February 2014 Sample Questions and Answers

Criminal

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QUESTION 1 - CRIMINAL

Avery worked at Peter’s candy store in Jerseyville. Peter, the owner, lived in an apartment above the candy store. Late one afternoon, Peter advised Avery that her services were no longer needed. Upset, Avery left the candy store and walked across the street to a bar.

At the bar, Avery ran into her sister Corey and told her that she had just been fired from her job. Corey, who suffers from psychological and cognitive disorders, was outraged when she heard this and said, “Peter deserves some payback for all your hard work and years of dedication.” Avery, aware of her sister’s disorders, initially thought nothing of Corey’s statement. But after two hours and five drinks, and now intoxicated, Avery said to Corey, “Yeah, Peter does deserve some payback; let’s go.” Without further discussion, they left the bar and crossed the street to the candy store.

When they reached the store, it was dark and closed for the evening. Avery used her key to unlock the door, and they entered. However, Avery forgot to disarm the alarm, which sent an alert to the Jerseyville Police Department. Once inside, Avery and Corey pushed over racks of candy and smashed display counters. Corey used her cell phone to take a picture of herself knocking over the displays. Without Corey noticing, Avery opened the register and removed $500.00, which she slipped into her pocket.

Peter, who was asleep upstairs, was awakened by the commotion. He jumped out of bed and ran toward the staircase that led into the store. In his haste, Peter fell, hit his head, and sustained injuries from which he later died.

Hearing Peter’s footsteps and fall from above, Avery and Corey each grabbed boxes of chocolates and ran from the store. Once outside, they headed home.

Along the way, their friend Rich was driving by and offered them a ride. He asked why they were running in the dark with boxes of chocolate, and Avery responded, “Pop the trunk, we just paid my ex-boss Peter an unexpected visit and we need you to
help us get home fast.” Rich agreed. Avery and Corey loaded the chocolates into the trunk, and they sped away.

A mile down the road, Rich was pulled over for speeding by a police officer who had been dispatched to check the alarm at the candy store. The police officer looked into the car and saw Avery, whom he recognized as an employee at the candy store. He noticed that Avery was visibly intoxicated and ordered everyone out of the car; they obeyed. The police officer conducted a pat-down of each and determined that they did not have weapons in their possession. He then directed that everyone empty the contents of their pockets onto the hood of the police car. Avery removed the $500.00 from her pocket. Corey removed her cell phone that the police officer scrolled through finding the picture of her in the candy store. Rich had nothing in his pocket other than his driver’s license. While he was waiting for back-up to arrive, the police officer searched the interior of Rich’s car and found nothing. He then opened the glove compartment and found a bag of marijuana, following which he opened the trunk and found the boxes of chocolate. All three were placed under arrest and brought to the police station pending charges.

You are an assistant prosecutor assigned to review this matter. You have been directed by the county prosecutor to prepare a memorandum outlining all possible charges that may be filed against Avery, Corey, and/or Rich. You are also to include all potential pre-trial motions and defenses that may be asserted by each.

PREPARE THE MEMORANDUM

SAMPLE ANSWER 1A:

To: County Prosecutor
From: Assistant Prosecutor
Re: Avery, Corey, Rich

Possible charges against each potential defendant.

The possible charges against Avery and Corey include conspiracy, larceny, burglary, and felony murder.

The issue here is whether Avery and Corey satisfied the statutory elements for each of these crimes.

Conspiracy arises where one individual makes an agreement with one or more other people, with the intent to enter into an agreement, and with intent to commit a crime pursuant to that agreement. Once the agreement is made, the act of conspiracy is considered complete. Unlike attempt, the crime of conspiracy does not merge with other crimes committed in furtherance of the conspiracy, and therefore, a defendant can be charged with conspiracy as well as the crimes she committed pursuant to the agreement.
Here, Avery made an agreement with Corey to inflict "payback" on Peter for firing Avery. They made this agreement together, with the clear intent to enter into the agreement. Although Avery and Corey did not state outright that they intended to commit a crime in order to seek revenge on Peter, it can be presumed from their anger that they did intend to commit a crime. The conspiracy charge will not merge with the crimes that they committed pursuant to the conspiracy. As Avery and Corey have met the statutory elements, they will be charged with conspiracy.

Burglary is the breaking and entering by force into the dwelling of another at night with the intent to commit a felony inside. Where a residential apartment is attached to a business, courts have deemed that breaking into the business adjacent to the residence satisfies the requirement that burglary must be committed in a dwelling.

Here, Avery used her key to open the door to Peter's store. While this may not appear forceful on its face, Avery no longer had the privilege of using her key to enter the building as she had been fired earlier that day. Accordingly, her entry into the store was unlawful and constitutes a breaking. Avery and Corey broke into the building at night. The store was attached to Peter's apartment, and therefore will be considered a dwelling. While Avery and Corey did not outright state that they intended to commit a felony once inside, their anger and statement that they wanted to exact "payback" can be construed to mean that they did want to commit a felony inside. As Avery and Corey have met the statutory elements, they will be charged with burglary.

Larceny is the taking of property of another, by trespass, with the intent to permanently deprive the rightful owner of that property.

Here, Avery took cash from the register of Peter's store, and Avery and Corey both took goods from the store. By fleeing the store with the money and goods, they evidenced the intent to permanently deprive Peter of his property. Accordingly, Avery and Corey committed the crime of larceny.

Felony murder occurs where a killing is committed in the commission of, or immediate flight from, a felony. If a jurisdiction follows the agency theory, then the defendant can only be held liable where he actually commits the killing of a victim other than his co-felon. Defendants can be held liable for all deaths that took place during the felony if it was reasonably foreseeable that a victim could die as a result of the defendant's conduct. If the death of the victim was unintentional, the defendant will likely be held liable for a lesser homicide charge, such as manslaughter.

Here, Peter died during the commission of the burglary by Avery and Corey. He died by falling and hitting his head, not because of any direct infliction of violence committed by Avery. However, it should have been foreseeable that if they broke into Peter's store at night, that he would hear her and would run and try to stop the crime. Avery and Corey can be held liable for Pete's death under felony murder, but will likely only be held liable for a lesser charge of homicide such as manslaughter.

The possible charges against Avery and Corey include conspiracy, larceny, burglary, and felony murder.
The possible charges against Rich are accessory after the fact.

The issue with the charge of accessory after the fact is whether Rich meets the statutory elements of the crime.

Accessory after the fact occurs when an individual enable parties to evade being charged with a recently-committed crime, either by helping the defendants escape or by destroying evidence.

Here, Rich was told by Avery that she and Corey paid an "unexpected visit" to her ex-boss. Coupled by the fact that Avery and Corey were running in the dark with goods in their hands, it is clear that Rich knew that Avery and Corey just committed a crime. He told them to get in his car to get them home fast, in an effort to evade the police.

Rich will be charged with accessory after the fact as he meets all statutory elements of the crime.

Potential pre-trial motions

Potential pre-trial motions include motions to suppress evidence that was seized by the police officer when he pulled over Avery, Rich and Corey. The pre-trial motion to suppress evidence obtained from Avery and Corey will likely be successful as the search was unlawful, so the evidence must be suppressed.

The issue with the suppression motion is whether the officer's search and seizure was unlawful.

The Fourth Amendment protects citizens from unlawful search and seizure where citizens have a reasonable expectation of privacy. Citizens do have a reasonable expectation of privacy in their car, but there are exceptions that permit an officer to search a suspect's car. In a search incident to a traffic stop, when police make a routine traffic stop, and upon stopping the vehicle have probable cause to believe that one of the inhabitants is dangerous or that the car contains evidence of a crime, the police may search the cabin of the car, including closed containers. In the more broad automobile exception, where police have reasonable belief that a vehicle contains evidence of a crime or weapons, the police are permitted to search the entire cabin of the car, including closed containers and the trunk. This is the only justification police may use to search a trunk; otherwise, a search of a trunk violates the Fourth Amendment protections. The police are limited in their search in that they may only search containers that could actually hold the evidence for which they are searching. To make a lawful search of a suspect, where police have cause to believe a suspect is armed or carrying contraband, the police may make a patdown of the suspect. The patdown is limited to the suspect's "wingspan," which includes anywhere the suspect could immediately reach into in order to grab weapons or contraband. The police are permitted to feel for weapons or contraband. Anything obtained by the police during an unlawful search and seizure can later be excluded from evidence, as fruits of the unlawful search and seizure.

