above, it must be supported by substantial evidence and be necessary. Whether it is necessary is determined by looking at the available empirical data and cost effectiveness.

3) The best argument available to all bauxite companies, other than Old Corp, for avoiding the application of the proposed new rules to them is that the rule was not necessary or supported by substantial evidence. As mentioned earlier, whether a rule is necessary is determined by looking at the empirical data and cost efficiency. The empirical data does not justify the rule. According to the facts in this case, the problems were all caused by one corporation, Old Corp. None of the

other companies, according to the facts, have engaged in any unsafe conduct or experienced any accidents involving employees, customers or the public. Additionally, the rule may not be cost effective to all the companies other than Old Corp because it will cost the public money to enforce the rule and it will cost the other corps money to implement the rule. The cost to the corps and public is not justified to ensure safety since the corps (other than Old Corp) are already safe. The statutory authority for the BC gives it authority to assure companies that are mining do so in a manner that does not endanger safety. This authority allows the Commission to make all necessary rules to fulfill this duty. However, since none of the other corporations are endangering safety, the commission may be exceeding its authority.

4) An avenue of relief available to customers and employees of Old Corp to require Old Corp's compliance with safety would include filing a complaint with BC claiming that they are aggrieved parties due to the failure of the agency to enforce its statutory mandate to mine in a safe manner. The agency would then be required to either grant or deny relief to the employees or customers. If the agency fails to grant relief, the employees and customers may argue that the failure to follow BC's statutory mandate has resulted in a loss of property and that under due process rules the employees/customers are entitled to hearing. If this method is used, the petition must be filed in Cole county or the county of the plaintiff's residence. The customers/ employees would be required to fully exhaust all administrative processes before seeking appeal to the trial court.

7-06 MO Essay 4 Example 1

4)

1. I should file an answer along with a motion to dismiss for failure to state a claim upon which relief can be granted within 30 days of service of process on Dr. Smith. In this pleading I would allege, with particularity, that the statute of limitations had run. Under the Missouri Rules of Civil Procedure, pleadings in Missouri must be made with particularity. Therefore, in contending that the statute of limitations had run, I would state, (1) that the statute of limitations for a wrongful death cause of action is three years (2) that the statute begins running on the death of the decedent (3) that Ms. Jones, the decedent, died on December 31, 2002 (4) That the statute of limitations has not been tolled at any time, giving details of this and (5) That the claim was filed on January 1, 2006, and that is when the statute of limitations stopped running, in excess of three years after the decedent's death. Therefore the court should dismiss the case.

2. In general, appellate review is only available upon a final judgment. A final judgment is one that disposes of all claims, issues, and motions before the court, resolving the rights and liabilities of the parties. A denial of a motion to dismiss is not a final judgment.

a. However, I could file a writ of prohibition in the appellate court.

b. A writ of prohibition is an extraordinary remedial measure that is available where the trial court is clearly beyond its jurisdiction, its course of action is clearly erroneous and beyond its scope of power, or where irreparable damage will result without appellate review.

c. In this pleading I would have to assert that the trial court is clearly erroneous in denying the motion and that forcing Dr. Smith to defend the motion would cause irreparable damage to his reputation as a doctor or some other injury that would not be remedied by monetary damages.

3. Three discovery devices I could use are depositions, interrogatories and requests for admission.

A deposition is an oral or written examination of a witness or party under oath prior to a trial setting. Both parties must be present or have notice of the deposition, it must be on the record and must be verified and signed by the witness.

An interrogatory is a discovery device whereby a party may send the other party written requests for admissions or denials to factual contentions, or even opinions. Interrogatories are also under oath and must be answered by the party in receipt with admissions or denials.

Requests for admissions are discovery devices where each party asks for verification of the accurateness of evidence in the hands of the party.

