February 2015 Questions and Sample Answers

TORTS

CONSTITUTIONAL LAW

EVIDENCE

REAL PROPERTY

CRIMINAL

CIVIL PROCEDURE

CONTRACTS

Question 1 - Torts

Tony is a farmer. He grows vegetables and produce, and sells his products at a roadside stand 10 miles from his farm. Tony hires Kim to drive the products from the farm to the roadside stand. Tony has known Kim for 20 years as a fellow member of the 4-H Club, but is unaware of her driving record.

The shortest distance between the farm and the roadside stand is a residential road known as State Street, which has a posted 25 miles per hour speed limit. Kim, whose driving record contains numerous speeding tickets, routinely drives more than 40 miles per hour on State Street. On the day in question, however, Kim is driving the speed limit when her car strikes Barry, a pedestrian, badly injuring him.

Vera, a passerby, calls for an ambulance. Pete, the ambulance driver, would normally be on duty, but he is nowhere to be found, so Vera’s call goes unanswered. When Pete is off duty, he is required to arrange for a replacement driver.
Vera waits at the scene for an hour, hoping the ambulance would arrive. Finally, fearing that the delay would jeopardize Barry even further, Vera begins efforts to staunch his heavy bleeding.

Two more hours pass before the ambulance arrives with a replacement driver. By then, Barry is pronounced dead at the scene.

Mike publishes a weekly newsletter with limited circulation, in which he reports on community events. In the first publication after the accident, Mike writes that “police sources,” whom he does not name, blame the accident on Barry. Specifically, Mike quotes his sources as saying that Barry “appeared to have been drunk at the time.”

Subsequent investigation reveals the following:

A) Pete, the missing ambulance driver, was at home rendering aid to his pregnant wife, who had gone into premature labor. In the excitement, he had forgotten to arrange for a substitute driver;

B) An autopsy revealed, first, that Vera’s efforts to assist Barry had actually worsened his injuries; second, that Barry’s life would have been saved had the ambulance arrived in a timely fashion; and third, that there was no alcohol found in Barry’s system; and

C) Witnesses to the accident report that Barry had darted from between parked cars into the path of Kim’s vehicle.

Barry’s family consults you, a noted attorney, for legal advice and to outline the available causes of action against each potential defendant, as well as each defendant’s anticipated defenses and cross claims. Confine the memorandum to persons named in the fact pattern.

PREPARE THE MEMORANDUM

Sample Answer 1A:

From: Law office
Re: Barry's Causes of Action

Dear Barry's Estate,

I would first like say I am very sorry for your loss and will use my most diligent efforts to aid your family during this tough time to bring those responsible to justice for Barry's unfortunate passing. There are 4 potential defendants that Barry's estate can pursue legal claims against, all with applicable defenses, which may or may not hold up in court. As for the woman, Kim, who hit Barry, she can be liable for negligence or battery, which can possibly be imputed onto her employer, the farmer. The woman Vera, who attempted to save, but actually hindered Barry's chance of survival may also be liable for negligence, as well as the ambulance driver who failed to rescue barry and did not have a replacement driver in case of emergency. I will take all of the applicable claims and defenses against each party, in turn.

**Barry's Estate v. Kim for wrongful death based upon negligence and/or battery**

First, although not personally as his family members, but through the representative of Barry's estate, on Barry's behalf, the representative will be able to bring a claim of wrongful death for pecuniary damages. In a wrongful death action the estate has the burden of proof to a preponderance of the evidence (like all civil actions) to show that the people liable have in fact caused Barry's death. The basis for the wrongful death action is that anothers actions caused the death of the decedent (barry) and as a result Barry's estate shold be able to recover for his untimely passing. Here, when Kim hit Barry with her car, if it was her intentions to do so she will be liable. A person commits a battery when the intend to cause harmful or unwarranted contact with anothers person, and in fact cause that unwarranted or harmful contact, and damages. Here, Kim did hit Barry with her car, which in fact caused him unwanted and harmful bodily contact being that he would not have wanted to get struck by a car. However, there is no evidence to show that Kim in any way wanted to strike barry with her car, possibly shown by the fact that a witness saw Barry dodge between parked cars into the way of kims car. Thus, kim is highly unlikely liable for battery. Similarly, an assault is a persons imminent apprehension of an immediate harmful or offensive contact, which was caused with intent. Likely, Kim will not be liable for assault.

However, Kim will likely be liable for negligence. Negligence is when a person breaches their duty of care owed to others which causes harm and damages. The four elements consists of: (1) duty; (2) breach of duty; (3) causation [actual/proximate]; & harm/damages. A person owes a duty to persons to act as a reasonably prudent person under the same or similar circumstances. When a person does not act in such a manner they have breached their duty of care. Further, there must be a casual link between the tortfeasors (Kims) conduct and the harm inflicted upon Barry. The casual link must be the actual, known as the "but for" cause of the harm, and the proximate cause of the harm (ie. the acts by the person who breached their duty of care could foresee that such breach would result in the harm caused) that resulted in Barry"s injuries/death. Kim owed a duty to other people on the road that she would drive in a responsible manner similar to a reasonable person under the same or similar circumstances. When kim was driving on state street she was possibly going the speed limit at 25 mph, but that alone does not show she acted as a reasonable person. A reasonable person in kims situation would have been paying
attention to the road, focus on where she was going and would have been able to stop her car before or avoid hitting Barry altogether. The striking of Barry with Kim's car was the actual and proximate cause. But for Kim hitting Barry with her car, he would not have been injured and laying on the road bleeding to death. It is also the proximate cause of the harm being that it is a foreseeable happening that striking someone with your car will lead to their death or a severe injury. Further, harm did in fact result from the car hitting Barry as he was injured, bleeding and eventually died. Thus, there is prima facie evidence of negligence on Kim's part to support a cause of action for wrongful death and negligence on behalf of Barry's estate against Kim.

Kims Defenses:

Depending on the jurisdiction in which you bring your case, and the laws of that state, Kim's defenses will vary. Accordingly, if it is a contributory negligence jurisdiction, any negligence on behalf of the plaintiff will completely bar their claim for recovery, unless the plaintiff can show that the defendant had the last clear chance to prevent the injury to the plaintiff. If the jurisdiction follows a modified comparative negligence standard then as long as the plaintiff is not more negligent than the defendant they will be able to recover. For a pure comparative negligence jurisdiction, even if the plaintiff is 99% at fault, the negligent defendant will still be liable for 1% of the damages the plaintiff has suffered.

Here, an eye witness saw Barry jump out and dodge between parked cars leading to him being struck by Kim's car. Kim can attempt to claim negligence on Barry's behalf (rules for negligence above) being that a reasonable prudent person would not have been dodging through parked cars and running into traffic which would make him in breach of his duty of care, making him a party at fault whom caused his own damages. If the jurisdiction follows the rules of contributory negligence, Kim will be able to try to defend based upon Barry's negligence which would completely bar his claim, unless Barry's estate can show that Kim had the last clear chance of avoiding the accident. If it is modified or pure comparative fault jurisdiction Barry will still be able to recover as long as he was not more at fault then Kim (modified) or even if he was 99% at fault (pure). Further, Kim can claim that Vera the passerby who tried to rescue Barry and actually harmed him, broke the causal chain that connected her actions to Barry's death, which she can claim was an intervening superseding cause to her negligence. In fact as to the medical examiners report (which would be admissible in court) shows that Vera's action lead to his death as well. However, under the theory of proximate cause, it is foreseeable that injuring a person will invite someone to rescue that person, thus the casual connection was not broken by Vera's act because it is foreseeable that someone would help to save Barry. Kim can similarly claim that the lack of Pete to come to the rescue scene with his ambulance and fail to provide a back up driver also led to his death as a superseding intervening cause. Kim can say that it is not foreseeable that the ambulance would not show up as they have a duty to do so. However, this is unlikely to prevail because it is foreseeable that there would be a problem in some form that the ambulance may not show up in time to save Barry. Kim may also attempt to join Tony, her employer in the action for contribution or indemnification. You may also be able to directly sue Tony for Kim's negligence.

Barry's Estate v. Tony
As the employer of Kim, under the rules of vicarious liability and respondeat superior, Tony may be liable as well. Vicarious liability and respondeat superior will hold people in certain relationship liable to the actions of those under them. Here, it would be an employer/employee relationship which, unless Kim committed an independent intentional tort (not in the furtherance of Tony's business) or was an independent contractor, Tony can be held liable for Kim's conduct. The conduct by Kim would of had to be within the scope of her employment with Tony to hold him liable. If it was a frolic, which is a substantial deviation from her work, Tony will not be liable, if it was a mere detour he will be liable, if it is neither of those two and within the scope of her employment Tony will also be liable. Here, Tony hired Kim to drive his farm product to the road stand, he is in this case acting as her employer as he has substantial control over what she is doing for him when she does it and how she gets paid. She was driving his farm product to be sold for him, thus, Kim was acting within the scope of her employment when she crashed into Barry, which will make Tony liable to Barry as well. Tony will have the same defenses as Kim and may further attempt to assert that it was a frolic, however, she was acting within her scope of employment with Tony and this will not be a valid defense.

Moreover, there is another claim against Tony for negligent entrustment/negligent hiring. Negligent entrustment is when someone gives another person a an instrument that they should know they cannot handle and are negligent for such allowance. Similarly, negligent hiring is employing someone who has a likelihood of past occurrences of not being able to handle the required act. Both claims have similar elements as normal negligence. For negligent entrustment and hiring if Tony knew of Kim's prior bad driving habit and still hired her to drive his farm products and entrusted her with the truck to drive the farm products he may be liable for negligent entrustment. However, it is unlikely that Tony was aware of this as the facts state he was unaware of her driving record. Although, Barry's estate can claim based upon the 20-year relationship between Tony and Kim he should have had constructive knowledge of the fact that she is a poor driver. All of which your estate will have to prove by a preponderance of the evidence.

Barry's Estate v Vera

Barry's estate may be able to claims possible battery and negligence on behalf of Vera. Rules above for each topic of law. Here, it is unlikely that she will be guilty of battery as it is impliedly consented to that an injured person would want someone to come help them when they have been struck by a car. Second, as to the negligence, Kim's danger to Barry invited resuce of him by Vera, which, although under no duty to give to Barry, she undertook. When someone does undertake the act of a rescue of another, they must not leave that person worse off than they were when they found them. Vera was continuously calling for the ambulance which did not arrive and she was only trying to save him by trying to stop the blood. It is also unlike to show a casual connection as not only will Pete's failure to have an ambulance arrive, but also Kim's actions alone will break the casual link of Vera's actions.

Barry's estate v Pete:
As a rescue pete has a duty, as a common carrier, of the highest care. His job is a rescuer and he should have provided for a back up drive if he could not make it. Same rules of negligence are above. He breached his care by not doing what an ambulance (reasonable one) driver should have done by making sure there was a back up drive in case of emergency. By not doing so it is foreseeable (prox cause) that someone in need of an ambulance and rescue would not have been provided with that. Although Pete can claim that vera and kims actions broke the casual connection of him causing Barry's death and they were superseding intervening causes, which he must show as well, which may be unlikely because VERA only continues to aid Barry when an ambulance showed up. If the ambulance had shown up it is likely that he would have been saved (as per the medical examiner's report.) Pete will ahve a another defense of private necessity, as his wife had gone into early and unexpected labor and he was rendering aid to her. He can claim, which he must prove by a preponderance of the evidence, that it was necessary for him to render aid to his wife and his soon to be born baby or they would have died, and it was the only choice between the lesser of two evils (leaving to go save Barry and has his wife and child potentially die, or stay with them and leave open the chance for Barry to die). However, although he was excited and distracted by this, a reasonable person in his circumstances would still have had 1 or 2 minutes to call a back-up driver allowing for someone to be there in case of emergency. Thus, there is a prima facie case that Pete breached his duty of reasonable care by not having a back up driver on duty. For all the defendants listed, they will ahve similar defenses as to contributory/comparative fault and you can join them all together in one action and the jury will decide whether or not they are jointly and severally liable (meaning they owe the entire amount or only their part after seeking contribution/indemnification from the other defendants), after doing so it will be on the defendants after the prima facie case against them is established to disprove their own guilt and liability for Barrys death.

**Barry's Estate v Mike for defamation**

Defamation is either slander (spoken) or libel (written) which describes a falsity about another person, which is published to a third person capable of understanding the statement and its meaning which cause harm (depending on the public/private distinction) to the plaintiff. In this case Mike committed libel by writing an article about Barry, which was false and published to a 3rd person. In this case, because Barry is a private party and this is a matter of private concern being that the public need not nor were they aware of what happened with barry, the estate will have to prove negligence on behalf of Mike. Mikes written article that he heard from police sources that Barry was drunk when he was hit by the car is about a private person and a most likely a matter of private concern (if it is deemed a matter of public concern he will ahve to show more culpability and causation on the part of Mike along with different damages and standards.) As a private person private concern, Barry's estate will have to show that Mike was merely negligent, which is unlikely the case as he had "police sources" and he is granted a degree of immunity when he has based his knowledge on that of a reliable informant. AS well, the right to publicity/privacy does not normall survive a person death and cannot be a claim on behalf of his estate. Thus, it is unlikely for you to succeed on the defamation claim.
In response to Barry's family's request for potential causes of action and potential defenses against the individuals involved in his death, the following paragraphs will address each individual's potential liability:

1) Tony

Under the common law, an employer may be held vicariously liable for the tortious actions of his employee if the tort was committed while the employee was acting within the scope of her employment. In order to determine liability of a principal for the acts of his agent, agency law provides that there must be: (i) assent to the agency relationship (an informal agreement between the principal and agent), (ii) a benefit conferred on the principal by the agent; (iii) control by the principal over the agent (in a managerial sense); and (iv) the agent must have been acting within the scope of her employment. If an agency relationship is found, then the employer may be held vicariously liable, under the theory of respondeat superior, for the tortious acts of an employer. An independent contractor is generally not considered an agent. An employer is also generally not liable for the intentional torts committed by an employee. A plaintiff may also have a cause of action for negligent hiring, where an employer should have known of the potential negligence of an employee. If it is found that there was a duty owed in this sense, the employer may also be found to be negligent.