Here, the police stopped the car for speeding. When the officer saw Avery recognized her as an employee of Peter's store, noticed that she was intoxicated, and knew that the store alarm had just gone off, there was reasonable belief for him to search the vehicle for evidence of the crime.
that he believed just occurred at the store. As his search of the automobile was based on reasonable belief that the automobile contained evidence of a crime, he was justified in searching the vehicle and the trunk. However, when the officer searched Avery, Corey, and Rich, he was limited to a pat-down in the wingspan of each party for anything that felt like weapons or contraband. The officer violated their Fourth Amendment rights when he ordered them to empty their pockets. Further, the officer's seizure of the $500 from Avery was unlawful, because this was neither contraband nor weaponry. The officer's search of Corey's phone was unlawful as he had no reason to look at the pictures of the phone, and the seizure of the phone was unlawful.

The pre-trial motion to suppress evidence obtained from Avery and Corey will likely be successful as the search was unlawful, so the evidence must be suppressed.

Possible defenses

Corey will likely have a defense that he was insane at the time the crime was committed, and Avery will likely have a defense that her voluntary intoxication negated her intent to commit the crimes charged.

The issue is whether Corey and Avery meet the statutory requirements for the defenses of insanity and voluntary intoxication.

Insanity is an affirmative defense raised by the defendant. The defendant must prove that she was insane at the time the crime was committed, and therefore cannot be held liable. Under the MPC, a defendant is considered insane if she did not appreciate the wrongfulness and criminality of his conduct, and if she could not conform his conduct to the law. Voluntary intoxication is also an affirmative defense raised by the defendant. The defendant can argue that due to her intoxication, she lacked the requisite intent for a crime. This defense only applies to crimes for which the requisite intent level is specific intent, recklessness, or knowledge. Voluntary intent does not apply to general intent crimes. Burglary, larceny, and conspiracy all require specific intent.

Here, Corey was apparently suffering from psychological and cognitive disorders. She may be able to prove that her disorders prevented her from understanding the wrongfulness and criminality of her acts, and that she could not control her conduct to conform with the law. Here, Avery was drunk when she committed all her acts. She may be able to argue that she lacked the intent to commit any of the crimes. While she will not be completely exculpated from liability, she will likely have her charges reduced.

Corey will likely have a defense that he was insane at the time the crime was committed, and Avery will likely have a defense that her voluntary intoxication negated her intent to commit the crimes charged.

SAMPLE ANSWER 1B:

In re: Avery vs. State, In re: Corey vs. State, In re: Rich vs. State Memorandum
The following memorandum details and outlines the possible charges to the above defendants as well as pretrial motions and defenses they may present. The incident stems from a candy store owner, Peter, who fired his employee of many years, Avery, from the candy store. Avery was very upset and met up with her sister across the street at a bar and subsequent multiple crimes resulted.

Avery and Corey were originally engaging in solicitation but they cannot be charged with this crime. Solicitation is the intentional inciting, aiding, urging or commanding someone to commit a crime with intent. But this crime ends when the solicited person agrees to commit the crime then merges. Solicitation merges into conspiracy.

Here, Corey was outraged when she heard of her sister’s termination. Corey suggested to Avery while unintoxicated that Peter needed payback for all of her hard work over the years. Later Avery suggested to Corey that they go give Peter some payback. However because of the following events, their acts were furthered by their subsequent crimes so they can no longer be charged for solicitation of one another.

Avery and Corey could both be charged with conspiracy along with any other crime they are convicted of later in the night. Solicitation merges into conspiracy which is an agreement between two or more people with the intent to agree and pursue an unlawful objective and requires an overt act. The agreement need not be express and can be inferred. You can be convicted of conspiring to do something and the underlying crime and all conspirators are liable for all foreseeable crimes. Here, Avery and Corey are co-conspirators because they agreed to leave the bar to further the intent to commit an act that would "Pay Peter back". Therefore they can both be considered to be co-conspirators.

Avery and Corey could be potentially be charged with burglary. Burglary is the breaking and entering of another person's dwelling at night with the intent to commit a felony therein. Here, the breaking arguably was not a dwelling because it was a property used for a commercial purpose but it can also be argued that it was because Peter lived there. Either way, modern courts tend to dismiss the "dwelling" element of the crime and the fact that Peter lived above the candy shop and was able to hear the two as they were conducting their crimes within, suggests that the dwelling element is nonetheless satisfied. The breaking may also be contested because Avery used a key given to her by Peter but given the fact she was fired, you can assume she was not permitted to enter any longer and thus can suffice as a breaking and entering. The crime occurred at night which is undisputed but the question here is whether at the time of the breaking Avery and Corey had the specific intent to commit a felony because all they said was they were going to "Pay Peter back"... The burglary did result in a felony of larceny however, it must be proven that they both had the intent to commit this crime. It does not seem that Corey wanted to commit a felony because all she did was vandalize and break things in the store she also did not have personal knowledge that Avery stole the money. However, as discussed before co-conspirators are guilty of any foreseeable crime which happens in the commission of the conspiracy. Therefore, if the elements discussed amount to burglary both can be charged.
Both sisters should also be charged with larceny. Larceny is the wrongful taking and carrying away of the personal property of another by trespass with the intent to permanently deprive. Avery took 500.00 from the cash register, which Corey does not see however she is still liable as a co-conspirator and both sisters ran away and took boxes of chocolates plus. Therefore both had the specific intent to permanently deprive and take and carry away Peter's property while committing a trespass.

Should the elements of burglary or larceny be proven, which is likely, both sisters could also be liable for the felony Murder of Peter. Felony murder is any death caused in the commission of or an attempt to commit an enumerated felony which includes burglary and larceny but the defendant must be found guilty of the underlying felony and the death must be foreseeable. Here, Peter was awakened by the break in and fell down the stairs and died. Avery knew Peter lived upstairs and could potentially be disturbed by their actions so his death was foreseeable. Therefore, if Avery and Corey as co-conspirators can be potentially charged with felony murder of Peter.

Avery, Corey and Rich can be charged for all crimes should their elements be satisfied because of the theory of accomplice liability. Accomplice liability requires that a person was actively involved with a crime (Aided advised) with the intent to encourage the crime. Accomplices are liable for the crime itself and all foreseeable crimes. Their freind Rich noticed they were running away and assisted them in their flight from the crime scene even after Avery tells him that they just paid her ex-boss an unexpected visit and urged him to get home quickly. Rich sees the chocolates and offers them a ride becoming an accomplice of their crimes. So arguably Richard had enough personal knowledge to render him liable for the other crimes. Corey and Avery have accomplice liability for the crimes discussed before.

Rich Avery and Corey all have a viable 4th amendment constitutional claim. The fourth amendment provides that people should be free from unreasonable searches, seizures and unreasonable arrests. To assert a violation of the 4th amendment, the defendant must have a 4th amendment right (search or seizure by a governemtn agent and violate the defendant's resonable expectation), the government must have a warrant or the police must make an invalid warrantless search. Warrantless searches are permitted in a lawful arrest. There is an automobile exception to the warrant requirement that permits the police to search a car if they have probable cause such as the vehicle contains fruits, intrumentalities or evidence of a crime. There is no need to arrest the driver at this point you just must have probable cause that the driver committed a crime. In a search like this the police may search the whole car including the trunk and may open any package regardless of who owns ity as long as it could reasonably be something that could contain the items they are looking for. Police may also stop a person without probable cause where there is resonable suspicion of criminal activity. The scope is limited to a pat down of the defendant's outer clothing. Weapons are always admissible if the stop was reasonable but the admissibility of anything other than a weapon depends on how much like a weapon or contraband could it have appeared from the outside. When Rich was pulled over for speeding down the road and the officer that stopped him was aware of the break in at the candy store recognized Avery as an employee. This was routine traffic stop because of Rich's speeding. The cop also recognized Avery and was aware of the alarm at the candy shop going off but arguably
had no probable cause to suggest that Rich committed a crime let alone his passengers. When the officer ordered everyone out of the car because he noticed that Avery was drunk he did not have the probable cause therefore the search of the car was unlawful. The officer conducted a pat-down of each and determined that there were no weapons this is an example of an illegal terry stop and frisk. There was no evidence of contraband when the officer told them to empty their pockets.