4. I can file a motion for summary judgment.

b. The standard for obtaining relief is that a party should prevail if there is no genuine dispute of material fact such that the moving party should prevail as a matter of law.

c. I should allege that there is no dispute as to when Ms. Jones died as it had been admitted by the other party in their discovery information, and I would attach affidavits to the motion that make these admissions. I would also enclose a memorandum of law explaining to the court why Dr. Smith should prevail as a matter of law giving support to the allegations. Finally, I would enclose a statement of undisputed facts with references to the record set forth in separate paragraphs with each paragraph alleging a different fact.

5. (1) A notice of appeal is to be filed with the clerk of the trial court, not the appellate court; (2) It must be accompanied by a \$50 docket fee; (3) The notice of appeal must be made within 10 days of a final judgment, which occurs 30 days after the court enters the judgment as long as there are no authorized post-trial motions, which there don't appear to be here, so notice of appeal would only be appropriate 40 days after April 1, long before June 1; (4) A notice of appeal must include the names of the parties, the judgment entered, the date, and the relief requested, this only includes the names of the parties (5) All pleadings, motions and documents must be signed by

the attorney or pro se defendant and when sent in electronically must be accompanied by certification that the signature is authentic (6) The plaintiff must also have notified the defendant of the impending appeal, which he does not seem to have done here.

7-06 MO Essay 4 Example 2

4)

1. A Motion to Dismiss should immediately be filed asserting that the Statute of Limitations applicable to a wrongful death suit is three years and therefore the case is barred as being untimely. First, the specific statute of limitations under which the motion is being filed must be asserted. Then, you must assert the facts sufficient to support the finding that the statute of limitations was not met. In this case, we must assert that the petition was filed January 1, 2006 and the date of Paula Jones' death was December 31, 2002 clearly beyond the three year statute of limitations for a wrongful death suit, which is three years. You may also assert the Statute of limitations as an affirmative defense in the Answer, but that will not entitle you to an immediate ruling.

2. Yes, you can seek immediate appellate review in the manner of a Writ of Prohibition. Although appellate review is generally only available when a final Judgment or order is entered, there are certain exceptions when you seek appellate review for an interlocutory order such as this Motion to Dismiss when you believe the trial court is acting outside his jurisdictional authority when continuing with a case. Interlocutory orders are orders that are generally not final for appeal purposes, but entered during the pendency of a case.

a. You should file a Writ of Prohibition.

b. The Petition should be filed directly in the Court of Appeals which has appellate jurisdiction over the Circuit Court which denied the Motion with a copy of the Petition being served upon the Court. The actual parties in a writ of prohibition are the person seeking relief and the trial court judge who is alleged to have went outside his jurisdictional authority.

c. You should allege in the Writ that the Circuit Court should be barred from proceeding with the case due to lack of Jurisdiction. There is no dispute of fact and on its face the Petition clearly shows that the cause of action asserted by the Plaintiff is barred by the Statute of Limitations.

3. 3 types of discovery provided for in the Missouri Rules of Civil Procedure I can utilize to

determine when Paula was treated by Dr. Smith and when she died are: 1) Requests for Discovery (Interrogatories and Requests for Production) 2) Requests for Admissions and 3) Depositions.

1) Requests for Discovery are forwarded in the form of interrogatories and requests for production in which both the information concerning Paula's treatment by Dr. Smith and when she died can be asked. Because this information is reasonably necessary to lead to the discovery of admissible evidence they will be proper in scope and form. In the requests for production of documents we can request the death certificate and any other documents the estate has which are pertinent to the litigation.

2) Requests for Admissions may be used since the petition alleges that Paula died on December 31, 2002. The request would affirm this allegation. Also, once the dates for treatment were established the requests for admissions would be used to establish this fact and narrow the issues at trial.

3) A deposition of any available witnesses could be used, although since Ms. Jones is deceased I would have to have additional information to determine who would be a proper witness to depose, perhaps the coroner who could establish the time of death.