In this case, Tony is a farmer who sells his products at a roadside farm, and who hires Kim to drive the products from the farm to the roadside stand. Whether or not Tony will be liable for Kim's tortious conduct will depend on whether Kim can be found to be an agent acting within the scope of her employment with Tony. Tony has known Kim for many years, but is unaware of her driving record. A cause of action may be brought for negligent hiring of Kim because Tony hired Kim as a driver without looking into her driving record. A person owes a general duty to act as a reasonable person would under the same circumstances to foreseeable plaintiffs. It would be reasonable to conclude that Tony should have looked into Kim's driving record before hiring her. Since Kim was driving within the scope of her employment for Tony when she hit Barry with her car, a cause of action may be brought against him under a theory of vicarious liability.

2) Kim

The common defines the general standard of care owed to other as acting as a reasonably prudent person would under similar circumstances to foreseeable plaintiffs. In an action for negligence and personal injuries, the plaintiff must prove a prima facie case of negligence by showing that the defendant: (i) owed a duty of care to the plaintiff; (ii) that duty was breached by the plaintiff's conduct; (iii) the breach was the actual and proximate cause of the plaintiff's injury; and (iv) there was harm/damages suffered. All of these elements must be met in order for the plaintiff to have a cause of action.

In this case, Kim, was driving the speed limit down State Street when she hit Barry, a pedestrian. State Street has a posted speed limit of 25 miles per hour. While Kim has a driving
record with numerous speeding tickets, and generally drives above the speed limit, she was
driving with care on the date in question. When proving the breach of the duty Kim owed to
Barry by driving with reasonable care, Barry's family would have to show that Kim had breached
that duty in some way. Under the facts, Kim will be able to raise the defense to a negligence case
that she did not breach her duty at that time because she was driving within the speed limit. This
would cut off her liability even though she was the actual cause of Barry being hit by the car.

3) Vera

Under the common law, there is generally no duty to rescue another person unless there
is a special relationship that exists. The special relationships that give a rise to a duty to recuse
include: (i) certain relationship (i.e., parent-child; husband-wife); (ii) contractual relationships
(i.e., a lifeguard, fireman/policeman); and (iii) when someone begins to rescue a person, they
must do so with care, and cannot abandon the rescue once they have started. In some states,
there are Good Samaritan laws that protect people who have the ability to assist injured parties
(doctors/nurses) by shielding them from liability. This encourages those who can help to do so
without the fear of being sued.

In this case, Vera was a passerby who witnessed the accident between Kim and
Barry. When no ambulance arrived on the scene, and fearing that the delay would jeopardize
Barry even further, Vera began efforts to staunch his heavy bleeding. Since Vera began a rescue
attempt in a situation where she did not actually owe any duty to Barry, this then obligated her to
do so with care and not abandon the rescue once she started. An autopsy then revealed that
Vera's efforts to assist had actually worsened Barry's injuries, and that Barry's life would have
been saved had the ambulance arrived in a timely fashion.

This raises issues of actual and proximate causation in a case for negligence. While a
person may be an actual cause of an injury, a subsequent independent intervening event may
occur that cuts off liability. For a person's actions to be the proximate cause of an injury, the
subsequent resulting injuries or further harm experience must have been foreseeable at the time
the actual injury occurred for the element of caution to be satisfied, both factually and legally.

Here, Vera, may raise the defense that she was not the proximate cause of Barry's injuries
because of both Kim and Pete's actions. She could bring a cross claim against both of them,
arguing that Kim was the actual cause, and someone dying during rescue efforts because of the
accident could have been foreseeable. Vera could also argue that it was Pete's negligence in not
being on call at the ambulance in time because Barry's life would have been saved if the
ambulance had arrived in a timely fashion.

4) Mike

In a case for defamation, there must be a defamatory false statement made that negatively
impacts a person's reputation, and that statement must be published to at least one other person,
and there must be damage suffered from the statement. The damage must be something more
than just embarrassment or hurt feelings, and in some cases the plaintiff must show that there
was some pecuniary loss. In a case of libel, which is the publication of a defamatory statement
in some permanent form, damages are presumed. If the statement is made about a private
person, the standard the plaintiff must show is that of negligence on the part of the defendant in
making the statement. For a case of defamation to be brought, the statement made must have
been about a living person. If there is defamation per se, which goes towards statements made
about someone's profession, a woman's chastity, moral turpitude, or a loathsome disease,
damages are always presumed.

In this case, Mike made a statement about Barry, that was published in a weekly
newsletter, stating that "police sources" blame the accident on Barry, and that Barry appeared to
be drunk at the time. While this could qualify as libel because it was published, this will not be a
cause of action that the family may bring because defamation causes of action must be brought in
regard to a living person. Since Barry is dead, this would not be successful.

5) Pete

The issue of duty in a negligence case as discussed above also arises when discussing
Pete's liability because he was an ambulance driver who should have been on duty when Barry
was injured. Because he was not, three hours passed from the time of the accident and the time
the ambulance arrived. Since Pete is an ambulance driver, he has a type of contractual duty of
care owed to the people he is supposed to rescue. Pete will raise the defense that he was at home
rendering aid to his pregnant wife, who had gone into premature labor. Although his mistake was
not intentional when he forgot to arrange for a substitute driver, this is not a valid excuse that
would cut off the duty he owed that required him to arrange for a replacement driver.

6) Barry

While the common law uses a form of contributory negligence, which completely barred
recovery of a plaintiff who was found to have contributed through their own negligence by
assuming the risk of their actions, almost all states have adopted some form of comparative
fault. The doctrine of comparative fault allowed a plaintiff to recover damages from a negligent
defendant, less their percentage of fault. In the case of joint and several tortfeasors, the plaintiff
may recover from any and all of the defendants, and may seek the full amount. If a defendant
pays more than their share of their assigned percentage of fault, then they may seek contribution
from the tortfeasors to recover that amount.

Barry may be found to have contributed to his death because witnesses saw him dart from
between the parked cars, but this would not completely bar him from recovering under the
comparative fault doctrine.

The family may also seek to bring a wrongful death action for Barry's pain and suffering
after the accident, which would allow them to recover the loss of the economic contribution
Barry would have made to the family if he hadn't died.

Question 2 – Constitutional Law
In 2014, the state enacted legislation and implemented executive action in the following areas:

1. **Quarantines:** Upon entry into the state, health care workers (HCW) who have had contact with Ebola patients are subjected to mandatory 21-day quarantine periods at the state’s infectious disease control facility. The legislation conflicts with more lenient federal HCW regulations, which do not mandate quarantines, only voluntary monitoring of symptoms. Lydia has just entered the state after treating Ebola patients, and thus, she has been placed under quarantine without a hearing. Lydia is asymptomatic for the disease.

2. **Recess Appointments:** In response to the state Senate’s refusal to confirm several nominees to vacant cabinet level positions, Governor Yokaira appointed those nominees while the Senate was in an informal “holiday” recess to circumvent the Senate’s “advise and consent” role. Previous governors routinely used the informal “holiday” recess to make similar appointments. Laura is one of the governor’s recess appointees, and she has promulgated numerous regulations that are viewed negatively in the state’s business community. Now, the state’s Chamber of Commerce has filed litigation alleging that Laura’s recess appointment was constitutionally invalid, and thus, her regulatory actions are null and void.

3. **Drug Sentencing:** The state’s judicial guidelines for determining the sentence for distributing crack cocaine and powder cocaine were updated: a. Distributing five ounces of crack cocaine results in a mandatory minimum prison sentence of three years, and b. Distributing five ounces of powder cocaine results in a mandatory minimum prison sentence of one year. As a consequence, a disproportionate number of racial minorities has received significantly longer prison sentences as they are primarily convicted of crack cocaine distribution offenses while caucasian defendants are primarily convicted of powder cocaine distribution offenses. Legislative history reflects that various members of the legislature’s minority caucus pushed for the disparate mandatory minimum sentences because of the explosion in criminal activity associated with crack cocaine use. Jullissa, a racial minority, received a longer sentence under the new crack cocaine sentencing guidelines.

4. **Yokicare:** Facing a difficult re-election campaign, the governor’s signature health care plan (Yokicare) requiring uninsured individuals to purchase health insurance has become a political liability. The governor has decided to delay implementation of Yokicare until after the upcoming November gubernatorial election. Yokicare was scheduled for implementation in January 2015. The state’s assembly speaker, Leola, has filed a lawsuit in federal court seeking a Writ of Mandamus compelling the governor to proceed with Yokicare's implementation, as scheduled. Leola’s lawsuit also seeks monetary damages from the governor in her official and individual capacities.
You are a lawyer on the state’s legal magazine’s staff. Your supervisor asks you to draft memoranda analyzing the potential constitutional claims and defenses presented in the above-referenced situations for an upcoming issue.

PREPARE THE MEMORANDA

Sample Answer 2A:

Constitutional Law.

1. Is the state's ebola quarantine period, which is more stringent than federal regulations, Constitutional?

Rule: Pre-emption clause of the Constitution provides that federal law is superior to state law in the case of any conflict between the two. However, state's may impose stricter requirements than the federal law requires as long as such provisions do not conflict with any federal law.

Analysis: The state's more stringent ebola control policy does not violate federal regulations (it only imposes more conditions) and therefore is constitutional.

2. Is the governor's recess apppoint constitutional?

Rule: The constitution Art. II provides for the separation of powers between the judicial, legislative, and executive branches. The executive is responsible for appointing superior officers to carry out law, subject to the advise and consent of the Senate. The Senate may not appoint officials without the executive branch, and can only indicate disapproval of an officer candidate for good cause. When the executive acts without the permission or authority of the Senate, executive power is at its lowest. Evidence of past actions and routine use is indicative, however, that the executive is acting within his/her constitutional powers.

Analysis: This is a state action, but the same analysis applies as with federal law. The governor's actions were based upon routine similar appointments which occured in the past, and therefore indicate that such powers are constitutionally valid.

3. Do the drug sentencing laws violate the Equal Protection Clause of 14th Amendment because of their disparate impact on minorities?

Rule: The Equal Protection Clause guarantees that individuals or certains classes of people will not be unfairly discriminated against by the law, subject to three levels of judicial review: strict scrutiny (narrowly tailored to achieve a compelling government interest), intermediate scrutiny (substantially related to an important government interest), and rational basis (a legitimate basis that is related to the law). Drug laws are subject to rational basis review and are almost
always constitutional because the vast public policy concerns provide a very strong legitimate basis for their enforcement. Nevertheless, a law that is facially neutral (i.e. does not target a particular class) can still be unconstitutional if a disparate impact can be demonstrated. If such impact was intentional during creation of the law, then strict scrutiny review applies. If such impact is only an incidental, unintended result of enforcement, rational basis review applies.

Analysis: The cocaine mandatory minimums have a disparate impact on minorities, however, both the legislative history of the laws (i.e. widespread minority caucus support) and their neutral application indicate that such results are only incidental. Therefore, a rational basis review will apply and the laws will be upheld as constitutional.

4. Is the governor compelled to implement Yorkicare? Is the governor responsible for monetary damages in her official and individual capacities?

Rule: The separation of powers doctrine clearly delineates the responsibilities of the 3 branches of government (leg/jud/exec). Once a statute is passed by the Senate and becomes valid law, it is the executive's responsibility to implement the law promptly and effectively. The executive cannot withhold implementation of the law on the basis of personal election considerations no matter how unpopular such a law might be. Failure to implement a law pursuant to executive responsibilities can result in the impeachment and removal of the executive; however, the executive enjoys an absolute privilege from monetary damages and other liability for conducting carried out (or omitted) in an official capacity pursuant to the responsibilities of office. Nevertheless, such immunity does extend to personal actions carried out during the course of office, and the executive can be sued at any time for conduct related to a personal cause of action.

Analysis: The governor in this instance will be compelled to implement Yorkicare because it was validly passed by the legislative branch, and there is no justifiable basis for withholding implementation. However, the governor will not be responsible for money damages because such cause of action concerns conduct related to her official position (not her personal life) and therefore the governor enjoys immunity.

Sample Answer 2B:

Quarantine: I wonder if Chris Christie wrote this fact pattern. This pattern involves a NJ quarantine law that subjects people who have had contact with Ebola patient to a mandatory 21-day quarantine. There are two interrelated issues, (1) Whether this is a valid exercise of the State's police power and (2) If it is, does the Federal government's regulation preempt the NJ law.