The money the officer found and the phone Corey used to take a picture of the crime with are excludable evidence. As well as the marijuana.

The exclusionary rule prohibits the introduction of evidence obtained in violation of a defendant's 4th, 5th or 6th amendment rights. It excludes all illegally obtained evidence normally admissible at trial as well as all "fruit of the poisonous tree". Fruit of the poisonous tree is evidence obtained from police misconduct except if it is obtained from a source independent of original illegality or inevitable discovery which means the police would have discovered the evidence with or without an unconstitutional search or seizure.

Because the search was unreasonable and the officer searched the entire contents of the car the bag of marijuana belonging to Rich, the boxes of chocolate, the money and the phone are all the poisonous fruit of an illegal search.

Lastly their arrest was a false arrest. Police need probable cause to arrest you or to compel you to go to the police station for interrogation.

Here for the reasons discussed above, the arrest of all three was unlawful.

Avery and Corey can assert voluntary intoxication as defenses to the specific intent crimes. Voluntary intoxication is defined as the intentional taking of a substance known to be intoxicating and is always a defense to specific intent crimes.

Avery becomes heavily intoxicated after five drinks as well as Corey which may negate the specific intent of the above crimes they may be charged with.

Both sisters have a chance as this being a viable defense.

Corey will likely not be able to use incapacity as a defense. A defendant who offers the defense of Insanity may be acquitted if it is proved that due to mental illness at the time of the conduct they lacked the ability to know the wrongfulness of their actions or understand the nature and quality of their actions. Corey suffers from psychological and cognitive disorders however there are no facts in that suggest she was incapacitated at the time of any of the crimes.

Therefore incapacity is not going to be likely as a defense.

**QUESTION 2 – CONSTITUTIONAL LAW**

Governor Yokaira signed several pieces of legislation into law, effective January 1, 2014.
1. Metadata: The State Police’s anti-terrorism unit has the statutory authority to collect metadata related to telephone calls to or from specific countries identified as “hot spots” for terrorist activities. This tracking, in turn, permitted law enforcement to focus its suspicion and to wiretap telephone calls based on algorithms suggesting criminal activity might be afoot. As a result of this wiretapping, Antonio was identified as a suspected terrorist imminently planning to build and to detonate a radioactive “dirty bomb.” He is arrested before executing the plan.

2. Shop and Frisk: In conjunction with the State’s major private retailers, municipal police departments have received funding to design anti-shoplifting computer programs to identify potential theft threats based on age, gender, religious, ethnic, and racial demographics. As an example of this municipal-private partnership, Luis, an off-duty police officer working at Aries’ Joyeria, uses the computer generated analytics to identify Lisa, a 14-year old, self-confessed “shopaholic”, as a suspected shoplifter. After observing Lisa buy several expensive jewelry items with her father Antonio’s credit card, Luis directs the store’s security team to detain and interrogate her. She is detained and questioned for several hours before being released.

3. Mandatory Health Insurance: In the State’s mandatory health insurance law, commonly known as Yokicare, for-profit, private employers with a minimum of 10 employees must offer insurance coverage for contraceptive prescriptions. Belky, the owner and operator of a local beauty salon, refuses to comply with this provision as it is antithetical to her religious beliefs. As a result, Belky must pay a $10,000.00 tax for non-compliance, equivalent to the annual cost of offering insurance coverage for contraceptives.

4. Electoral Redistricting: Yokaira’s 2013 election resulted in realignment of the State’s political landscape. In an effort to sustain her party’s substantial majorities in both the State Senate and Assembly, the State’s electoral districts have been reconfigured to reflect this political reality. Edwin, an opposition party member who lost his assembly seat in the 2013 election, suspects that the reconfiguration is a subterfuge primarily to create safe seats for Yokaira’s party and secondarily to dilute the voting power of a large racial minority group, known derisively as Prietos, in the State’s central counties. Edwin is not a Prieto.

5. Veterans Hiring Quotas: State, county, and municipal government entities must fill 20 percent of all new job openings with honorably discharged veterans of the U.S. Armed Services. Dolores, a non-veteran, applied and was rejected for a county government position despite her superior qualifications. The job was ultimately filled with a slightly less qualified, honorably discharged veteran.

You are the law clerk to an appellate judge and have been asked to prepare memoranda about the constitutional claims and defenses in each appeal.

PREPARE THE MEMOR ANDA

SAMPLE ANSWER 2A:
1. Metadata: there is a state action, which is subject to scrutiny. The federal Fourth Amendment (and the relevant provision of NJ Constitution, which is even more protective of the privacy) protect individuals from unreasonable searches and seizures. The search without a proper warrant is presumed illegal unless it falls within a well established exception. In this case, it is not clear whether the state law to collect metadata requires a warrant; if it does and a warrant from a detached and neutral magistrate was obtained in case of Antonio, the statute is constitutional and the search and arrest are legal. However, if the statute authorizes the police to intrude into the record of the phone calls without a valid warrant the statute is unconstitutional as violative of the NJ constitutional provisions. Although the statute should not be violative of the federal Constitution under "third party exceptions" (no expectation of privacy in banking records, phone records, etc): no reasonable expectation of privacy in services obtain from a third party. However, NJ protection of privacy is much stronger: expectation of privacy in banking records, phone records, ISP records, and even garbage are protected. Therefore, unless the state statute includes requirement of warrant, it is unconstitutional in NJ; unless a warrant was obtained or another exception applies (such as public safety), search of Antonio's records was unlawful.

2. Since the action is "in conjunction with the State", under the doctrine of "silver plate" and of the unity of interests between the private enterprise and the state, the shoplifting program is a state action and the protection of the Fourth Amendment and corresponding provisions of NJ Constitution apply, as do the protections of the Fourteenth Amendment. The factors used by the programs are not suspect classes, so under Equal Protection clause, the program is not illegal, ie it passes low scrutiny test (economic interest, non-suspect categories): the plaintiff has a high burden to show that the measure is not reasonably related to a legitimate state interest; the plaintiff is likely to fail because store safety and prevention of crime are legitimate interests and the program is reasonably related to them. Furthermore, even race seems to be just a minor factor, one of many, so the program should not be found facially unconstitutional [in analogy to law school admission cases: if the race is a determinative factor, then high scrutiny, however, if it's just a few points out of total score, the high scrutiny is probably not triggered).

However, in application to Lisa, who is detained for several hours for questioning, her freedom was violated and she was subjected to unreasonable seizure by a State sponsored enterprise. On the fact, it is not clear who demands what, but Lisa would have a cause of action for false imprisonment against the store, because she was detained for an unreasonable period of time, without her consent, and without opportunity to escape. So, Lisa may have a violation of freedom claim against the State and false imprisonment claim against the store.

3. Mandatory health insurance: the law promotes economic interest (full coverage, spreading of the healthcare costs); its burden on the religious beliefs is accidental. This is conduct regulation and it passes Lemon test: it does not promote or inhibit religion, it applies to everyone and it does not foster excessive entanglement of religion and state. Therefore, the law is constitutional. Even though the opponents of the law may claim that the law passed in order to target a particular religion or cult, there are not facts on the record to support that claim. The law is not unconstitutional and falls within the traditional realm of state powers to regulate for health and well being of its citizens.

4. Edwin "suspects" but does not allege enough facts to establish racial discrimination, which
would trigger strict scrutiny under 14th and/or 15th Amendments. Furthermore, Edwin does not have standing to make the claim because there is no showing that he was injured by the alleged discrimination. Furthermore, there is no showing of violation of voting rights, "one person, on vote." The claim attempts calls for advisory opinion on a political question and should be dismissed.

5. The law may be challenged on equal protection grounds (14th Amendment incorporated against the States through the Due Process Clause of the Fifth Amendment). However, the classification here, veteran v non-veteran, is a non-suspect category and the law is subject to low scrutiny test: it is reasonably related to a legitimate state purpose of providing the returning veterans with employment. The law cannot be challenged on this ground. If the opponent of the law can make a good claim that significant part of the veterans are males and there is actual gender discrimination under the color of that law, an intermediate scrutiny would be triggered and the opponent would have a better chance. However, that claim is not before the court. The law is constitutional on its face and as applied to Dolores.