4. a) Motion for Summary Judgment

b) The standard for obtaining relief under a Motion for Summary Judgment is there are no disputed material facts and Defendant is entitled to relief as a matter of law.

c. I will allege that the Defendant, Dr. Smith is entitled to judgment as a matter of law due to the statute of limitations for a wrongful death suit not being complied with. Sufficient facts including the date of death and the date the Petition was filed should be included in the separately numbered paragraphs which delineate the undisputed facts which entitled Defendant to relief. Attached to the Motion should be the statement of undisputed facts, a memorandum in support of the Summary Judgment, affidavits to establish any facts not on the record and any portions of the pleadings which are pertinent to establishing the relevant facts. All statements of

facts in the separately numbered paragraphs must refer to the pleadings or other documents (including depositions by line and page) which establish the fact as true. A movant for Summary judgment cannot rely solely on his own pleadings to establish all undisputed facts.

5. 1. First of all, the alleged notice of appeal is untimely filed. The final judgment was entered on April 1, 2006 and the notice of appeal must be filed within ten days of the date that the Judgment becomes final. The Judgment becomes final thirty days after the entry of the final Judgment meaning that the Notice of Appeal must be filed within 40 days of the date of the final judgment which was April 1, 2006. The notice was filed untimely

2. The notice was filed in the wrong place. A notice of appeal must be filed in the Circuit Court in which the Judgment was entered ten days of the date of the final judgment. In this case, the notice was faxed to the Court of Appeals in error.

3. The notice does not include the caption of the case. In order to be complete a notice of appeal must include the full caption of the case including the full names of each party, the name of the Circuit Court from which the appeal is being brought and the Circuit Court case number.

4. The notice does not have a copy of the Judgment from which the appeal is being sought attached. A copy of the Judgment from which the appeal is being sought must be attached to the notice of appeal which includes the name of the rendering Judge, the date of the Judgment and a summary of the contents of the Judgment.

5. The notice does not state the grounds for appeal. In order to be a valid notice of appeal the appeal must state the grounds by which the Appellant is seeking relief.

6. The notice is not accompanied by the appropriate filing fee. In order to be accepted by the Circuit Court and sent to the Court of Appeals, the notice of appeal must be accompanied by the required filing fee which at this time I believe is \$50 or \$75. When filing it with the Circuit Court you must verify that the proper filing fee is being paid.

7-06 MO Essay 4 Example 3

4)

1. The proper pleading would be a motion to dismiss for failure to meet the statute of limitations (SOL). Additionally, failure to meet the SOL could be raised in the answer as an affirmative defense. If raised in the answer, it must be pled specifically. In this pleading, it would be necessary to allege the particular statute of limitations at issue and facts showing that it has run. The particular SOL for wrongful death actions is three years. Thus, it would be necessary to allege this statute. Additionally, it would be necessary to allege when the SOL began to run. Generally, the SOL begins to run when the cause of action accrues, and the cause of action accrues when damage is sustained and capable of ascertainment. It is the fact, and not the extent, of damage, that must be capable of ascertainment. This is a reasonable person standard. Damages for a wrongful death case are capable of ascertainment upon death of the decedent. Thus, the statute of limitations would have started to run on December 31, 2002. I would further allege that the case was not filed until January 1, 2006. This is more than three years after the cause of action accrued and thus the case was not filed in a timely manner. Furthermore, if Plaintiff alleged in tolling issues in the complaint, it would be necessary to respond to those.

2. Generally, in order to obtain appellate relief, the court must have entered a final judgment and the party seeking appeal must be an aggrieved party. A judgment is final when it disposes of all issues between the parties as to all claims. In this case, since the court denied the motion there are still issues before the court with respect to the parties. Thus, the judgment is not final and under the general rule no appeal would be permitted. However, in this case it might be possible for Dr. Smith to get a writ of prohibition. Prohibitory writs are extraordinary remedies and should only be granted in extraordinary circumstances. They are appropriate in situations where the court can't act because it either lacks personal or subject matter jurisdiction, where the court has jurisdiction but lacks the power to act as contemplated, and where irreparable harm would result absent some form of immediate relief. Dr. Smith would want to argue that the court has no jurisdiction over the claim because the SOL run and that he would be irreparably harmed by having to expend money for a suit that should be time barred.