(a) Validity of the law. A mandatory quarantine is probably valid under the Federal and NJ constitution. The states have extremely broad authority to exercise their police power. Laws are very rarely declared constitutional on their face unless they discriminate against a suspect class. This is does not, so a federal court would consider uphold it so long as it is rationally related to a legitimate state interest. In the interest of federalism and dual sovereignty, this is a very low bar. This is especially true when you consider that this involves healthcare, which is undeniably a legitimate state interest. It is also very clear that this is rationally related to the interest. A federal
court does not consider whether the law is good or not, just whether it is rationally related. It is very unlikely that a court would find that it isn't.

A stronger argument against this law's constitutionality is whether it violates due process. The constitution guarantees due process rights when there is a liberty interest, and since people quarantined are having their liberty limited this would certainly be an issue. To satisfy due process there must often be some sort of process or hearing before rights are taken away, and there is no hearing here. However, the lack of a hearing is not automatically fatal. The court will balance the liberty interest of the individual with the interest of the state, and consider whether a lack of hearing is reasonable. Here, it probably is. Ebola is a serious, contagious disease. Setting up a hearing might be unfeasible, and it could be an emergency situation. The person quarantined also does not suffer a catastrophic injury to her liberty, since it seems she will just be quarantined at home. It is unlikely a federal court will strike this down under due process.

(b) Federal preemption of the law: Someone arguing against this statute may also argue that this law is invalid because federal regulations preempt it. Under the Constitution's supremacy clause, federal laws are supreme and may preempt state laws. However, just because the federal government regulates an area doesn't mean all state laws are automatically preempted. The federal government may do this implicitly or explicitly. Since there is no evidence of explicit preemption, we would have to consider whether the federal regulations implicitly preempt state quarantine laws. The facts show that they probably don't, and that they simply create a "floor". New Jersey is probably free to create quarantine laws that go beyond the federal government's. A lack of preemption is especially strong because this is an interest traditionally left to the states (healthcare, and the health and welfare of it's citizens). A preemption argument is unlikely to succeed.

**Recess appointments:** This question concerns the executive power of a NJ governor, specifically her appointment power. Under the NJ constitution the executive power is vested in the governor, and she may nominate vacant cabinet level positions with the advice and consent of the State Senate. The governor seems to have bypassed this constitutional requirement with holiday recess appointments, which are allowed so that vacation seats may be filled when the Senate is unavailable. However, abuse of this ability does not make all the regulations these appointees promulgated invalid. At best, the relief here would be that the senate has their opportunity for confirmation hearings. And, even if they are not confirmed, the regulations would still be valid. The governor has ultimate authority under these regulations anyway, and although he vests some of that power in cabinet officials, they still derive from his power.

Moreover, there are standing issues with the chamber of commerce even bringing this suit. An organization cannot simply sue because they don't like a law, they must show that they have been injured under the law first. (There are also other requirements, like redressability, that does not factor in). Here, there is no evidence that the chamber has been affected by any of these regulations, only that they are viewed negatively. Without a showing that they have been injured they likely do not have standing. Moreover, my previous analysis concludes that they may not be redressable, so they may lose standing based on that at the outset. Finally, it is likely that even if a court someone found standing this claim would not proceed because of the political question doctrine, which states that political questions are non-judiciable. This probably is, because it
involves the interaction between the senate and governor. It is not the chamber of commerces claim to make, it is the senates, and the constitution probably includes rules to settle disputes between the senate and executive, such as impeachment.

**Drug sentencing:** This question involves the constitutionallity of mandatory minimum drug distribution laws. Under the facts, minority groups are impacted more under these laws than non-minoritys. There are two issues present in a constitutional analysis (a) Whether these laws are cruel and unusual punishment and (b) whether or not they violate equal protection.

(a) Cruel and unusual punishment. Mandatory minimum laws are sometimes scrutinized that they are cruel and unusual. However, these types of claims rarely succeed. A judge has a lot of discretion when deciding if something is cruel and unusual and must base it on contemporary sensibilities. For instance, the supreme court recently held that sentencing minors to life sentences if cruel and unusual absent extreme circumstances. It is clear that these standards shift over time, so the question will be whether it is cruel and unusual for there to be a mandatory minimum of 1-3 years for drug distribution. It probably isn't, many states have laws like these on the books and that have withstood cruel and unusual punishment claims. These laws involve crack cocaine, which is often considered a harder drug and that distributing it allows for a tougher punishment. It is doubtful that, under current federal jurisprudence, that these laws would be considered cruel and unusual on their face.

(b) People are guaranteed equal protection under the laws by the constitution. There are two ways a law can be found to violate equal protection: (1) whether it is discriminatory on it's face or (2) whether it has a discriminatory impact. Moreover, even if a law is found to be discriminatory, it may still be constitutional if it passes a higher level of scrutiny. For cases involving protected minorities, which I assume this is, the federal courts will apply strict scrutiny, which requires a substantial relation to a compelling government interest. This law will probably not be stricken down under the equal protection clause. The facts in the pattern do not show nearly enough to provide a full analysis, but absent smoething extraordinary this claim is unlikely to succeed. This law is clearly not facially discriminatory. Many criminal laws have a discriminatory impact because some minority groups are affected by them more than others, but that doesn't automatically mean that the law is invalid. It is clear that this law substantially serves a compelling government interest. Sentencing laws serve the interest of the government in crafting their penal code. This also touches on compelling interests states have in protecting their citizens from drug culture, their health, and reducing violent crime related to the drug trade. All things considered, it is unlikely this law would be considered constitutional.

**Yokicare:** This question involves standing, seperation of power, and executive power concerns. As far as standing, the issue is whether speaker Leola may bring a claim against governer Yokaira. She probably cannot. These is most likely a non-justiciable political question. The federal courts are going to be very apprehensive in requiring a state executive to enforce state law. Another standing issue is whether this has subject matter jurisdiction. A federal court can only here cases (a) Involving a federal question or (b) where there is diversity of jurisdiction in a controversy over $75k. There is no diversity here and this matter does not involve federal law.
Even if the speaker could get this case heard, she is unlikely to succeed. In NJ the executive power vests in the governor, and she has broad power in enforcing state law. Delaying a law is an enforcement choice an executive can make. Speaker Leola would have to impeach the governor instead of bringing a federal suit. Finally, public officials are immune from monetary damages when serving in their official capacity. Since Yokaira is acting in her capacity as governor Leola will not be able to seek monetary damages.

**Question 3 - Evidence**

Robert was accused of providing financial support to Sovereign Liberation Citizens (the “SLC”), a recognized domestic terrorist group. Accordingly, the United States moved, in New Jersey state court, to civilly seize $10 million Robert had in New Jersey bank accounts, allegedly used to fund the SLC. After a hearing, the court ordered the funds seized. Certain evidentiary rulings are now contested on appeal by his defense team. They are:

1) Testimony that Robert would regularly, and in great detail, document his charitable contributions, except for 2014, when $168,000 in cash disbursements were simply listed as “miscellaneous.” Additionally, international bank records of SLC reflected $168,000 in cash receipts for 2014.

2) Allowing counsel to read an affidavit by Alice, a local bank teller. In the affidavit, Alice stated that Robert would frequently make large cash withdrawals from his accounts. The reading was allowed after Alice stated she was too scared to testify in open court because she believes many of her neighbors are SLC members or supporters.

3) Testimony of James, the court-appointed mediator, who stated that Robert said to him during the mediation of this case: “Yea, I support SLC. It is my God-given right to disagree with this heathen government.”

4) An enlarged photo, made from a smaller image found on Robert’s Instagram™ during 2014, of him handing a large blank envelope to a person, who appears to be wearing an SLC cap and t-shirt.
5) Requiring Robert to answer if he is a member of 2nd Omega. Members of 2nd Omega hold a sacred belief that they are not bound by the laws of man, but only by the laws of God.

6) Testimony of Brian, an admitted SLC member, that he repeatedly overheard the SLC treasurer tell the SLC president that “Robert is our greatest benefactor.”

You are the law clerk to the appellate judge. Assess the merits of each evidentiary ruling.

PREPARE THE MEMORANDUM

Sample Answer 3A:

1) Testimony about a defendant's documents are usually not allowed by the best evidence rule that requires the documents to be submitted into evidence or read in court. The court readily allows copies of the document instead of the original. If the actual document is not accessible then will allow testimony by individuals who seen the document or a copy of it and not allow testimony from individuals that have only heard about the document. Thus, the testimony about Robert keeping a document of charitable contributions is given by a person who has first hand knowledge of such facts then it is admissible as a witness's perception of facts relevant to the case that has a probative value that is not outweighed by bias, unfair prejudice, etc. As such, the testimony about the document could be admitted if it meets the above standard.

The fact the the sum, $168,000 being recorded into the charitable contributions documents in a manner that is vague and not as detailed as every other charitable giving makes it relevant and properly raises suspicion. The fact that the international bank records of SLC reflect a receipt of the same amount, $168,000, in the same year can make it seem that Robert transferred the money to SLC. IF the person makes the bank receipt as a testimony he still is required to have first hand knowledge of the fact that can be cross examined against, but if the international bank record is a document for submission into evidence it is hearsay which requires that the document is a normal produced document for the type of action that occurred, done by bank employees in their regular course of business and was kept in the regular locations for such information or documents. The document would have to have this foundation supported the person who regular keeps these records. If the receipt met these above stated standard it would be admissible.

2) Alice providing counsel to read an affidavit of bank transactions of Robert's account stating that Robert frequently made large cash withdrawals from his account requires several
questions to be asked. This is relevant because it shows that Robert moves large sums of cash which could possibly be used for the terrorist activity, which has a probatitive value that is not outweighed by bias. If the affidavit is a representation of bank withdrawals that Alice was personally a teller for then Alice would be required to testify to because this is a criminal case and the Constitutions 6th Amendment Confrontation Clause requires defendants to be able to see those making allegations against the defendant. Further the affidavit, in from only the times Alice gave withdrawals to Robert only allows what the prosecution wants the judge or jury to hear and does not allow for a cross examination. It is an out of court statement and thus hearsay and would not be allowed.

However, Alice could give the prosecutor bank records of Robert's account if subpoenaed by the prosecution if there was a bank custodian to testify as to the records and give the foundation for the records that is needed because the records would be hearsay and must conformed with the exception of business records that are normally kept by the business, in a normal fashion, for all bank accounts at that bank, and recorded by employees of the bank as tellers or online transaction recorders, kept as regular court of business for the particular business, in a location where those documents are normally kept. That type of evidence would be admissible into the court to show Robert's withdrawals of large sums of money.

3) James as a mediator would not normally be allowed to testify in court about mediation because the court has a large docket and wants many cases to be resolved either through plea deals, mediation, etc. The federal rules of evidence would normally not allow the testimony of a mediator about that mediation because the court wants to promote mediation and if mediators could then testify against defendants most people would not mediate. Here, James informs the mediator that he supports SLC, a domestic terrorist group, which is illegal. Lawyers are required to report if their clients informs them of future illegal activity that the client plans to commit. Likewise, mediators might be required to to report under the same rules. However, what Robert tells the mediator is that he supports the SLC as it is a right to disagree with the government. The statement only demonstrates belief, not any action that Robert has performed in furtherance of SLC, the group, or any future plans to do so. As such, the court should not allow James to testify as it violated the rules of evidence and would discourage future mediations that the court seeks to promote. This is not relevant because the mediator testimony would show intent to financially support terrorist activity, but it probatitive value that is outweighed by bias.

4) The photo would be admissible as evidence because it is relevant, showing the defendant making a transfer of an envelope to an SLC member, where the probative is not outweighed but unfair prejudice, bias, etc. It would be admissible because even though it is not the actual Instagram from 2014 from Robert's account it is a photo, which could be thought of as a snapshot of the Instagram. This could be admitted if in the possession of the prosecution or any witnesses of the prosecution. This does not violate the best evidence rule because it is the actual document, the photo of the Instagram even through it is not the Instagram.

5) Robert cannot be forced to answer or testify to anything. The 5th Amendment of the constitution gives a defendant the right to remain silent and testify against himself. As such,
Robert could be asked to testify but can involve his 5th Amendment protection against self incrimination which would require the court to prevent Robert from testifying when involved.

6) The SLC is a conspiracy because they consist of more than one member desiring to accomplish an illegal activity of terrorism. Brian as a member and thus co-conspirator can testify about a conversation that he overheard mage my his co-conspirators as an admission by a co-conspirator. Brian is testifying to what he had first hand knowledge of through his own perception of his ears. Thus, Brian can testify that he overheard the SLC treasurer tell the SLC president that Robert is their greatest benefactors. This is relevant because it is about Robert giving money to the SLC, which is what he is on trial for, and the probative value is not outweighed by bias, etc.

**Sample Answer 3B:**

**MEMORANDUM**

To: Appellate Judge  
From: Law Clerk  
Date: February 26, 2015  
Re: Robert's Evidentiary Rulings

You asked me to assess the merits of each evidentiary ruling made by Robert's defense team. Below is my analysis, however it is up to Your Honor's discretion in whether the evidence will be admissible.

1. Hearsay Testimony

Testimony regarding Robert's absence of entry regarding his charitable contribution documents would be admissible as a hearsay exception. Under the rules of evidence, hearsay is inadmissible. Hearsay is an out of court statement used to prove the truth of the matter asserted. When a document or testimony purports to include hearsay as evidence, the court must analyze whether there is an exception to the hearsay rule that would allow the hearsay to be admitted as evidence. Under Rule 803, the absence of an entry is admissible as evidence, although otherwise constituting hearsay. This rule is only applicable when the absence of documentation is highly unusual due to the fact that it is normally and regularly provided for otherwise.