SAMPLE ANSWER 2B:

To: Appellate Judge  
From: Law Clerm  
Re: Constitutional claims and defenses

(1) Metadata: The issue is whether the state law authorizing the state police to collect meta-data related to telephone calls for the purpose of identifying terrorists violates Antonio's privacy rights. The Supreme Court has held that the right to privacy is a fundamental right. Although the court has not addressed the issue of widespread government collection of meta-data, it is possible that the court would hold that such collections are unconstitutional. In past cases, the court has held that the right to privacy includes the right to use contraceptives, the right to receive an abortion, and the right to engage in private consensual sexual activities in the privacy of one's home. It is possible that the court could analogize a similar right to keep private one's personal data. However, because most phone and internet companies already possess this data, the court could hold that there is no expectation of privacy in such data.

(2) Shop and Frisk: The issue is whether the public-private computer programs which identify "potential theft threats" based on age, gender, religious, ethnic, and racial demographics violates Lisa's right to equal protection. As an initial matter, it must first be determined whether there is sufficient state action to warrant constitutional rights (generally, the constitution only applies to the state, and not private conduct). State action will be found whenever there is significant aide or encouragement by the state of the questionable conduct. Here, municipal police departments have received funding to design the computer programs, which are then used by the State's major private retailers. Because the state is directly funding and implementing the activity there is state action. The next issue then is whether the program violates Lisa's right to equal protection. The state action here discriminates against certain persons based on several suspect classifications, such as race, ethnicity, and religion. Consequently, the activity could only be upheld if it meets strict scrutiny; that is, the action is necessary to achieve a compelling government interest. The
burden of proof lies with the government. This burden is extremely difficult to prove, because it requires that the state interest can be achieved through no less restrictive means. Here, the state would likely demonstrate that it has a compelling interest in preemption and preventing crime. However, it will not demonstrate that classifying people by race, ethnicity, and religion is necessary to achieving this purpose. Thus, Lisa will likely win if she challenges her detention in court.

(3) Mandatory Health Insurance: The issue is whether a provision requiring employers to fund their employees' contraceptives violates Belky's right to free exercise of his religion. Generally, a law will not be held to violate the free exercise clause, even if it burdens religion, if the burden is incidental, and the law is generally applicable to all likely situated parties. For instance, in one Supreme Court case, federal law prohibited the use of peyote, an extremely potent plant known to cause hallucinations. Several Native Americans challenged the law as a violation of their right to free exercise because the law prohibited them from using the peyote in their religious rituals. The court upheld the law, however, because it was generally applicable to all people, and only incidentally burdened the plaintiff's religious views. Here, the State has a generally applicable law that requires all employers of 10 or more employees to offer insurance coverage for contraceptive prescriptions. Although the law is antithetical to Belky's religious beliefs, like the law regarding peyote, this law will be upheld because it is generally applicable and only incidentally burdens Belky's right to freely exercise her religion.

(4) The first issue is whether a challenge to legislative redistricting is a political question. Generally, the courts will refuse to hear a case if an issue is: (1) committed to another branch of government; or (2) inherently incapable of resolution. For instance, the Supreme Court has held that matters regarding the president's control over foreign affairs, and the legislature's control over the impeachment process are political questions. Here, it is possible that the court would hold that the legislative process of gerrymandering (redistricting) is a political question and, thus, would refuse to hear the case.

Assuming the court does hear the case, the next issue is whether Edwin has standing to sue on behalf of the Prietos. Generally, the courts do not allow third party standing, with a few minor exceptions where: (1) there is a special relationship between the plaintiff and the third-party being represented (e.g. doctor-patient); (2) the third-party is unable to defend its own rights; or (3) in class-action lawsuits, the court will allow a representative to assert claims of a certified class. Here, Edwin is a third party and, thus, cannot assert the rights of the Prietos unless one of the exceptions to the rule applies. Edwin could argue that he should be granted standing because of his special relationship with the Prietos; specifically, they are his constituents and, thus, it is Edwin's job to represent them. However, no court has ever held that a legislator may sue on behalf of his constituents. Alternatively, Edwin could argue that the Prietos are not able to represent themselves, but this argument will likely fail. The court should probably find that Edwin lacks standing.

Finally, assuming the court does grant Edwin standing, the issue becomes whether Yokaira's redistricting violates the Constitution. Generally, states are held to the strict standard of one man-one vote. This concept requires almost exact mathematical equality between election districts within a state. Thus, if the court found that the redistricting process violated this rule, it could be
overturned. Alternatively, if a redistricting plan is specifically undertaken in order to disadvantage a particular racial group, that redistricting plan will be held unconstitutional. In order to make this showing, the challenger must prove that the plan was undertaken with the specific intent to discriminate; not just that the plan has a negative effect on the Prietos. Absent this finding, Edwin will likely fail.

(5) The issue is whether the State's requirement that governments must fill 20 percent of all new job openings with veterans violates due process. Generally, laws that do not violate a fundamental rights and that do not discriminate against a suspect or quasi-suspect class will be upheld if they meet the rational basis test. Under this test, a government action is valid if it is rationally related to a legitimate government interest. Under this test, the challenger has the burden of proving that this test is not met. Moreover, any rational purpose includes any conceivable purpose on which the state can legislate. Here, the state has a clear, legitimate interest in ensuring that its honorably discharged veterans are employed. Moreover, setting aside a quota of 1/5 of the new job openings for veterans is rationally related to achieving this objective. Consequently, the law will be upheld.

**QUESTION 3 – TORTS**

Barry operates a seasonal business, doing landscaping in warm weather and snow removal in the winter. With more jobs than he can handle, Barry hires Tony to plow a customer’s large parking lot following a heavy snowfall.

Unbeknownst to Barry, Tony suffers from a nervous disorder that makes it difficult for him to control his leg muscles when he becomes tired. After several hours of plowing using his own equipment, Tony accidentally sprays excess snow and ice onto adjacent property owned by Peter. In addition, Tony loses control of the snow plow and damages a car, owned by Vera, that had been buried in the parking lot by the snowfall.

The next day, Vera comes to claim her car and discovers the damage. Upon learning that the damage had been caused by Tony’s plow, Vera confronts Tony, demanding compensation for her property damage.

Tony reacts angrily, shouting at Vera about her weight (Vera is morbidly obese). Among other things, Tony calls Vera “a fat slob.” Tony’s shouts are heard by a group of strangers standing nearby, none of whom know either Tony or Vera.

Both Vera and Peter discuss their potential claims with an attorney, whose investigation reveals that at the time he was operating the snow plow, Tony had been taking muscle relaxants prescribed by his physician, Mike. The pill bottle contains a warning against the use of heavy equipment while taking the muscle relaxant.
You are the law clerk to the attorney, who asks you to prepare a memorandum, discussing the causes of actions that Vera and/or Peter have against Barry, Tony, and/or Mike, as well as their potential defenses and, if applicable, cross claims.

PREPARE THE MEMORANDUM

SAMPLE ANSWER 3A:

Your Honor,

Here is the memo your requested:

1. Peter v. Tony - Trespass: To be liable for trespass onto property a defendant must: (1) intentionally or recklessly (2) enter another's property or cause an object to enter the property (3) without consent or justification. This tort does not require any damages and nominal damages may be granted.

In this case, Peter fulfills the requirement for entry on the property when he spray excessive snow onto Peter's property. However, the spraying of the snow as done accidentally. There are no facts to show that Tony was being reckless or acting with intent when he cause the snow to enter Peter's property. Thus, trespass to property would not be a recoverable cause of action for Peter.

2. Peter v. Barry - Negligent Hiring and Vicarious Liability: Peter may still be able ot recover for the damage to his property from Barry under the doctrine of vicarious liability. Under the doctrine of respondeat superior, an employer may be responsible for the negligence of their employee's provided that (1) the employee was acting within the scope of his or her employment; (2) he was acting to benefit the employer and (3) the employer retained an element of control over the employee. Conversely, independent contractors do not subject the employer who hires them to vicarious liability. To determine whether a person is an employee or an independent contractor - the court must look to factors like the level of control the employer retains, who supplied the tools and whether the employee has the right to choose how to proceed in this work. To recover from an employer for negligent hiring, the plaintiff must show that the defendant (1) had a duty to hire a reasonable employee, (2) the duty was breached, (3) the breach of that duty actually and proximately caused the injuries of the plaintiff and (4) there were damages.