The petition for the writ should be filed with the lowest appellate court that could grant

the relief. In this case it would be the Missouri Court of Appeals; however, the MO Rules of civil procedure set forth specific situations where the petition must be filed with the Supreme Court. This isn't one of them. The court of appeals will either grant the writ and the case will be set for oral argument or the writ will be denied and the case can then be appealed to the Supreme Court.

The petition for the writ should allege that the SOL has run and thus the Court lacks jurisdiction over the case and power to act as contemplated. Additionally, the pleading should allege that irreparable harm will result to Dr. Smith if he is forced to defend a suit that is time barred. He will expend time and money defending suit. This would be unnecessary if the case were dismissed.

3. First it would be possible to file a request for production of documents. Requests for production are a form of written discovery where a party makes specific request to the other side to produce documents or other evidence that might be relevant to the case. The other party must answer in a timely fashion and in good faith. The requests do not have to request discoverable evidence but must reasonably lead to the discovery of admissible evidence. In this case the discovery request could include requests for any medical records or certificates of death in the presence of David Jones.

Second, it would be possible to file requests for admissions. Request for admissions are another form of written discovery that pose questions to the other party and require that party to either admit or deny the statement. Any statement admitted may be admitted into evidence as an admission of a party opponent. Here, the requests could seek David's knowledge as to when Paul a was treated and when she died.

Finally, it would be possible to conduct depositions. Depositions are a form of oral discovery and consist of examination of an opposing party or other witnesses under oath. The deposition may be used for any purpose at trial if the other party had notice of the depo and was present at it. Here, it would be prudent to depose David about his knowledge of the facts surrounding paul's treatment and death.

4. a. The proper pleading would be a motion for summary judgment.

b. The proper standard as set forth in ITT Commercial Finance corp is that summary judgment (SJ) is appropriate where there is no dispute about a genuine issue of material fact such that judgment is appropriate as a matter of law. The moving party defendant must show that there is no dispute that the Paula cannot meet an element of the claim or that there is no dispute that defendant can meet every element of an affirmative defense. The burden then shifts for the non-moving plaintiff to show that a genuine dispute exists as to whether she can meet her claim, or that a genuine dispute exists as to whether defendant can meet every element of the affirmative defense.

c. The pleading should allege facts in separately number paragraphs. In this case, the facts should focus on the date of treatment, the date of death, and the date the case was filed to demonstrate that the SOL has run. Each fact should specifically reference evidence in the record and the motion should be accompanied by affidavits based on personal knowledge and otherwise admissible or other admissible evidence.

5. First the notice is untimely. The notice of appeal must be filed within 10 days from the date the judgment becomes final. The judgment becomes final 30 days from when it is entered if no post trial motions are filed. If authorized post trial motions are filed the judgment is final on the date the last post trial motion is ruled on or 30 days after judgment entry which ever is later, or if the motions are not ruled on 90 days from the date the last post trial motion was filed. No motions were filed in this case after entry of judgment on April 1, 2006. Thus the notice of appeal was due 10 days from May 1, 2006. As it wasn't filed until June it is untimely.

Second, the notice was faxed and not filed. The notice of appeal must be filed and is a pleading before the court. The fax was insufficient.

Third, the notice was sent to the appellate court rather than the trial court. The notice of appeal is filed before the trial court rather than the appellate court. Thus, the notice should have been filed in the Circuit court from which the judgment emanated.

Fourth, the notice doesn't designate the parties or their attorneys as required by the Missouri Rules of Civil Procedure.

Fifth, the Notice doesn't designate the judge that entered the order.

Sixth, the Notice doesn't specify the judgment appealed from with sufficient particularity.