Here, the prosecution seeks to introduce evidence of the absence of Robert's charitable contribution entry from 2014. The facts indicate that Robert regularly, and in great detail, documented his charitable contributions, except in 2014. Instead, in 2014, $168,000.00 was labeled as "miscellaneous." This document therefore would fit under the absence of entry hearsay exception.
Robert may argue that this evidence constitutes improper character evidence, which is inadmissible, but the Court most likely will find that this is evidence of habit. Specific acts are inadmissible as character evidence however, evidence of habit is generally always admissible.

It is therefore respectfully recommended that your honor OVERRULE defense counsel's objection to this evidence and allow the evidence to be admitted because the evidence fits under the hearsay exception of absence of entry.

2. Alice's Unavailability

Testimony on Alice's Affidavit will be inadmissible unless the prosecution can properly demonstrate that Alice is unavailable as a witness, otherwise the evidence constitutes hearsay. Hearsay, as defined above, is inadmissible as evidence. However, when the declarant (the person who made the hearsay statement) is unavailable, the court will allow what otherwise would constitute hearsay so long as the hearsay is: former testimony, a statement made under the belief of impending death, a statement against interest, a pedigree statement (regarding diary entry or family history), or a statement made by forfeiture of wrongdoing.

Here, the best argument that the prosecution could make is that the affidavit is a form of former testimony. However, a declarant is only deemed unavailable for purposes of this hearsay rule if the declarant cannot be reached by subpoena, has died or is otherwise incompetent from testifying (i.e. ill, memory loss), or has some privilege that prevents him from testifying.

Being merely scared to testify in open court will not allow the witness from not testifying whatsoever and her affidavit in lieu of live testimony would violate Robert's right to confrontation under the 6th Amendment. Under teh 6th Amendment, a defendant has a right to confront any witness who testifies against him.

Therefore, because Alice's Affidavit is hearsay and would violate the constitution caluse, it is respectfully recommended that Your Honor SUSTAIN defense counsel's objection.

3. Admission by Party Opponent

Testimony regarding Robert's comment to James will be admissible as nonhearsay, because the statement, although hearsay, is an admission by a party-opponent. Hearsay (as described above) is usually not permitted into evidence however, this statement by Robert constitutes nonhearsay. As nonhearsay, an admission is any statement that Robert directly made or adopted as his own. Here, the statement was made directly by Robert. Therfore, the prosecution can argue that it is an admission by Robert as the party opponent.

Robert's defense counsel may argue that this statement was made during mediation, and as such, should not be allowed into evidence because it is irrelevant; the statement was made during potential settlement negotiations. Evidence is only admissible if it is relevant, meaning that there is a tendencye taht the evidence will either help prove or disprove another material fact of the
case. Evidence is usually only relevant when it relates to the present place, time and person. Evidence of settlement negotiations however, are inadmissible because admitting such evidence would discourage parties from settling or negotiating their cases. Therefore, Robert's defense team would argue that evidence of his statement during mediation is inadmissible.

It is therefore respectfully recommended that Your Honor SUSTAIN defense counsel's objection to this evidence because it is a statement that was made during settlement negotiations.

4. Photo

Evidence of the enlarged photo from Robert's Instagram may be admitted so long as the prosecution is able to lay the proper foundation. Photos, or copies of photos, are admissible so long as the photo can be authenticated. Authentication of a photo requires that the person testifying about the photo can truthfully testify: (1) that he knows what the photo is; (2) that he can describe what the photo depicts, and; (3) that the photo is an accurate representation of the event and persons on the date/time in question. In order to testify to a photograph, the witness need not be the person who took the photograph.

Here, so long as the prosecution is able to produce a witness who can authenticate the photo, the photo will be admitted. Depending on how enlarged the photo is however, the photo may be distorted, in which case, the Court should only allow a smaller image that better depicts the events and person in the photo.

It is therefore respectfully recommended that Your Honor OVERRULE defense counsel's objection to this evidence so long as it is properly authenticated.

5. Robert's Testimony

Evidence of a Robert's religion may not be admitted because it would be an inadmissible use of character evidence. Character evidence regarding a person's religious belief is inadmissible to prove bias. Here, while it is unknown why the prosecution wants to admit this statement, the overall effect would be that Robert is biased by his religious beliefs. This goes against Robert's 1st Amendment right and freedom to associate. In addition, the prejudicial effect of this evidence is substantially outweighed by its probative value because by highlighting Robert's religious beliefs, it would take the jury away from the issues before the Court.

It is therefore respectfully recommended that Your Honor SUSTAIN defense counsel's objection to the testimony of Brian's religious beliefs.

6. Testimony of Brian

Evidence of Brian's testimony concerning the SLC treasurer is inadmissible as hearsay. As stated above, hearsay is an out of court statement used to prove the truth of the matter asserted. Here, this is evidence of hearsay that does not fit into any exception.
It is therefore respectfully recommended that Your Honor SUSTAIN defense counsel's objection to the SLC Member's statement.

**Question 4 – Real Property**

Elizabeth divides a large plat of land into 200 lots. Elizabeth sells 180 of the lots providing deeds each stating that only a single family home can be constructed on the lots and requiring that plantings be installed on the lots. All new owners build single family homes on their lots and install plantings. Thereafter, Elizabeth sells the remaining 20 lots to Lou and provides deeds that make no mention of the requirements of single family homes or plantings. Lou wants to erect an apartment complex on the 20 lots. Lou sees other apartment complexes in the area and knows there are no zoning restrictions that prevent their construction. Some of the owners of the original 180 lots learn about Lou’s plans and threaten to file suit to prevent Lou from constructing an apartment complex and to require Lou to install plantings.

Lou keeps chickens that he allows to range freely on his residential property. He believes that eggs from free-range chickens are better for his family than store-bought eggs. Lou’s neighbor tells Lou the chickens must be removed as the noise they make wakes up his family before dawn. The neighbor also complains that recently he found a small amount of chicken droppings on his property.

John executes a Last Will and Testament leaving Lot 1 to Lou and all of John’s other personal and real property to Steve. After John executes his Last Will and Testament, the municipality brings an action to condemn Lot 1. John opposes the condemnation action but judgment is entered in the municipality’s favor. Thereafter, John passes away and the municipality pays the condemnation award to John’s estate. Lou and Steve each believes he is entitled to the condemnation award from the estate.

Lou comes to your law firm. He wants to: (1) construct an apartment complex on his 20 lots and does not want to install plantings; (2) keep the chickens on his residential property; and (3) have the executor of John’s estate pay him the condemnation award.

You are asked to prepare a memorandum setting forth all of Lou’s rights and liabilities with respect to these three issues.
Sample Answer 4A:

To: Senior Partner

From: Associate Attorney

Date: February 26, 2015

Re: Lou's Rights and Liabilities

1. If the language provided in the 180 deeds is applicable to Lou's 20 lots, Lou will not be able to construct an apartment complex nor avoid installing plantings. A restrictive covenant is a written promise, typically contained in a deed, to do or refrain from doing something on land. Certain factors must exist for the burden of a restrictive covenant to run with the land: a writing establishing the existence of the covenant; the intent that the covenant run with the land; the covenant must touch and concern the land; vertical privity; horizontal privity; and notice. Where multiple lots are conveyed and all deeds contain the same or similar language (or the existence and validity of the covenant is clear by looking at the land), courts may find that an implied negative reciprocal servitude (or "common scheme or development"), exists. Subsequently, later owners will be bound by the common scheme even if the restriction is not contained in their deed.

Here, 180 of the 200 lots Elizabeth sold contained language in the deed restricting use to single family homes and requiring plantings be installed on the lots. Since all of the lots are in conformity with the terms of the deed, a common scheme with regard to those 180 lots may be implied. The issue is whether Lou's 20 acres is subject to the common scheme. Lou may argue the restriction is inapplicable to his 20 acres because if Elizabeth intended it to apply, she would have included it in Lou's deed. Further, there are other apartment complexes in the area and no zoning restrictions prevent their construction. It is not as if Lou is attempting to build commercial properties on his 20 acres.

The residents will assert that Lou purchased his property with actual and record notice of the restriction contained in the other deeds. They will argue that a common scheme exists, the majority of the 200 lots is bound by the deed, and that Lou should be prevented from constructing the apartment complex. If the residents are successful, the restriction contained in their deeds will apply to Lou's land. If Lou's 20 acres are in the middle of the other 180 acres, the other residents will have a stronger argument for enforcement. However, if Lou's 20 acres are, for example, all the way on the eastern portion of the land, he will likely succeed in preventing application of the restriction to his property.
2. Although Lou believes that eggs from free-range chickens are better for his family than store-bought eggs, Lou's chickens are entering his neighbor's property and creating noise. Lou's neighbor has a valid claim for nuisance and trespass to land, and Lou's desire for free-range eggs will not outweigh his neighbor's rights.

   A plaintiff may assert a claim for nuisance where the defendant commits an unlawful interference with the use and enjoyment of the plaintiff's land. Hyper-sensitive plaintiffs will not prevail; the interference must be unreasonable and annoying to the average person. Lou's chickens are waking up his neighbor's family before dawn. A court would likely deem this an unreasonable and unlawful interference.

   A claim for trespass to land may be brought where the defendant intends to enter the plaintiff's land, causation, and damages. The "intent" element does not require a person to knowingly enter the plaintiff's land; merely crossing the property line is sufficient. Here, the chicken droppings are circumstantial evidence that Lou's chickens are entering his neighbor's property. The droppings are sufficient to constitute damages.

   Thus, Lou's neighbor has viable claims for nuisance and trespass to land against Lou.

3. The executor of John's estate should pay Lou the condemnation award. Assuming John's Last Will and Testament was validly executed, Lou's entitlement to the condemnation award depends on whether the proceeds belong to John's estate or remain attached to the property interest in Lot 1. Where a will is validly executed, it will be administered according to its explicit terms since those terms are presumed to be the testator's intent. John's Last Will and Testament conveyed Lot 1 in fee simple to Lou. All of John's other personal and real property, which would include the residual of John's estate, was conveyed to Steve. Lou may argue that if John had passed away before the condemnation award was paid to John's estate, Lou would have been the rightful owner of Lot 1. Thus, all proceeds would clearly have been awarded to him. Steve may counter that since the condemnation award was paid to the estate, the award belongs to the estate. Ultimately, since Lou would have been the lawful owner of Lot 1 if not for the condemnation, John's estate should pay Lou the condemnation award.

Sample Answer 4B:

To: parnter
From: examinee
re: Lou's rights and abilities

Memorandum
LOU'S RIGHTS/ABILITIES TO (1) CONSTRUCT AN APARTMENT COMPLEX ON HIS 20 LOTS AND (2) NOT INSTALL PLANTINGS

(1) Lou cannot construct an apartment complex on his 20 lots because there is a valid negative equitable servitude resulting from a common scheme or plan that is enforceable against him as he had constructive notice.

Negative equitable servitudes resulting from a common scheme or plan are valid use restrictions where (1) there is a common scheme that was once a single plat (2) all lots restricted by the servitude are subdivisions of this plat and were all owned by the a common owner/grantor (3) there is written notice of the restriction that the grantor (4) intended to run with the land that (5) touches and concerns the land. The notice requirement can be satisfied in various ways: by actual notice, inquiry notice, or record/constructive notice. Actual notice occurs when the grantee receives notice in his own deed, inquiry notice is when the grantee could have received notice of the restriction by a reasonable inquiry into the land and record or constructive notice occurs when there is a record of the restriction in other grantees' deeds and there is a noticeable or apparent common scheme or plot to the land such that would reasonably put a grantee on notice of the restriction's existence. Although courts are split on whether constructive notice alone is sufficient, many courts find that it is. As negative equitable servitude is a construct in equity, the proper remedy for enforcement is not damages, but injunction. Although in certain circumstances, changes in an area that make an otherwise restriction untenable may allow an owner to violate the restriction, this is quite rare and requires a major and dramatic change in circumstances and character of the area.

Here, all of the elements required to create a valid negative equitable servitude. There is a clear common scheme to all the subdivided lots. All of the lots are subdivisions of the large plat originally owned by a single owner, Elizabeth. The majority of the lots received deeds with written notice of the restriction. The restriction was intended to run, because Elizabeth put it in the vast majority of the deeds. The restriction touches and concerns the land because it concerns what sort of structure may be built on the land.

While it is true that Lou did not receive actual notice of the restriction in his deed, he will likely be found to have had sufficient constructive notice, because all of the other lots in the area were clearly single family homes with plantings. Additionally, he should have been prudent and done inquiry into the lots before purchasing. Thus, the other owners will likely succeed on their action for an injunction preventing lou from constructing an apartment building. Although there is no zoning restriction preventing apartment buildings in the larger surrounding area, the fact that there are 120 other lots in Lou's immediate vicinity that are all single family homes complying with the restrictions of their deeds, he will not be able to contest this injunction by citing changed circumstances.

(2) Lou does not have to install plantings because affirmative easements must be in writing.
Affirmative easements are obligations that impose an affirmative duty on a servient land (the land burdened by the obligation). In order to be enforceable, affirmative easements must be in writing.