In this case, the employee was acting in the scope of his employment because Barry hired him to plow and that is what he was doing. However, as a seasonal operator, Barry may have just hired Tony as an independent contractor. Without more facts, indicating the level of control Barry had over Tony, it is likely that Tony will be considered an employee. Regardless of his status as an employee or independent contractor, Barry may still be liable for the negligent hiring. Tony is taking medication that should prevent him from operating heavy machinery and has leg problems. It is likely that the Barry should have known these facts before hiring Tony because snow plowing is a somewhat dangerous project that must involve a level of care by the drivers.
However, without any damages - the snow will melt in Peter's yard eventually - there still will no case for recovery against Barry.

3. Vera v. Tony - Negligence: A tort for negligence requires that the plaintiff (1) owes a duty of care to the defendant (2) breaches that duty of care (3) is the actual and proximate cause of the plaintiff's (4) foreseeable injuries.

In this case, Tony owed Vera the duty of care of being a reasonable snow plow driver and avoiding careless mistakes that cause damage to herself or her property. Tony breached the duty of care when he lost control of the snow plow. A reasonable snow plow driver would likely be held to a standard of care which does not allow him to completely lose control of the car he is driving due plowing, thus there is breach. The breach of the duty is the actual cause, but for the plow losing control Vera's car would not have been damages, and proximate cause, losing control of a snow plow is likely to cause damage to other cars, of the damages to Vera's car. Additionally, there is damage to the car and economic actual injuries which are discernible to Vera.

Tony would be liable to Vera for the damages to her car under a negligence theory unless Tony could show that his disorder cause him to involuntarily lose control and he could not have foreseen it.

Vera v. Barry - Negligence and Vicarious Liability: For all of the reasons stated above, Vera would be able to recover for vicarious liability from Barry. Barry hired Tony, Tony was negligent. Tony was acting within the scope of his employment to Barry, to benefit Barry and under Barry's control when the accident occurred.

Barry will be vicariously liable to Vera for the damages his employee, Tony, caused to her car.

3. Vera v. Tony - Defamation: The tort of defamation requires that a defendant make (1) a false statement about the plaintiff (2) negligently (depending on the plaintiff's status - here a private person) broadcast that statement to a third party (3) the plaintiff suffers special damages or damages per se and (4) there are no defenses. One defense to defamation is truthfulness.

Here, there is a statement about Vera that she is a fat slob. Though she is fat, actually morbidly obese, she may not be a slob. Thus, the falsity of the question is in question. The statement was broadcast to third parties upon it being overheard by the strangers walking by. Since the statement was made maliciously, the negligent broadcast element is satisfied. However, damages may be difficult to show because the statement was not one of the slander per se categories of a statement about an unchaste woman, a loathesome disease (slobbery is not a disease), business reputation or crimes of moral turpitude. Thus, without showing more damages, defamation could not be proven.

4. Vera v. Tony: IIED: Intentional infliction of emotional distress requires that a defendant (1) intentionally cause (2) the plaintiff to suffer severe emotional distress (3) and there are actual damages. There must be some physical manifestation of the injuries, mere pain and suffering will not suffice.
In this case, Tony may have wanted Vera to suffer emotional distress and intended her to do so. However, there are no overt injuries or physical manifestations of Vera's injuries. Thus, it is unlikely Vera will be able to recover from Tony for IIED.

No Claims v. Mike: It does not appear Mike did anything more than prescribe medication to a patient in this case. There are no causes of action that should be pursued against Dr. Mike.

**SAMPLE ANSWER 3B:**

To: Attorney  
From: Applicant  
Date: 2/27/14  
Re: Claims, defenses of Tony, Barry, Vera and Peter

First, an underlying issue to decide is whether or not Tony is Barry's employee or an independent contractor. The distinction is important in determining whether Barry is liable in tort for the negligent conduct of Tony while he was engaged in the course and scope of his employment. Whether or not Tony is an an independent contractor turns on whether he uses his own equipment, is paid hourly, is under the supervision of Barry or whether Barry just hires him per job and Tony carries it out for a fixed rate. If an independent contractor, then Barry will not be held liable jointly and severally (whereby any judgment obtained against Tony, Barry would be jointly and severally liable for for the full amount and can sue Tony for contribution later on) under the theory of respondeat superior for the torts Tony commits (both intentional and negligent). However, regardless of their relationship, Barry can be held liable independently for being negligent in hiring Tony in the first place to operate a motor vehicle which is dangerous while having a nervous disorder that makes it difficult for him to control his leg muscles. To be liable for negligent hiring, an employer must have breached his duty to make a reasonable inquiry in the background of the potential employee that he is seeking to employ to make sure that that employee does not pose an unreasonable risk of injury to persons or property while carrying out his employment duties. The facts suggest that Barry did not know "unbeknownst" about Tony's nervous disorder, but maybe he should have known about it. This is a question of fact to be resolved by a jury - whether Barry breached his duty in hiring Tony or not.

Peter v. Tony  
The first cause of action is whether Tony is liable in trespass for accidentally sparying excess snow and ice onto Peter's property. For trespass, an actor must intent to enter the property of another without consent or justification (excuse, necessity, etc.). Trespass is an intentional tort and if the plaintiff can prove intent (purposeful or substantially certain) and entry onto land, he need not have suffered damages to recover. There don't appear to be any damages here and the question of fact for the jury to resolve is whether Tony had the requisite intent to enter onto Peter's property. Tony will argue that he entered the land by way of snow and ice accidentally and thus there was no voluntary act or "intent." Peter will argue back that Tony knew that he was on muscle relaxants and knew his condition when he took upon the task of snow removal and knew that he was prone to lose control of his muscles. Depending on how the
employee/independent contractor issue is ultimately resolved, Tony can sustain an action against Barry, as Tony's employer, too,

Vera v. Tony
Vera will argue that Tony's reaction to Vera's confrontation amounted to an intentional infliction of emotion distress. To be found liable under this theory, the actor must have purposely engaged in conduct that was so excessive and persist and that conduct (words or actions) caused severe emotional distress in the plaintiff. Some jurisdictions require that the plaintiff suffer an actual physical injury beyond the severe emotional distress to recover under this theory. Tony called Vera "a fat slob." Given that Vera was morbidly obese, she was likely aware of her status. Moreover, did Tony persistently and egregiously engage in such conduct that would cause a reasonable person to suffer severe emotional distress? Vera may have been particularly sensitive to such name calling, but would a reasonable person, under similar circumstances, have suffered severe emotional disturbance after being called "a fat slob"? There is no indication that Tony and Vera are in any special relationship with one another and nothing to indicate that Tony was aware or should have been aware of her sensitivities regarding statements made about her weight. His name calling was limited to one statement and did not go on for a period of time that would "shock the conscience" of a reasonable person. People engaged in arguments say nasty things to one another all the time, which don't amount to a intentional infliction of emotional distress. The people that overheard the comotion were not in the zone of danger, and none of them seem to have a special relationship to Tony and thus they have no cause of action on a by-stander theory of intentional infliction of emotional distress.

Vera v. Tony in Defamation
Defamation is an intentional tort that requires the publishing of a defamatory opinion to a third party about someone else. The defamatory statement has to harm the person about whom it is made in a proprietary, personal, or pecuniary, or penal sense. Negligence is the standard for the publication of defamatory statements about a person to third parties when the person and facts being disseminated are both private. While Vera is free to bring a cause of action for defamation, she will not likely succeed because truth is an absolute defense to defamation. Moreover, Tony's statement that "Vera" is a fat slob, while published to the people walking by during their argument, was an opinion. The fact supporting that opinion is that Vera is actually really over weight. It may not have been proper in a moral sense to call Vera those things, especially in public, but that does not rise to civil liability in tort for which Vera will recover (If she files a summons and complaint, Tony can file in a pre-answer motion "failure to state a claim upon which relief can be granted or he may do so in summary judgment or he may do so in the answer itself and likely succeed).

Vera v. Tony for property damage
Will Vera be successful in a cause of action to recover for the property damage she suffered as a result of Tony's inadvertent muscle movement's. Probably. Tony was aware of his condition, and was warned against operating heavy equipment while taking the medication. He ignored those warnings and went ahead and engaged in conduct that he was warned against doing. Thus, he implicitly assumed the risk of any injury to persons or property that he may cause as a result of that willful ignorance of the warning. The fact that Tony was on medication will come out in discovery and all the claims against him will increase the potential for recovery for the plaintiff's
because of his gross negligence - recklessness (conscious disregard of a substantial and unjustifiable risk of harm that amounts to a gross deviation of the standard of conduct that a reasonable person would be expected to engage in). Tony will have a difficult time defending against these claims.

Any claims against Mike, the physician? Mike prescribed Tony medication and warned him by way of the pill bottle that said use of heavy equipment while taking the muscle relaxants was ill-advised. Tony was on notice about both his nervous disorder and about the pills' potential for interfering with his driving of heavy plow equipment. Since Mike warned him of the risk, he is probably absolved of any civil liability for Tony's course of conduct.

In most jurisdictions and employer is absolved from liability for the wanton/willful misconduct or intentional conduct of his employee. If Tony is found to be an employee rather than an independent contractor of Barry's, then Barry can assert the defense against the intentional torts saying that he is not responsible for the wanton/wilful intetional torts of his employees (defamation, intentional infliction of distress, trespass) and is only vicariously liable for the employees negligence during the course and scope of employment (property damage).

QUESTION 4 – EVIDENCE

Paulina and her family traveled to Ski Resort (“Resort”) in New Jersey to enjoy a weekend of snowboarding and skiing. While at Resort, Paulina was traveling up the mountain on the high-speed chairlift operated by Ernie, when she fell out of the chairlift, plummeted to the ground, and was seriously injured.

Paulina filed a lawsuit in New Jersey Superior Court against Resort and Ernie. At a pre-trial conference with the judge, the parties outlined the evidence they will seek to introduce at trial.

Paulina seeks to introduce the following:

1. Testimony of Paulina that Ernie seemed drunk and was negligently operating the chairlift at excessive speeds.

2. Testimony of Gina, Ernie’s former wife, that she was text messaging Ernie at the time of the accident, and that immediately after the accident he sent her a text stating, “I guess I should not have been drinking during my lunch break today.” In addition, Paulina will seek to introduce Gina’s telephone records of the text messages between Ernie and her on the day of the accident.

3. Testimony of Chris, a witness who knows Ernie from their local church, that Ernie has a reputation among the members of the church for untruthfulness.

Resort and Ernie seek to introduce the following:
4. A medical doctor’s report that states although he never personally examined or treated Paulina, he reviewed her medical records, and in his opinion her injuries were not proximately caused by her accident at Resort.

5. Testimony of Warren, a witness, that he saw the aftermath of the accident and stopped to aid Paulina after her fall. He will also testify that after Paulina was taken away in an ambulance, Warren carefully took notes of what Paulina told him after the accident. Because Warren has no independent recollection of the conversation, Resort will seek to introduce a photocopy of Warren’s personal notes stating that Paulina told him she was at fault because she failed to put down the safety bar on the chairlift.

You are the trial judge’s law clerk and are assigned to write a memorandum advising the judge how the issues raised by the parties should be resolved and why.

PREPARE THE MEMORANDUM

SAMPLE ANSWER 4A:

1. Paulina's testimony that Ernie seemed drunk and was negligently operating the chairlift at excessive speeds is admissible.

   The issue is the proper scope of a lay witness' testimony and whether a lay witness can opine on the ultimate issue. To be admissible, evidence must be relevant. Evidence is relevant if it has the tendency to prove or disprove a fact of consequence. However, relevant evidence will not be admitted if its probative value is substantially outweighed by the danger of unfair prejudice. Here, Paulina's testimony about the alleged drunkeness of Ernie and how he was operating the lift is relevant. A lay witness can testify as to facts of which she has personal knowledge and if the testimony will be helpful to the trier of fact. Here, Paulina has personal knowledge because she observed Ernie while he was operating the lift. A lay witness is qualified to testify as to whether someone seemed drunk or sober -- that is considered to be within the realm of perception of a lay person. A lay witness can also testify as to the speed at which a vehicle, or here a chairlift, was moving. Moreover, a lay witness can offer opinions which go to the ultimate issue -- e.g., here, whether Ernie was negligent in his operation of the lift.

   Therefore, Paulina's testimony is relevant and admissible. The defendants will have the opportunity to cross-examine Paulina on her testimony and test her credibility.

2. Gina's testimony that she was texting with Ernie at the time of the accident will be admissible. The testimony is relevant to the issue of whether Ernie was negligent in operating the lift because he was texting with Gina at the same time, and his admission of fault following the accident. The first issue is whether the marital communications privilege applies. The courts recognize a privilege for confidential communications between spouses made during the marriage. This privilege applies in civil cases such as this, and can be invoked by either spouse to bar testimony by a spouse about statements made during the marriage. The privilege survives divorce but
applies only to communications that were made during the marriage. Here, it appears Gina was Ernie's ex-wife at the time of the accident and therefore that privilege would not attach. And, in any event, the privilege only applies to "statements" that were made during the marriage. Here, Gina will proffer testimony that Ernie was texting her, which is conduct, not a statement, so the privilege does not attach.

The second issue is whether Ernie's statement to Gina that he should not have been drinking at lunch is hearsay. Hearsay is an out of court statement offered for the truth of the matter asserted. Hearsay is not admissible unless subject to an exclusion or exception. Here, Ernie's statement is not hearsay and is admissible as an admission by a party opponent.

The third issue is whether the telephone records are admissible. Business records are admissible as a hearsay exception if relevant and authenticated. The records must be kept in the regular course of business, made by a personal with knowledge and made close in time to the event. Here, telephone records are likely to meet all of those conditions though it is possible that an employee of the phone company would need to authenticate the records as a witness.

3. Chris' testimony that Ernie has a reputation for untruthfulness may be admissible as character evidence against Resort and can be used to impeach Ernie at trial. Ernie's reputation for truthfulness will be relevant if Ernie testifies at trial. Character evidence is generally inadmissible when offered to prove propensity. There are, however, limited exception where character evidence can be introduced in a civil case. This includes cases where character is an essential element of the claim. One such claim is negligent hiring. If Resort is charged with negligent hiring of Ernie, his character is in issue and such opinion/reputation may be introduced against Resort.

Opinion and reputation evidence case also be used against Ernie if he testifies at trial. A defendant who testifies puts his veracity in issue, and can be impeached through opinion or reputation testimony that calls his honesty into question.

4. The doctor's report is inadmissible hearsay. The doctor is qualified to render an expert opinion if he has the appropriate experience and/or education, his opinion is relevant and reliable and would be helpful to the jury. However, the report itself is hearsay that does not fall within any exception.

5. Warren's testimony of what he observed after the accident is admissible and his notes can be used to refresh his recollection as to his conversation with Paulina. Warren's testimony is relevant to how the accident happened and possibly to damages. Warren is a lay witness who personally observed the aftermath of the accident. He is competent to testify as to what he saw and such testimony will be helpful to the jury. Warren can also testify as to what Paulina told him. This is admissible as the admission of a party opponent.

A witness who cannot recall can have his memory refreshed by a writing on the stand. The offering party (Resort and Ernie) generally can't offer the memory refresher into evidence as substantive but can question the witness (Warren) after he has an opportunity to look at it. However, the memo can be admitted as a past recollection recorded if Warren testifies that he had personal knowledge of the facts therein at the time he created the memo, recalls creating the memo and created it contemporaneously or soon after the incident occurred. A photocopy will be admitted.
To: Judge
From: Clerk
Re: Evidentiary issues

In order to be admissible, evidence must be relevant. Relevant evidence is evidence that makes a material fact more or less probable than it would be without it. Evidence also cannot be hearsay. Hearsay is an out of court statement offered to prove the truth of a matter. Hearsay is admissible if it is a hearsay exemption or exception.

1) The testimony of Paulina that Ernie seemed drunk and was operating the chairlift at excessive speeds is admissible, but the testimony regarding whether Ernie was negligent is inadmissible. The issue is whether Paulina plans to testify as to something she perceived or to a hearsay matter.

Laywitnesses may testify as to what they perceived. A witness may testify about perception if they perceived it first hand, they remember it, and they can communicate it under oath. A perception is not hearsay because it is not an out of court statement. A laywitness cannot make legal opinions. For example, they cannot testify that in their opinion, someone was negligent.

Here, Paulina can testify that Ernie seemed drunk and that he was operating the chairlift at excessive speeds. She was present and perceived these things. She remembers it and she can communicate it under oath. However, Paulina cannot testify that Ernie was "negligently" operating the lift, since she is only a lay witness, and cannot testify about legal findings. In conclusion, Paulina can testify that Ernie seemed drunk and was operating the lift at excessive speeds.