Here, since Lou's deed does not contain a writing referencing an affirmative duty to install plantings, there is no valid affirmative easement that the other owners can enforce against him. Since they are not a homeowner's association that he submitted to being a part of, they do not have standing to impose affirmative obligations on Lou for his home's upkeep as long as he is complying with local, state and federal law.

LOU'S RIGHTS/ABILITIES TO KEEP THE CHICKENS ON HIS RESIDENTIAL PROPERTY

(1) Lou cannot keep the chickens on his property as they will be considered a private nuisance since they substantially and unreasonably interfere with his neighbor's use and enjoyment of his own home.

A private nuisance is an action that one neighbor can bring against another in order to get the court to order that the nuisance neighbor ceases his nuisance activities. A nuisance occurs where one landowner's activities substantially and unreasonably interfere with the complaining neighbor's use and enjoyment of his own land.

Here, the chickens are substantially interfering with the neighbor's family's use and enjoyment of their property since they can no longer sleep at night without interruption in their own home. This is an unreasonable manner of interference rising far beyond the level of typical residential disturbances. Lou is maintaining the chickens unreasonably because his belief in their eggs being better for his family than storebought is not significant enough to warrant substantial interference with his neighbor's use and enjoyment of their property. Therefore, Lou will likely be prevented from keeping the chickens on his suburban property by the court that will likely find a private nuisance if his neighbor moves to sue him in tort.

(2) If he does keep the chickens, he must prevent them from entering neighbor's land and leaving droppings as this is trespass on the part of the chickens and Lou is strictly liable for the torts of his livestock.

An owner is strictly liable for the torts of his livestock. Chickens are livestock. Trespass occurs when a party intends to step onto a piece of property owned by another. The party need not know that the property belongs to another, it must simply intend to be on that land. In addition to parties, tangible invasions of property are considered trespass as well. Droppings on the land of another, for instance, constitutes trespass.

Since Lou is strictly liable for his chickens' torts, and their trespass in body and in droppings both constitute trespassory torts, he must prevent them from entering his neighbors land, at the very least.
LOU'S RIGHTS/ABILITIES TO HAVE THE EXECUTOR OF JOHN'S ESTATE PAY HIM THE CONDEMNATION AWARD

Where a decedent leaves specific property to a devisee, and the property is converted from its original state specified by the will into money that is clearly identifiable as the converted existence of the former devised property, and has not been commingled into the other funds of the decedent's estate, the devisee of the property may take the value of the property. Where the government condemns a property and pays out a condemnation award, the payment may go to the owner of the estate at the time of condemnation or anyone in privity of estate with that owner. Privity of estate occurs where a granor and grantee have identical interests in a property.

Here, the award is clearly identifiable and does not seem to have been commingled, so Lou is likely entitled to the award as his rightful devise as a matter of law. Additionally, he is in privity of estate with John, as the grantee by will of John's former (presumable) fee simple absolute interest. Thus, Lou should receive the condemnation award.

**Question 5 - Criminal**

One evening, Henry returned home and confided in his wife, Mary, that he had just taken a diamond ring from the Jerseyville Jewelry store by swapping it with an imitation diamond while the clerk was not looking. Mary immediately called the police, in Henry’s presence, and reported that “there is a stolen ring at my home.” The call to headquarters was recorded. Mary told Henry to leave the house and to never come back.

Henry left with the ring and went to a bar where he met his friend Dave. Both Henry and Dave drank multiple shots of tequila over a three-hour period, during which time Henry explained what had transpired back at his house. The more Henry drank, the angrier he became at Mary. Henry decided to head back to his house and said to Dave: “I need to go and take care of Mary.”

Henry asked Dave for a ride back to his house. Upon reaching the house, Henry said to Dave: “Hold this ring for me. I need to go inside and take care of my problem, once and for all.” Dave obliged and waited in the car for Henry. When Henry reached the front door, he found that it had been bolted shut. He was able to kick the door open, whereupon he went to the bedroom and retrieved his handgun. Hearing Henry at the door, Mary dialed 911.
When Mary entered the bedroom, Henry yelled: “You sold me out, and now it’s payback time,” which was heard and recorded by the 911 operator. Henry aimed the gun at Mary, which jammed when he tried to shoot it. Further enraged, Henry hit Mary on the head multiple times with the gun causing her severe injuries, from which she later recovered.

During the struggle, Henry dropped the gun, which discharged sending a bullet through the bedroom wall, killing his daughter, Veronica, who was in the next room.

The police arrived at the house and arrested both Henry and Dave, who were clearly intoxicated. The police emptied both of their pockets and found the diamond ring that Dave was holding. On the way to headquarters, the police officers asked Henry what had happened. Henry responded: “I just wanted to give my wife a ring; but I guess she didn’t like it. So I decided to shoot her instead. After all, wives come and go; but diamonds are forever.”

You are an assistant prosecutor and you have been provided with copies of the following: police recording of the initial phone call from Mary; police recording of the subsequent 911 phone call; police report setting forth the statement made by Henry; and an inventory of property seized at the time of arrest.

You have been directed by the county prosecutor to prepare a memorandum outlining the elements of all charges that may be brought and the likelihood of success of each charge at trial. You are also to include all potential pre-trial motions and defenses that may be asserted by each defendant.

PREPARE THE MEMORANDUM

Sample Answer 5A:

MEMORANDUM

__________________________

To: Prosecutor

From:Assistant Prosecutor
RE: In Re Henry

As per your request, I have outlined all of the charges we can bring against Henry and Dave, the likelihood of success of each charge, and any pretrial motions and defenses that may be brought below.

State v. Henry

Larceny

It is likely that the state can bring a charge for larceny against Henry for the taking of the Diamond ring from Jerseyville Jewelers. Theft is a specific intent crime that requires that a defendant knowingly take and carry away the property of another with the specific intent to dispossess the true owner of said movable property. The defendant must have the intent to take the personal property at the time of the larceny in order to succeed on said claim. As the facts present, the state can clearly establish a claim against Henry for larceny as he intentionally dispossessed the store of the diamond ring by taking it. Furthermore, his intent to do so can be inferred from the fact that he replaced the ring with an imitation, and that he brought the imitation for that specific purpose. Furthermore, the statements he made to his wife are indicative of his intent to permanently dispossess the true owner of the ring and indicate that he had no intent to return the stolen item. It is likely that a Larceny claim against Henry would be successful.

Burglary

The state can make an attempt at bringing a burglary charge against Henry. Burglary is a specific intent crime that requires a Defendant break and enter the dwelling of another with the intent to commit a felony therein. At common law, burglary required that the offense occur at night, however, this has been discarded in this jurisdiction. Applying this standard to the facts presented, it seems unlikely that a successful burglary charge could be brought against Henry because, although he forcibly entered the premises with the intention to commit a felony therein, the property he entered was his, and thus does not fulfill the element of "dwelling of another" under the definition of the crime. However, the state may seek to state that the house was in fact the property of another because Mary had thrown Henry out of the house, but it would be up to the factfinder to determine whether this satisfies the above described element.

Assault and Battery

It is likely that the state could bring a successful claim against Henry for both assault and battery. Assault requires that the state prove that a defendant intentionally placed an individual in immediate and reasonable fear of a battery. Likewise, battery requires that the state prove a defendant intentionally made a harmful or offensive contact with a party. The facts clearly indicate that Henry placed Mary in fear for her life when he pointed a gun at her and told her "its payback time", as any reasonable person would fear deadly contact from the weapon subsequently. Furthermore, the facts indicate that after the gun jammed, Henry beat Mary with the gun, causing severe injuries, thus fulfilling all elements of a charge for battery.
Attempted Murder

The state can bring a charge for attempted murder against Henry for his acts involving the gun, in which he pointed it at his wife and pulled the trigger. Attempt is an offense that occurs when a defendant takes substantial steps at completing a felony, but does not commit the felony in its entirety. Here the facts indicate that Henry made substantial steps at killing his wife, and that he intended to do so. Moreover, the state can demonstrate that he had the requisite intent to commit murder because he acted with malice and aforethought when he planned the murder at the bar. Likewise, the state can claim that going and retrieving his gun, telling his wife it was "payback time", pointing the gun directly at her, and pulling the trigger, all constitute "substantial steps" at completing the felony of murder. Furthermore, it can be argued that had the gun not jammed, he would have completed the attempted and killed, or at least seriously injured his wife.

Felony Murder

Felony murder occurs when a defendant causes the death of another during and as a result of their commission of a dangerous felony. Common law defines these felonies as burglary, arson, robbery, rape, kidnapping and other felonies of the like. It is not required that the underlying felony be completed in order to constitute felony murder, and an attempted felony that results in death can still constitute felony murder. In order for felony murder to be successfully brought against a defendant, the state must prove that the defendant caused the death of another DURING the commission of said felony. As the facts present, the killing of Henry's daughter was the result of the gun firing while Henry was potentially committing a burglary and absolutely committing a felony level battery and attempted murder against his wife. It is highly likely that the state will succeed in bringing a charge against Henry for Felony Murder.

State v. Dave

Conspiracy and Accomplice Liability

Conspiracy occurs when two or more people agree to commit a felony and take substantial steps to complete said felony. The state may seek conspiracy charges against Dave for his involvement in the burglary, attempted murder, battery, assault, and felony murder committed by Henry. In order to succeed on this charge, the state must show that Dave knew of Henry's intent to commit said offenses, and agreed to help him achieve his criminal objectives. The state may seek to demonstrate that Dave drove Henry to the house with the knowledge that he intended to harm his wife and that he agreed to help him do so.

The state can also attempt to bring a charge of Felony Murder and all other completed offenses against Dave for the death of Henry's daughter and other completed felonies using the theory of accomplice liability. Accomplice liability extends to accomplices who aid in the commission of a felony, and an accomplice is liable for all crimes and felonies committed by the principal actor in the commission of the offenses in which they were aiding. Applying this standard to the facts, if the state can prove that Dave knowingly assisted Henry in the commission of felonies, and had
the knowledge that he was in fact aiding Henry commit felonies, they can successfully charge him with all of the same felonies to which they charge Henry.

Receiving Stolen Property

Receiving stolen property occurs when someone receives property with the intent to keep it with the knowledge that the item was stolen or was most likely stolen. Applying this standard to the facts, it is unlikely that Dave can be charged with receiving stolen property because, although he was in possession of it at the time of arrest, he most likely intended to return it to Henry after he returned to the vehicle, and did not have the requisite intent to permanently deprive the owner of the property by converting the property to his possession.

Defenses

Voluntary Intoxication

It is likely that both Henry and Dave will seek to bring the defense of voluntary intoxication. Voluntary intoxication occurs when a person knowingly and willingly takes an intoxicant and then commits a crime while under the influence of said intoxicant. This defense is merely a mitigating defense, rather than a complete defense, and has the effect of lessening the severity of charges by negating the specific intent required to commit specific intent crimes. Voluntary intoxication is not a defense to general intent crimes and does not have the effect of totally shielding the person bringing the charge from criminal liability. Under the facts presented, it is clear that Dave and Henry were both intoxicated at the time the events described took place. The state should be prepared to provide alternate charges for the crimes committed as the voluntary intoxication defense will most likely succeed.

Motions

Suppression of Ring

It is likely that Dave's attorney will likely try to suppress the ring from evidence by filing a pretrial motion claiming that it was the fruit of a warrantless and unconstitutional search. The 4th Amendment protects against warrantless and unreasonable searches by requiring that an officer have a warrant before they search or arrest an individual. However, there are warrantless search and arrest exceptions which shield the state and likely make the ring valid evidence. A police officer can arrest an individual without a warrant when they have probable cause to believe that a person committed a crime. As the facts present, the 911 call by Mary likely gave the police probable cause to arrest both Dave and Henry at the scene without an arrest warrant. Furthermore, a warrantless search exception called "Search Incident to a Lawful Arrest" allows the arresting officer to search the body and surrounding area of a suspect for contraband, fruits of a crime, and weapons. This exception is backed by a public policy promoting officer safety and preservation of evidence. Applying this standard to the facts, it is likely that a factfinder would
hold that the fruits of the warrantless search fall within the Search Incident to Arrest exception of a warrantless search and are permissible and admissible against the parties as evidence at trial.

Suppression of Statement made by Henry after an Arrest

The 5th Amendment assures the right to citizens to avoid self incrimination. This guarantee is assured by the mandate that all officers provide suspects with Miranda warnings that inform them of their rights upon custody. Whether or not a suspect is in custody is determined by a standard that determines whether a reasonable person would believe they were free to go under the situation. Custody triggers the need for Miranda. Miranda warnings can be waived by a suspect, however the state must demonstrate that the waiver of their rights was knowing, voluntary, intelligent, and not the result of coercion. Custodial situations are considered inherently coercive and thus Miranda warnings are highly important and should be given immediately upon arrest. A statement given without Miranda warnings is considered unconstitutional and must be excluded as to not violate the constitutional rights of the accused. In this fact pattern, it is likely that the post custody statement of Henry will be excluded, as he should have been properly Mirandized upon being arrested, and the facts also indicate clearly that Henry was in custody. It is likely that this statement will be excluded by pre-trial motion as admissibility of this statement would be violational of Henry's 5th Amendment right to self incrimination.