2) The testimony of Gina, Ernie's former wife, is admissible if she and Ernie were not married at the time Ernie made the statement. The issue is whether Ernie and Gina were married and whether Ernie intended to keep the testimony confidential, between he and his wife.

Under the marital communications privilege, spousal communications made to a spouse while married, and not in the presence of anyone else, are privileged in criminal and civil proceedings. Either party holds the privilege. Here, Ernie communicated with Gina and told her he was drinking. He intended only for Gina to see this. Therefore, if Ernie and Gina were married, Ernie and Gina could each elect for Gina not to testify under the marital communications privilege. If Ernie and Gina were not married when this statement was made, there is no privilege.

If Ernie and Gina were not married when this statement was made, there was no privilege and it would be admissible as a party admission, a hearsay exception. A party admission is a statement made by a party, that the party made, having no reason to give a false statement. Here, Ernie had no reason to lie to Gina at this time regarding the fact that he was drinking. Therefore, his statement would be admissible.
Furthermore, if Gina and Ernie were not married, Paulina could introduce Gina's phone records as a business record exception. The issue is whether phone records are business records.

Business records are hearsay, but are admissible under a hearsay exception. Business records are any records that are normally kept within the ordinary course of business, which the recorder has good reason to make accurate, and which the person who recorded those records can testify about. Here, the phone company normally keeps phone records in the ordinary course of business for billing purposes. The phone company has a reason to make these records accurate- they do not want mistakes in the course of their billing. Furthermore, someone from the phone company can testify as to the truth of these statements. Therefore, the phone records are admissible under the hearsay exception, business records.

In conclusion, if Gina and Ernie were married, Gina's testimony is inadmissible under the marital communications privilege. If Gina and Ernie were not married, the testimony and communications are admissible as a business record exception.

3) The testimony of Chris, a witness who knows Ernie from church, is inadmissible. The issue is for what purpose Chris would like to give evidence of Ernie's reputation.

In a civil or criminal trial, character evidence is valid only if the case is based on a character claim such as defamation. If the case is not based on a character claim, a plaintiff cannot give negative character evidence against a defendant unless the defendant puts his character at issue by mentioning their reputation and opinion for truthfulness first. A plaintiff also can give negative character evidence if a defendant testifies, in order to impeach the defendant's testimony.

Here, the case is based on negligence, so the case is not based on a valid character claim. Also, the facts do not state that Ernie will testify in his proceeding, so the negative reputation evidence cannot be used to impeach him. Furthermore, there is no evidence that Ernie has in any way put his character at issue in the case through reputation or opinion evidence. If he does, then Chris can give testimony as to Ernie's reputation, opinion or specific acts. However, since he has not, Ernie's testimony is inadmissible.

4) The medical expert's report is admissible as an expert witness. The issue is whether the medical expert meets the requirements to be an expert witness.

Since this expert never examined Paulina, he will give an opinion based on his being an expert. An expert witness must give specialized scientific testimony that will be helpful to the trier of fact. He must be qualified in education, training and experience. He must base his opinion on the basis of facts in the case. He must give his opinion with reasonable certainty and finally, he must use the type of information normally relied on in his field to make his conclusions. He is able to make findings of law, such that a person was negligent.

Here, the medical expert is giving expert opinion based on specialized scientific testimony that will be helpful to the trier of fact. He is a doctor so he is qualified in training. He is basing his testimony on the facts of the case, Paulina's medical records. He is giving an opinion with
certainly, and is using the type of information normally relied upon in the field to make his qualified conclusions. Furthermore, his opinion that Paulina’s injuries were not proximately caused by the accident is admissible.

Paulina may argue that since the expert did not examine her, his findings are not based on the type of evidence normally used in the field. However, if the expert can testify with reasonable certainty that he can make his findings by simply examining medical records, his expert opinion is admissible. Overall, the expert's opinion will be admissible since he meets the qualifications needed to be an expert witness.

5) Warren testimony as to what he saw in the aftermath of the incident and what he saw when he aided Paulina will be admissible. Warren's recorded recollection will also be admissible. The issue is whether Warren's recorded recollection meets the qualifications to be a hearsay exception.

Warren's testimony as to what he saw in the aftermath of the incident and when he aided Paulina is based on perceptions. There is no out of court statement, and as such, his testimony based on his perceptions is admissible.

Warren also would like to introduce evidence of his recorded recollection. A recorded recollection is a hearsay exception. A recorded recollection qualifies as a hearsay exception if the person who wrote it perceived the event, wrote down what they perceived immediately after the event while it was fresh in their mind, have since lost memory of the event, can testify as to the accuracy of the statement when they wrote it, and can testify about it on cross examination.

If Warren's recorded recollection was written down immediately after he witnessed the accident and heard Paulina make a comment about her negligence, he can no longer remember it, and he can testify as to its accuracy, the recorded recollection will be admissible.

Paulina could argue that a photocopy of the recollection will not meet the best evidence rule. The best evidence rule states that if an original copy of a legally important document cannot be produced, the person trying to bring the document in must give a good reason for its originals absence. However, Ernie and resort will argue that a photocopy is just as reliable as an original. Therefore, Warren's recorded recollection of a carbon copy of it will be admissible.

**QUESTION 5 – CONTRACTS**

All Girls Private School (“All Girls”), a prestigious college preparatory school, experienced a surge in enrollments. Demographic projections indicated the growth was likely to continue. All Girls determined to fund a substantial expansion project, constructing three additional buildings on campus. Persnickety Preparatory Private School (“Persnickety”), located within a mile of All Girls, had experienced a decline in enrollment, commensurate with the growth experienced by All Girls, and its campus facilities were therefore underutilized.
In July 2011, All Girls entered into two written contracts. First, All Girls and Persnickety signed an agreement whereby Persnickety would make its campus facilities available for up to 50 students in year one (2011-2012 school year) for a per student price of $3,500.00, and up to 100 students in year two (2012-2013 school year) for a per student price of $4,000.00. The contract provided, “Additional students will be accommodated at similar terms upon request.” Second, All Girls and Big Builder Construction Company (“Big Builder”) entered into a written contract for construction of three new campus buildings, to be completed and ready for occupancy by August 2013.

With notice to the students’ families, All Girls accepted for September 2011 50 more students than its own facilities could accommodate and used the Persnickety premises as expected. All Girls increased its enrollment by another 40 students in September 2012, and again used the Persnickety premises.

All Girls accepted enrollment of a full complement of students for September 2013, expecting to have the new buildings available. It accepted deposits and signed enrollment agreements with the students’ families.

In August 2013, Big Builder informed All Girls the construction would not be completed before, at the earliest, March 2014. In the same month, Persnickety informed All Girls it would not make its facilities available for the 2013-2014 school year for any All Girls’ students.

The President of the Board of Trustees for All Girls asks you, in-house counsel, to prepare a memorandum for the Board outlining its legal rights, obligations, liabilities, and remedies based on these circumstances.

PREPARE THE MEMORANDUM

SAMPLE ANSWER 5A:

To: Board of Trustees
From: Counsel
RE: All Girls' Rights, Obligations, and Liabilities

MEMORANDUM

Persnickety Contract

All Saints may be able to obtain specific performance on the contract if they persuade the court to consider extrinsic evidence on the terms of the contract, and are able to persuade the court that the parties intended a binding obligation to renegotiate a price for additional school years if necessary.

The first issue is whether Persnickety owed any obligation to All Saints to enter into a new agreement for the continued use of Persnickety facilities by All Saints. As a general rule, once
both parties have fully performed under a contract, there is no further duty to continue, or renew, a contractual relationship.

Here, the July 2011 contract with Persnickety provided for the use of Persnickety facilities for two consecutive school years (2011-2012 and 2012-2013 school years). An additional provision in the lease provided that Persnickety would accommodate "[a]dditional students . . . at similar terms upon request." Whether Persnickety is obligated to negotiate with All Saints for the use of Persnickety facilities for an additional school year depends on the application and enforceability of that term.