Suppression of Mary's first call to the police

Henry's attorney may seek to exclude the statements of Mary's first call to the police as she obtained the information that the ring was stolen as a result of a communication between spouses. Spousal communications are considered privileged and cannot be compelled, however, the spouse of the declarant, not the declarant, holds the privilege, and can volitionally break the privilege and provide information from a spousal communication if they choose. It is likely that this statement will be admissible as Mary waived the spousal privilege when she initially called police.

Please contact me if you have any further questions.

Regards,

Assistant Prosecutor

Sample Answer 5B:

This memorandum will discuss which charges the prosecutor should bring against Henry, and will also discuss which pre-trial motions and defenses will likely be made by Henry. Even though we currently only have copies of the police report, phone call transcripts, and police
inventory, I assume in making the following assessments that we will be able to prove the facts as described in the narrative provided.

1. **Larceny.** Under NJ law, larceny is defined as taking and carrying off the property of another with intent to permanently deprive that person of the property. Henry took the diamond ring from the store without the store's knowledge and intended to keep it. His actions clearly support a charge of larceny. They may also support a charge of larceny by trick, which is the unlawful gaining of possession of property by deception. In addition to the standard elements of larceny outlined above, Henry substituted a fake diamond for the real diamond at the store. This deceptive act will also support a charge of larceny by trick.

2. **Driving Under the Influence.** Under NJ law, it is unlawful to operate a motor vehicle if one's blood alcohol content is over .08%. Here, Dave drove Henry back to Henry's house after the two of them drank tequila shots for 3 hours. In addition, the police noticed on arriving to the scene that both Dave and Henry were clearly intoxicated. Thus, Dave actions would support a charge of driving under the influence.

3. **Receipt of Stolen Property.** Under NJ law, a person cannot knowingly receive the stolen property of another. Here, Dave had heard Henry describe his earlier interaction with Mary -- including the part about the stolen ring -- before accepting the ring from Henry. This crime is a crime of possession, so Dave's accepting the ring from Henry supports a charge of receipt of stolen property.

4. **Accomplice Liability.** Under NJ law, when a person aids or encourages another to commit a crime, with the intent that the other commit that crime, the person is guilty of accomplice liability. Here, Henry was visibly angry and told Dave, "I need to go and take care of Mary." When Dave drove Henry to his house, Henry then said, "Hold this ring for me. I need to go inside and take care of my problem, once and for all." In context, while it is unclear whether Henry meant to actually kill Mary, he unquestionably meant to do her harm. By driving Henry home, accepting the ring, and generally appearing to oblige Henry, Dave encouraged and aided Henry in the commission of the crime. By not objecting to anything Henry said, and appearing to oblige, the evidence could probably also show that Dave's actions were borne out of his intention that Henry commit the crimes. At the very least, Dave should be charged as an accomplice to Mary's assault. Dave did not know that Henry had a gun in the house, and may not have guessed that Henry would attempt to kill his wife and then kill his daughter. On the other hand, Henry's language carried with it a tone of finality. We should therefore charge Dave as an accomplice to the homicide of Henry's daughter and the battery to Henry's wife.

Dave may try to defend on a voluntary intoxication theory, which would eliminate any specific intent he might have had. Because accomplice liability is a specific intent crime, this may be a full defense for him.

5. **Destruction of Property.** Under NJ law, burglary requires the unlawful breaking and entering of the dwelling of another at nighttime with the intent to commit a felony. Henry's actions met all of these elements, with the exception that the house was his own. However, we could still charge him with the willful destruction of property, when he destroyed the front door.
6. **Assault / Aggravated Assault.** Under NJ law, assault is intentionally causing harm or the reasonable apprehension of imminent harm upon another. Aggravated assault is assault with a deadly weapon. By holding up the gun and declaring that "it's payback time," Henry intended to cause Mary harm, and intended to cause her to fear that harm. In fact, Henry intended much more than that but was foiled by the jammed gun. Henry's actions clearly support an aggravated assault charge.

Henry may try to defend on a voluntary intoxication theory, which would eliminate his specific intent. However, assault can also be prosecuted on a recklessness theory, so Henry's defense will not work. As a secondary option, we could charge Henry with reckless endangerment, which occurs when a person places another in danger with a state of mind equivalent to recklessness. This charging option would eliminate the possibility of a voluntary intoxicication defense, but would also not carry as severe a penalty as assault.

7. **Battery.** Under NJ law, battery is the intentional causing of offensive contact with another. Here, Henry intentionally hit Mary on the head with the gun several times. This injurious conduct is patently offensive, and we should charge Henry with battery. Note that battery is a general intent crime and Henry would have no voluntary intoxication defense.

8. **Attempted Murder.** Under NJ law, murder is the intentional, premeditated killing of another. Henry's pulling of the trigger while pointing a gun at Mary would ordinarily qualify as attempted murder. Henry's vicious battering of Mary, especially given the severe injuries, would also normally qualify as attempted murder. The only problem for us is that attempt crimes require specific intent, which would be obviated by Henry's voluntary intoxication defense. Therefore, we may not be able to charge him for this offense.

9. **Involuntary Manslaughter.** Under NJ law, involuntary manslaughter is a homicide resulting from criminal negligence. Here, Henry's attempt to use the gun on his wife, and his allowing it to be loaded in the house and in a generally unsafe condition, supports criminal negligence in the killing of his daughter. Ordinarily, I would recommend a charge of felony murder in a case like this. Under NJ law, felony murder is a killing that occurs during the commission of a felony that is a foreseeable result of the felony. Here, however, the bullet's piercing the wall and killing of Henry's daughter does not seem to be a foreseeable result of Henry's attack on Mary. Reasonable minds can differ here, of course, so if you believe that Veronica's death was a foreseeable result, then we should charge felony murder.

Henry is likely to move to suppress the statement he made to the police officer. The court will likely grant this motion. Under the 5th Amendment, Henry had a right to receive Miranda warnings before undergoing custodial interrogation. Henry was obviously in custody, since he had been arrested. While it is a closer question whether he was also being interrogated (the question coming casually, as it did), a court will probably hold that the officers were attempting to elicit an incriminating response from Henry. Therefore, a court will grant the motion to suppress the statement.
Henry may move to suppress the diamond ring that Dave had in his pocket. However, he lacks standing to make this motion because if anybody's 4th Amendment rights were violated, they were Dave's.

Henry may move to suppress the phone call recording when Mary called 911 at the time of the attack. Henry may argue that the use of this evidence violates his 4th Amendment right to not be searched without a warrant. However, this motion will fail because Henry offered this statement to Mary and assumed the risk that she might be wired or otherwise capable of transmitting his words to the authorities.

Finally, Dave may move to suppress the diamond ring found on his person as the result of an illegal search and seizure under the 4th Amendment. However, the police had probable cause to arrest him when they found him sitting in the driver's seat of his car while visibly intoxicated. An exception to the warrant requirement is that police may make a valid search incident to an arrest, in order to properly ensure the arrestee has no weapons. Here, that is what the police did, and Dave's motion will be denied.

**Question 6 – Civil Procedure**

On December 4, 2013, ABC, a New Jersey (“NJ”) limited liability company, filed a complaint in the federal district court of NJ, seeking $250,000 in damages and an injunction against ZGame, Inc. (“ZGame”), a Nevada corporation with its principal place of business in NJ, based on a violation of the NJ Franchise Practices Act (the “NJFPA”). On the same day, ABC filed a motion for a preliminary injunction to prevent ZGame from terminating the parties’ franchise agreement pending a final adjudication on the merits. ABC’s members are Bunny, a resident of Pennsylvania, and Kaster, Inc., a New York (“NY”) corporation with its principal place of business in NY. The parties conducted expedited discovery and introduced the following evidence and testimony at the hearing for the motion.

In 2003, ABC signed a franchise agreement with ZGame to act as the exclusive distributor of ZGame gaming machines in the casino industry in Pleasantville, NJ. Within just a few years, ZGame’s market share rose from 15% to 48%, largely due to ABC’s efforts. In 2007, ABC spent $1 million to expand and train its highly technical staff on ZGame specific knowledge and to open a new office in Pleasantville, NJ, in which it displayed, sold, and promoted ZGame products. Bunny testified he devoted 90% of his time to selling ZGame products, which prevented him from pursuing other business opportunities. Over the years, Bunny consistently promoted ZGame products to casino operators “as superior” to that of all other gaming device manufacturers and increased considerably both parties’ goodwill.
Under the franchise agreement, ABC agreed to use “best efforts” to sell and distribute ZGame products, maintain an office in NJ, and refrain from selling competitor products in NJ. On November 25, 2013, franchisor, ZGame, notified its franchisee, ABC, that although ABC always acted in the best interest of ZGame, it would be terminating the parties’ franchise agreement due to a business decision to sell its products directly to customers in NJ to reduce costs.

The NJFPA provides that a franchisor shall not cancel, terminate, or fail to renew a franchise without good cause. Good cause is statutorily defined as the failure of a franchisee to substantially comply with the requirements of the franchise agreement. The NJFPA was enacted to protect franchisees due to the unequal bargaining power between franchisors and franchisees.

You are the law clerk to the district court judge who has asked you to prepare a memorandum addressing the following issues:

1. Is subject matter jurisdiction proper in the federal district court of NJ? Explain.

2. Assuming jurisdiction remains in federal court, how should the court rule on ABC’s motion for a preliminary injunction? Explain.

PREPARE THE MEMORANDUM

Sample Answer 6A:

To: District Court Judge

From: Applicant

Re: ABC, LLC. v. ZGames, Inc.

Please find below a discussion of the two issues you've asked me to address in the following memorandum:
1) The first issue is whether subject matter jurisdiction is proper in the federal district court of NJ.

Subject matter jurisdiction determines the power of the court to hear the specific subject matter at issue. In order for there to be valid subject matter jurisdiction such that a federal court can hear the matter and enter a valid judgment over the dispute, there must be either 1) a federal question, or 2) diversity jurisdiction. Federal question jurisdiction exists when the plaintiff is claiming a right that "arises under" federal law. Whereas here, where the issue is with regards to a violation of the NJ Franchise Practices ACT (NJFPA), the claim is not arising under federal law and the court does not have federal question jurisdiction to hear the matter. The next issue is then whether the court has proper "diversity" jurisdiction to hear the case.

Diversity Jurisdiction:

Diversity jurisdiction is proper in a federal court where the following requirements are met. There must be 1) complete diversity between the parties, and 2) an amount in controversy that exceeds $75,000. The amount in controversy requirement is met where there is a good-faith basis that the amount in controversy exceeds $75,000, even if the ultimate outcome is less. With regards to an injunction, the amount in controversy requirement will bet either when the plaintiff's loss resulting from no injunction exceeds 75k, or when the defendants cost in complying with the injunction exceeds 75k. In this situation, however, the amount in controversy requirement is met regardless of which method is taken because there is a complaint seeking $250,000 in damages.

The most important issue is whether there is complete diversity. Diversity is established based on each parties domicile, if they are citizens, and for corporations, can be based either on 1) their place of incorproation, or 2) their principle place of business. For parnterships, each partner must be made a member to the action and the domicile of each partner will be taken into consideration. As you know, Domicile is established where a party has a physical residence and where they intend to permanently reside.

In order to determine if complete diversity exists, we must examine all the parties to this action, beginning with ABC. ABC is a limited liability company, with its incorporation in the state of NJ. If the court were to merely look at the place of incorproation, it would be clear that there is no diversity jurisdiction because the defendant in this case, ZGame, Inc., is an incorproated company and therefore subject to diversity in both its state of incorproation, Nevada, as well as where it has its principle place of business, here, NJ. However, because ABC Is a limited liability company, and not incorproated, they will not be treated as an incorproated company, but rather, the court will look to their individual members to determine if complete diversity is met.

Here, ABC is composed of both Bunny, a Pennsylvania resident and presumably a Pennsylvania domicile then, and Kaster, Inc., a New York incorproated company with its principe place of business in New York.
Therefore, there appears to be complete diversity on all sides. On the plaintiffs side, there is a Pennsylvania and New York "citizen," for purposes of diversity, and on the defense side there is a Nevada and NJ "citizen. Therefore, there is both complete diversity and the amount in controversy requirement is met, as stated above. Thus, there is proper subject matter jurisdiction over this suit and the court can proceed to address whether it should grant ABC’s motion for preliminary injunction.

2) Whether the court should grant a preliminary injunction for ABC.

A preliminary injunction is a equitable remedy that is used to prevent or require certain actions while a lawsuit is pending. The other party must be given notice and a chance to be heard. Here, assuming the preliminary injunction was properly filed and notice properly given, we must address the elements. In order for this court to grant a preliminary injunction (PI), the court must find: 1) There is an irreperable harm that will be suffered by the plaintiff (ABC) if the injunction is not granted, 2) there is an inadequate legal remedy, 3) there is a probability of success on the merits of the underlying claim, 4) the PI is feasible for the court to enforce, 5) there is a proper balancing of the hardships that both parties will face with a PI, and 6) there are no valid defenses to be raised by ZGames, including laches (which occurs where there was a delay by ABC in bringing the suit initially, or unclean hands (where the plaintiff has somehow acted improperly and should not be granted a PI based on those improprieties, the improprieties which must relate to the issues at hand).

Irreperable Harm:

Here, ABC will likely claim there is an irreperable harm to their company based on the amount of money it spent and amount of time it spent in reliance on the franchise agreement with Zgames. There may be a valid argument to be made if the harm that would come from allowing Zgames to sell its own products will cause such grave damage to ABC such as bankruptcy. ABC will likely argue this is so based on the fact that they spent over $1 million dollars to expand and train its highly technical staff and to open a new office in Pleasantville, NJ which displayed, sold, and promoted ZGames products. They will argue that if they lose this contract, they could potentially be out of a lot of money and cause their business to fail. If they no longer have the games to sell and promote, they will have no store to hold open to the public and would be irreperably harmed by not being able to fill the vacancy of games that needs to be sold to sustain their current customer base. Additionally, they will argue without customers coming to their stores, they will have to spend additional time and money to train the employees to sell other company’s products, and they might not have the necessary funds to do so. The only argument that will save ZGames with respect to this element is if ABC would not go financially bankrupt if the court were to deny the PI. If the court denied the PI and ABC could find other games to fill the store, and their employees could be use effectively in other manners, then there is no irreperable harm. This is a tough standard to meet, so only if they will go bankrupt should the court find that there is adequate irreperable harm.

Inadequate Legal Remedy: Similar to the argument above, ABC would likely argue there is no adequate legal remedy. Moreover, there may be an additional argument from Bunny that he spent 90% of his time promoting Zgames, and because he passed up other opportunities, simply giving
a monetary award will not be sufficient because he wants to profit from the gains in "goodwill" that both parties benefited from. Goodwill is likely something the court should find cannot adequately be compensated as it is too speculative to put a specific monetary value on.

ZGames will argue that there is an adequate legal remedy and if the court ultimately finds in favor of ABC games, they would be entitled to certain monetary damages with regards to the lost profits they would have made while the lawsuit was being litigated, as well as increase in goodwill. As stated above, if ABC however would go bankrupt, as a result of not granting this PI, then there would not be an adequate legal remedy and would suffice during the litigation and the purpose of the PI would be well served.

Ultimately, if the court believes it cannot put a money number on goodwill, then there will be deemed an inadequate legal remedy.

**Probability of Success on the Merits:**

In order to be granted the PI, they must show they would be probable on success of the merits, and would need to post a bond to the court most likely as well. Here, the probability on the success of the merits favors ABC strongly.

The NJFPA states that a "franchisor shall not cancel, terminate, or fail to renew a franchise without good cause. Good cause is statutorily defined as the failure of a franchisee to substantially comply with the requirements of the franchise agreement." According to legislative history, the NJFPA was enacted to protect franchisees due to the unequal bargaining power between franchisors and franchisees.

Here, ABC has a high probability of success based on their prior actions with regards to the business relationship with ZGames. For instance, they spent over $1 million dollars training their staff to be educated in the highly technical aspects required by ZGames. Moreover, they opened up a store to promote, sell, and display ZGames products for the casino industry. Additionally, Bunny, the member of ABC, personally spent over 90% of his time selling ZGame products. These actions show that they acted and used their "best efforts" as was required under the franchise agreement. Not only was there no breach of the franchise agreement, but based on this there was also no good-cause by ZGames to terminate the contract. ZGames merely wanted to end the contract so it could save money. However, where the ABC LLC used its best efforts, complying substantially with the requirements of the franchise agreement, ZGames improperly cancelled the contract. Thus, there is a high probability of success on the merits.

**Balancing of Hardships:**

As stated above, the court will balance the hardships of ABC without the injunction and ZGames with complying with the injunction. Here, ABC will suffer much greater hard than it would be for ZGames to comply. By requiring ZGames to comply, they are simply continuing the existing relationship they have. They will still have their products sold by a company who has been doing so sufficiently since their contract begun, with its own store, and a highly technical specialized staff. However, ABC will potentially suffer a huge loss of business, loss of goodwill, and will
have no way to make up for the lost profits in the meantime. Ultimately, the court should find that after balancing the hardships, ABC stands to lose a lot more if the injunction is granted, and ZGAMES actually stands to benefit in the meanwhile during litigation as they will not lose profits but will continue to have their products marketed and sold to casinos looking to purchase, and seeing a continued increase in their good will.

**Defenses:**

As stated above, there does not appear to be a delay that would make the defense of laches available to Zgames against ABC. Moreover, there does not appear to be any unclean hands on the part of ABC. They went above and beyond and completely lived up to the contract. Because there are no defenses that can be raised, the court would be able to make its decision disregarding this aspect of the PI analysis.

**Conclusion:** Ultimately, the court should grant the preliminary injunction to Zgames based on the above-mentioned factors.

**Sample Answer 6B:**

MEMORANDUM

FROM: LAW CLERK

TO: JUDGE

Set forth below is my analysis on the subject matter jurisdiction and preliminary injunction issues in the case of ABC v. ZGame, Inc.

1. **Subject-Matter Jurisdiction;**

As you know, our court is one of limited subject matter jurisdiction, and it must appear that there is one of the Constitutional bases for federal court jurisdiction for us to hear the case. There appears to be no federal question presented; rather, diversity jurisdiction must be the basis if there is any. Diversity requires that plaintiff and defendant be citizens of different states.

For purposes of jurisdiction, a corporation is considered a citizen of the state of its principal place of business and its state of incorporation. Accordingly defendant ZGame is a citizen of Nevada and New Jersey. With respect to plaintiff ABC, it is a little less clear. If it is treated as a corporation, then its incorporation in New Jersey destroys diversity, and the case must be dismissed. If, on the other hand, it is treated as an unincorporated association, then we would need to look at the citizenship of its members, Bunny and Kaster. Kaster is a NY corporation with principal place of business in NY, so it does not interfere with diversity. Bunny appears to be an individual, so his citizenship is determined by his domicile which is in Pennsylvania. The fact that he spends 90% of this time supporting the ZGame franchise through an office in NJ under the franchise agreement, would not change this conclusion.
In short, we need to delve further into the nature of the ABC entity. If it is a corporation, there is no jurisdiction. If it is an unincorporated association, then its members are citizens of NY and Pennsylvania, and there would be diversity in a claim ZGame, a citizen of Nevada and New Jersey. As subject matter jurisdiction is not a waivable defense, and indeed may be raised by the court sua sponte at any time, the fact that there has already been substantial litigation of this matter in no way affects our decision as to dismissal.

2. Preliminary Injunction

Assuming there is subject matter jurisdiction, we will need to decide if ABC can meet the essential standards necessary for a preliminary injunction: (1) likelihood of success on the merits; (2) irreparable injury; (3) a balance of harms in favor of the movant; and (4) a public interest which is served by the injunction.

In this case, there appears to be a strong likelihood of success on the merits. The New Jersey statute prohibits franchise termination except for good cause, which is defined as a failure to substantially comply with the requirements of the franchise agreement. Here, the agreement required ABC's best efforts, and there is substantial evidence that Bunny provided that. He testified that he devoted 90% of his time to selling ZGame products and consistently promoted the products as superior. ABC spent over $1 million in training technical staff, and market share increased substantially, largely due to ABC's efforts. ZGame's reasons for termination had nothing to do with the terms of the agreement or with ABC's efforts, but rather were due to a business decision to sell directly. Whatever the merits of that decision from a business point of view, it appears to be foreclosed by the NJ statute, which ties "good cause" to the terms of the agreement.

A more difficult issue for ABC is irreparable injury. This is partially a matter of showing urgency supporting interim relief pending a final disposition, but as with all equitable relief, it also must be shown that a legal remedy of damages is inadequate in order to support the equitable relief of an injunction. The urgency part is relatively clear; if relief is not granted, ABC will be forced to exit the market and it may be difficult or impossible to reestablish itself. But the inadequacy of legal remedy is less clear: ABC's investments can be quantified and it profit history can be proven in support of a claim for monetary damages. Damages can be viewed as an inadequate remedy, if they are exceedingly hard to quantify. Here, future damages are difficult to quantify, which would argue for inadequacy of the legal remedy; the increased goodwill to ZGame may also be very difficult to prove with any certainty. Also, it appears that ABC and Bunny invested major resources and almost all of Bunny's time in developing the ZGame franchise, and it can be argued that no monetary remedy would as a matter of equity fairly compensate them for the substantial investments they made.

The balance of harms would also favor ABC. If the injunction is denied, they will lose the franchise and all of the investment they made; if they were ultimately successful, the interim loss of the business would make it very difficult for ABC to establish its position in the market for ZGame products, having been required to exit for the pendency of the litigation. On the other
hand, ZGAmes has by all accounts profited handsomely through the efforts of ABC, so requiring
ZGame to maintain status quo would not injure ZGame, except in the limited respect that it
would have to postpone its business strategy of selling directly.

Finally, the public interest should be defined in terms of the purposes of the NJ statute. The
NJFPA was enacted to protect franchisees due to the perceived unequal bargaining power
between franchisors and franchisees. Maintaining status quo until it can be finally determined if
ZGame has "good cause" for terminating ABC supports the public interest, as defined by the
New Jersey legislature, in ensuring that the unequal bargaining power of franchisors does not
result oppress franchisees which, even though not citizens of the state, operate there.

In short, we should question ABC closely about whether there is an inadequacy of legal remedy
and irreparable injury to ensure that this element is satisfied. If we are convinced on that point,
you should grant the injunction.

**Question 7 – Contracts**

Virgil owns a gas station in Busytown, New Jersey. As part of his business, he runs an
auto repair shop. Ivan is his mechanic and works off the books. Virgil pays Ivan $20.00 an
hour and 40% of the mechanic bill charged to each customer.

Lucy is a whiz-kid who has finished her first year of college at the age of 17. Her parents
decide to give Lucy a new car for her to use while in college. She and her father go to a
used car lot, Lemons-R-Us. Ivan has a second job as a used car salesman at Lemons-R-Us,
which is across the street from Virgil’s gas station. Lucy falls in love with a little red sports
car on the lot.

Lucy’s father wants her to buy something more practical, but after speaking to Ivan, who
assures him that the car runs “like a top,” Lucy’s father gives Lucy his checkbook and
says, “Get what you want, Lucy.” Lucy’s father’s cell phone rings. He finds out that there
is an emergency at work and leaves the lot. Lucy then fills the paperwork out in her
father’s name and buys the car for $7,000. Ivan gives her the keys.

Lucy starts the car and pulls out of the used car lot. The car stalls in the middle of the road
and rolls into Virgil’s gas station. Ivan walks across the street, puts his mechanic’s overalls
on, and waits for Virgil. Virgil walks into the mechanic’s shop and tells Ivan that the little
red car, which is stalled blocking the entrance to the gas station, needs some work.
Ivan tows the car into the shop, looks under the hood, and tells Virgil that the car needs a new engine. Virgil walks out to the waiting area and tells Lucy that the car needs a new engine. Lucy loves the car so much that she says, “Just make it run again.” Virgil then walks back into the shop and tells Ivan to make the car run again.

After the repairs, Lucy is given an itemized bill for the car repairs: $1,000 for a new engine, $2,000 for labor, and $500 for towing. She uses her father’s checkbook and pays the bill.

Lucy gets home and informs her father that she spent $10,500 on the car and the repairs. She is happy, but her father is not. He drives to the repair shop and sees Ivan dressed in his mechanic’s clothes splitting money with Virgil. He recognizes Ivan from the used car lot. He calls them both crooks and drives directly to your law office. He wants to sue Lemons-R-Us and Virgil.

While Lucy’s father is at the law office speaking to one of the partners, he gets a call that there has been an accident. Apparently, Lucy was taking a “selfie” in her new car and wrecked it. She is fine, but the car is totaled. After Lucy’s father leaves, the partner asks you to write a legal memorandum to address all the claims, defenses, and liabilities in the case.

PREPARE THE MEMORANDUM

Sample Answer 7A:

MEMORANDUM

TO: Attorney

FROM: Applicant

DATE: February 25, 2015

RE: contract claims
This memorandum should address all the claims, defenses and liabilities that should arise in this case.

There are two governing theories of contract law. The first is the common law, which applies to services, the sale of real estate and the like. The other is the Uniform Commercial Code, which applies to the sale of goods. Both laws apply to the claims stated in this case.

(1)

Regarding the first claim, the purchase of the car. A contract is formed when there is an offer, an acceptance and consideration. An offer is a manifestation of an intention to enter into a contract. An acceptance is an agreement to enter into that contract at those stated terms. Consideration is found when there is a bargained for exchange between both parties and each party incurs a legal detriment. The sale of a car is found to be applicable under the Uniform Commercial Code, since it is the sale of a good. Under the UCC, the sale of a good, that is over $500 must be in writing to satisfy the statute of frauds. During the sale of a good, there are certain express and implied warranties that are found in the contract. There are two implied warranties in every sale of goods contract, that being the implied warranty of fitness for a particular use and the implied warranty of merchantability. The implied warranty of merchantability is found to prove that the merchant who sold the good is a valid merchant and may rightfully sell the type of good that is part of the contract. The implied warranty for a particular use is found when the merchant is aware of a specific use the buyer intends to use the good for and states that the good should be sufficient to support that particular use. However, these implied warranties may be waived if there is an agreement within the contract stating that the goods are bought as is. Furthermore, sometimes a merchant may make an express warranty. An express warranty is an express assurance to a certain statement regarding the good.

Here, there is a valid contract for the sale of a car. There was an offer of a price from Lemon R Us, an acceptance of the price from Lucy, and consideration since the car was given to Lucy and the money was exchanged to Lemon R Us. The sale of the car was for over $500. However, it is stated that forms were filled out, thereby implying that the contract was done in writing and satisfying the statute of frauds. Since the car is a good, there are two implied warranties that are applicable to the car, that being the implied warranty of merchantability and the implied warranty of fitness for a particular use. Ivan, an employee of Lemons R Us, was aware of Lucy's purpose for purchasing the car, that being that she planned on using it to drive to and from school and the like. Thus, this implied warranty is valid. Additionally, Lemons R Us asserted an implied warranty of merchantability since the car was sold from a used car merchant who sells this kind of good and is a merchant of this kind of good. Further, there is an express warranty from Ivan, on behalf of Lemons R Us. Ivan told lucy and her father that the car run like a top. Thus, ivan makes an express warranty that the car is in godo condition and will run top notch. Therefore, there was a valid contract formed.

However, Lucy and her father should be able to raise the defenses of incapacity, fraudulent misrepresentation, negligent misrepresentation, and breach of both implied and express warranties in regards to this sale of goods contract.
The defense of incapacity can be raised when an individual, under the age of 18 enters into an agreement. The other party may or may not have known of the individual's age and lack of capacity. The individual who lacks capacity is the only party to the contract who may raise this defense and cause the contract to be invalid. Further, this defense may be waived if the individual, after achieving the age of 18, ratifies the contract, and if the contract is not for a necessity. Here, Lucy was 17 years old at the time she entered into the contract with Lemons R Us. She was therefore a minor and did not have the capacity to enter into such a contract. She may claim this defense to the contract and try to void the contract. However, she may encounter some liability and issues raising this defense. This is because although she filled out the paperwork, she technically did not enter into the contract with Lemons R Us. Rather, her father was the one whose name was on the contract and the check was from his account. This might be a liability for Lucy and her father on this claim, but likely will not be a huge issue because Lucy did not have the authority to sign for her father. Although he told her to get what she wants, she did not have the authority to enter into a contract under his name, but instead could have entered into a contract under his name.

The defense of fraudulent misrepresentation may be raised when an individual, makes a statement, knowing that it was false, and knowing that the party hearing the statement would rely on it, when the party actually does rely on the statement, and damages ensue. Here, Ivan expressly assured both Lucy and her dad that the car was in top notch. However, Ivan knew that the car was not in top notch. He was a salesman of the used car dealership and knew of the state of the condition of each and every car. He knew when he made this statement that they would rely on the statement and buy the car. Lucy and her dad did just that. Therefore, they should be able to raise the defense of fraudulent misrepresentation. However, Lucy and her father may have some liability in trying to prove the fact that Ivan knew if the statement he was making regarding the vehicle being top notch was actually true or not. If he did not know, then the fraudulent misrepresentation defense will fail.

The defense of negligent misrepresentation may be raised when an individual, makes a statement, not knowing if it is true of false, but knowing that the party hearing the statement may rely on it, when the party does actually rely on the statement, and damages ensue. Here, Ivan was a salesman at Lemons R Us. He expressly assured Lucy and her dad that the car was top notch when he most likely did not have the knowledge to know this information. He negligently made this communication to them, knowing they would rely on it, and purchase the car. Thus, the defense of negligent misrepresentation will likely succeed.

The defense for breach of both implied and express warranties will likely be upheld. Lemons R Us, breached their implied warranties because they did not add language in the contract stating that the sale of the car was as is. Instead, they allowed these implied warranties to arise in the sale of the car. They breached these warranties when Lucy drove the car not even a block away from the used car lot and the car engine failed. The engine is a pivotal part of the car and is implied to be in suitable condition in the implied warranty of merchantability and the implied fitness for a particular purpose. Additionally, Ivan on behalf of Lemon expressly assured them of the car's condition, thus this was also found to be not valid when the car broke down. Thus, these defenses should likely succeed.
Regarding the second contract, between Lucy and Virgil's gas station for the repairs. The common law should apply because this was a contract for services. Therefore, the statute of frauds does not need to be met, unless there is an express intention for the services agreement to be in writing. Additionally, the same law applies where the contract must have an offer, acceptance and consideration. The contract under the common law should have stated who the parties to the claim were and what the services were that were to be done. Even though the statute of frauds does not necessarily require that the contract be in writing, it is good practice for services contracts to be in writing, for the parties to agree to the terms and for their to be documentation. This prevents future discrepancies as to certain terms of the contract, which if the contract is the final written integration of the contract, will not allow contradictory language to be introduced because of the parol evidence rule.

Here, Lucy entered into a contract with Virgil. Virgil hired Ivan as an employee under the books. Ivan knew that Lucy was 17 years old since he had just dealt with her and her dad at the used car dealership across the street. Virgil offered to fix Lucy's car for x amount. Lucy agreed. There was consideration since Virgil's company did the services and Lucy paid them for doing so. Thus, there was a valid contract that was entered into for the services to be completed.

However, Lucy can likely raise the defense of incapacity and likely succeed. In this contract, she personally entered into the contract with Virgil. Lucy was 17 at the time. Ivan was even aware of her age. A minor is allowed to void a contract entered into unless they later ratify it after they reach the age of majority or if it is for a necessity. Lucy can argue that the car was not for a necessity. The car was out of convenience. Her father was buying it for her to use while at college, however she did not necessarily need it. Thus, Lucy should be able to raise this defense and likely succeed and get out of this contract with Virgil.

Another liability Lucy may encounter is the fact that Virgil pays Ivan under the table. Virgil can try to claim he is not an employee of Virgil, and thus Virgil did not know he was entering into a contract with a minor. However, it does not matter that he knew. The simple fact that he did so gives the minor the ability to void the contract.

Finally, the third issue regarding damages. Damages may be asserted for a variety of reasons. However, due to the fact th Lucy totaled her car in an accident while taking a selfie, this might limit her ability to claim damages from both Virgil and Lemons R Us. Although, the court may find that there was an invalid contract, the court may also not find for damages for Lucy or her father since they would then be unjustly enriched. Even though they spent the money on the car and the services, they also completely totaled the car. if they were to obtain a judgment for damages and be given back there money, they may be able to be restored to the same place they had been prior to the contract. However, because of the accident, they cannot give the car back to either Virgil or Lemons R Us. Thus, both of these merchants will have lost both the amount of money they should have received on the same plus the value of the car.
The court most likely will find that Lucy and her father should be given back damages in the amount spent on the car and the services, minus the value of the car at the time of the accident since Lucy destroyed the car and neither Lemons R Us nor Virgil can retain possession of the car and thus have lost the cars value.

Sample Answer 7B:

To:   Partner
From: Applicant
RE: Potential Claims against Lemons - R- US and Virgil

The following memo addresses all the potential claims against Lemons-R-Us and virgil as well as any defenses that they can assert. The type of law applied to a cause of action arising out of a contract depends on whether the contract is for predominatley goods or services. If the contract is for the sale of goods then the UCC applies. If the contract is for services then the CL applies.

(1) Lemons-R-US

A merchant is someone who regularly deals with the goosd that are at issue. Lemons-R-Us is a merchant of cars because it regulalry sells cars. Consequently, the UCC applies to this transaction.

Under principles of agency law an employer is liable for contracts entered into by their employees on behalf of the busienss if the agent has authority to bind the principal in contract. The facts indicate that Virgil was hired as a car salesman. Thus he has express and implicit authority to sell cars on behalf of the principal, Lemons-R-US, in order to carry out his job reponsibilities. Consequently, Lemons-R-US is responsible for any contracts made by Virgil.

An express warranty is a warranty made by a merchant involving the basis of the bargain. An express warranty cannot be disclaimed. The facts indicate that Ivan, an agent of the car dealership, made an express warranty about the basis of teh bargain when said "the car runs like a top." A breach occurs when party is substantially deprived of its bargain under the contract. The facts indicate that Lemons-R-Us breached an express warranty because the car did not run well. Consequently, Lemons R-Us is liable for breach of an express warranty and Lucy and her father are entitled to damages. The most common damages in a contract cause of action are expectation damages. This means taht parites should be restored to what they expected to receive under the contract. Consequently, Lemons-R-Us will have to reimburse Lucy and her father for whatever it takes to put the car in "top shape."
All merchants who sell goods make an implicit warranty that the goods they sell will be sufficient for their commercial purpose. The commercial purpose of a car is to drive. The car was clearly not fit for that purpose because it broke as soon as it got off the lot. There is no evidence that this warranty was specifically disclaimed by the merchant. Consequently, Lemons R US breached their warranty that goods will be fit for their commercial purpose. This constitutes a breach under the contract.

Lucy may also be able to rescind the contract on the ground that she is a minor. When a person is under 18, they have until they are 18 to void a contract, unless the contract is for necessities. If they reach the age of 18 and fail to void the contract then they remain liable under the contract. The facts indicate that Lucy was 17 when she purchased the car. Thus, if she purchased the car on her own she would be able to void the contract prior to when she turns 18.

The plaintiffs may also be able to rescind the contract on the grounds that Ivan fraudulently sold them a car. Fraud is a valid defense when a party makes an intentional misrepresentation of past or present fact or an accidental misrepresentation of a material past or present fact. The facts indicate that Ivan misrepresented the parties that the car was working. There is circumstantial evidence that this misrepresentation was intentional because he wanted to be able to do the repair work and earn extra money. If that is the case then this will be a valid defense to the fact that a contract was formed. Even if the representation was negligent, the plaintiffs can still defend against contract formation because the functionality of the car is a material aspect of the sale and Virgil made an affirmative statement that the car would be working properly. Consequently, the plaintiffs have a valid defense based on misrepresentation.

Lemons-R-Us can assert that the contract is no longer voidable since Lucy totalled the car based on her own negligent actions and so she can not return the car to Lemons-R-US.

Lemons-R-Us may be able to defend against Lucy's infancy by saying that the contract was really between Lucy's father and Lemons-R-Us and not Lucy and that Lucy was merely acting as an agent of her father. The father gave Lucy express permission to act on his behalf and subject to his control when he told Lucy to "get what she wanted." The fact that the paperwork was completed in Lucy's father's name and using funds that Lucy's father provided is further evidence that the contract was actually between the father and Lemon-R-Us, not Lucy and Lemons-R-US. If the judge finds that Lucy's father, not Lucy purchased the car then there is no defense of infancy.

(2) Virgil

(A) Liability for Car Sales

When selling the car to Lucy and her father, Virgil acted as a disclosed agent since Lucy and her father were aware that he was selling cars on behalf of Lemons-R-US. An agent to a disclosed principal is not personally liable for contracts entered into on behalf of the agent. Thus, Virgil
will not be personally liable under any breach of contract between Lemons-R-US and Lucy and her father.

Lemons-R-Us may be able to seek Indemnification from Virgil if they can prove that Virgil acted negligently while carrying out his duties or engaged in fraud because that would constitute a breach of his fiduciary duties.

(B) Liability for Repair work

A contract requires: (1) Offer, (2) Acceptance and (3) Consideration. An offer is an offeror's objective manifestation of his willingness to enter into a contract that is determined based on whether a reasonable person would believe that an offer had been made. Under the Common Law (CL) an offer must contain all of the essential terms price, quantity, subject, and parties. UCC does not require that the parties to agree on a price term because the UCC will use its gap filling provisions to insert a reasonable price.

An acceptance is an offeree's objective manifestation to enter into a contract based on the offer. Under CL, an acceptance must be the mirror image of an offer. Under the UCC an contract may still be formed so long as an acceptance does not materially alter the terms of the original offer or condition acceptance upon the agreement to the specific terms of the original offer.

Consideration is a bargained for exchange of benefits and deterrents. A typical example of consideration is the exchange of money for goods or services.

Since the rules for contract formation differ based on whether the CL or UCC applies, it is necessary to determine whether the predominate purpose of the contract was for goods or services. The primary purpose of a gas station and auto repair shop is to provide services. However, the facts of the present case indicate that the contract was really for the sale of a new engine and that the services to install the engine were merely incidental to the sale of the good. The price breakdown of the contract supports that the primary purpose of the contract is for services because the engine was less than 1/3 of the total cost breakdown, while service encompassed more than 2/3 of the contract. Thus, it is more likely that a court would analyze this contract based on the CL.

The facts indicate that Virgil told Lucy that the car needed a new engine. If the court determines that the primary purpose of the contract is for services then this will not be considered a valid offer to replace the engine because the offer does not contain the essential price term so it is not a valid offer. If a court finds that the primary purpose of the contract is for the sale of the engine then Virgil's statement may be considered a valid offer and the court will merely insert a price term using the gap filler provisions.

Under the UCC, if Virgil's statement was an offer then Lucy accepted the offer when she said "make it run." There is no question that the contract would contain consideration because it
involves the exchange of goods and services for money. Thus, if the court decides that the predomininate purpose of the contract is services then no enforceable contract was created, but if teh court determines that the primary purpose of teh contract is goods then a contract was created.

If a contract was created then lucy may be able to defend on the grounds of infancy. When a person is under 18 then have until they are 18 to void a contract, unless the contract is for necessities. If they reach the age of 18 and fail to void the contract then they remain liable under the contract. The facts indicate that Lucy was 17 when she requested teh services. Thus, she may be able to void the contract.

Virgil may be able to defend against this by arguing that voiding the contract would result in unjust enrichment. Unjust enrichment is a remedy provided by the court even if there is not a valid contract because it would be unfair to let a party retain the benefits received.