A court could construe this term as a continuing obligation on Persnickety's part to negotiate for the use of Persnickety facilities for additional years. In order for the Court to construe the term in All Saints' favor, All Saints would have to provide secondary evidence as to the intent of the parties. The parol evidence rule, however, generally bars the admission of extrinsic evidence if offered as proof of the parties true intentions. An exception under the parol evidence rule, however, allows the court to consider secondary evidence to determine the intent of the parties when a term is vague or ambiguous. Thus, if All Saints chooses to pursue a claim against Persnickety in this regard, they will first have to demonstrate to the court that the term is ambiguous before All Saints will be allowed to submit evidence that the provision was intended as an agreement that Persnickety use allow All Saints continued use of facilities past the 2013-2013 school year on negotiable terms.

If All Saints is successful in persuading the court to consider extrinsic evidence, then All Saints may be able to seek court ordered specific performance under the contract. As a general rule, courts do not award specific performance as a remedy. However, an exception exists when the contract pertains to real property, as it does here. In contracts pertaining to real property, specific performance is considered the usual remedy.

On the other hand, if the court determines that the provision is not ambiguous and gives the provision its plain meaning, it is likely that the Court will interpret the provision to mean only that Pinkerton agreed to allow use of the facilities during the 2011-2013 and 2012-2013 school years a greater quantity of students than the number specified in the contract, and at a negotiable rate. Thus, Persnickety's obligation to allow All Saints continued use of Persnickety facilities terminated at the conclusion of the 2013 school year. Therefore, Persnickety is not in breach of the of the July 2011 contract, and is under no duty to enter into a new contract with All Saints.

It should be noted, however, that the determination of the court in this scenario will be difficult to predict, and the Board should consider the costs of litigation before pursuing a cause of action with such uncertain results.

Big Builder Contract

All Saints has a cause of action against Big Builder for breach of contract. All Saints' remedies for Big Builder's breach will depend on whether the breach is material or immaterial. Under the common law, satisfaction of contractual duties requires that each party substantially perform
under the contract. If a party does not substantially perform, they will have committed a material breach. On the other hand, if the breaching party has substantially performed, and have breached, then the breach is immaterial. An immaterial breach usually occurs when one party's performance under a contract is improper.

Here, All Saints contracted with Big Builder for the completion of three new on campus buildings to be completed and ready for occupancy by August 2013. In the same month that completion was due, August 2013, Big Builder notified All Saints that construction would not be complete until March 2014. All Saints should argue that this constitutes a material breach in that All Saints will not be able to benefit from any use of any of the school buildings until March of 2014 (as opposed to if All Saints had access to at least one of the three buildings in time for the contracted date).

When a breach is material, the non-breach party may choose from several remedies. The non-breaching party could elect to use the breach as an excuse for non-performance, withhold the contract price from the breaching party, enter into a new contract with a different party, and additionally hold the breaching party liable for any offsetting damages in finding a replacement to perform the contract, minus any costs already incurred by the non-breaching party in performing. On the other hand, a non-breaching party may also elect to hold the breaching party to the contract, and collect expectation damages (those damages meant to put the non-breaching party in the same position they would have been in had the breach not occurred) as well as incidental damages (the costs and expenditures incurred by the non-breaching party as a result of the breach) from the breaching party.

Thus All Saints has two options. First, All Saints may instead contract with a replacement contractor for the remainder of the work. If All Saints elects to do this, they are entitled to withhold the contract price from Big Builder, and may also collect in damages any offset in the price required hire a replacement. All Saints will, however, remain liable to Big Builder for the cost of the work Big Builder has already advanced in performing.

All Saints second option would be to hold Big Builder to the contract, and allow them to complete performance by March 2014. If All Saints decides this is a preferable option, All Saints will be entitled to expectation damages as well as incidental damages. If All Saints is able to find a replacement facility for the 2013-2014 school year, and is therefore to continue its obligations to all incoming students, than All Saints damages will be limited to the cost of the replacement facility. If, however, All Saints is unable to find a suitable replacement facility, and is unable to offer admission to the incoming students which they have accepted for the 2013-2014 school year, then All Saints will be entitled to collect from buyer the loss of the tuition price they expected to receive from the new students.

Big builder will likely argue that their breach is immaterial, and are therefore entitled to complete performance. It is unlikely they will succeed in this argument, however, because Big Builder has not completed performance on any of the three contracted buildings. However, in the unlikely event that Big Builder succeeds in this argument, All Saints will still be entitled to collect expectation damages from Big Builder as discussed above, but All Saints will not have an excuse for non-performance.
Therefore, All Saints should be able to succeed in a claim against Big Builder for their material breach of the contract.

Accepted Students

In the event that All Saints is unable to secure a replacement facility for the 2013-2014 school year, All Saints will not liable to accepted students who will have to be turned away, but All Saints will have to return any deposits paid by the students. The issue is whether All Saints will be liable for breach of the Student Enrollment Agreements between All Saints and the accepted class for 2013-2014. Under the common law, a contract imputes a binding obligation on both parties who enter into an agreement for consideration. Here, the exchange of tuition deposits in exchange for enrollment agreements constitutes a valid binding contract.

However, the common law provides that a breaching party may be excused from performance when performance has been made impossible. Here, All Saints performance under its contracts with the accepted students may be excused by impossibility if All Saints is unable to secure an adequate replacement facility.

Therefore, All Saints may be excused from performing under its contracts with the accepted students if performance has been rendered impossible by Big Builders' breach and All Saints is unable to find a replacement facility.

SAMPLE ANSWER 5B:

TO: President
FROM: In-house counsel
RE: Contracts with Persnickety and Big Builder

Contract with Persnickety

All Girls had a valid contract with Persnickety, but the term has expired. A valid contract must have offer, acceptance, and consideration. All three are present here. There was clearly an offer from All Girls, which Persnickety agreed to by signing. Consideration is a bargained for legal detriment. The consideration would be the use of the school facilities (for Persnickety) and the money per student (for All Girls), which each constitute a bargained-for detriment. Contracts which cannot be performed within 1 year must be in writing under the statute of frauds, and this contract is for 2 years, but it is in writing so that is not an issue.

The contract is not for the sale of goods so it will be interpreted according to common law, not the UCC.

The contract covers the 2011-2012 school year and the 2012-2013 school year, but says nothing directly about the 2013-2014 school year. The issue is the meaning of the term "additional students will be accommodated at similar terms upon request." This could be interpreted to mean that, during those school years, additional students will be accepted, or it could be interpreted to mean that additional students will be permitted to enter during future years. Neither
interpretation is obvious from the document. If the term is meant to apply only during those years, then there wouldn't be a need for a maximum students term elsewhere in the contract, and courts typically don't interpret contracts to make terms meaningless. On the other hand, if the term is meant to apply for future years, it should mention years, or give some indication of time. Because the term is ambiguous, additional evidence will be brought in. A court may look to additional factors such as course of dealing, term of art usage in the industry, and statements made during negotiations to interpret the ambiguous term. (Under normal circumstances, evidence of what was said during negotiations may not be introduced under the "parol evidence rule", but such evidence may be admitted to interpret an ambiguous term.) If such evidence can be found, then we might have a good case that Persnickety breached the agreement by failing to allow additional students for this term.

If Persnickety is found to have breached, a court would try to order damages to put All Girls in the position it would have been in without the breach. This may include paying the cost for alternative temporary campus space, less the amount saved as a result of the breach.

Contract with Big Builder
All Girls had a valid contract with Big Builder which Big Builder breached. A valid contract must have offer, acceptance, and consideration. All three are present here. There was clearly an offer and acceptance (indicated by signed writing), and there is consideration on both sides (a promise to construct the building and a promise to pay money are both valid forms of consideration). The agreement was made in 2011 and is not meant to terminate until 2013, but it is a signed writing so there's no statute of frauds issue.

The contract is not for the sale of goods so it will be interpreted according to common law, not the UCC.

Big Builder clearly breached the agreement. They promised to have the building constructed by August 2013 and now say it won't be ready until March 2014.

Because Big Builder breached the agreement, All Girls has a number of options. It can wait until March 2014 and claim damages in the form of losses from the lack of use of the building before then (e.g., the cost of securing additional temporary campus space). Alternatively, it could hire contractors to finish the job by August and claim damages in the form of the additional cost of hiring the new contractors.

In terms of liabilities and obligations, All Girls has already accepted deposits and signed enrollment agreements with the students' families. I am assuming that this means All Girls signed the agreements as well. (If only the parents signed enrollment agreements, but not All Girls, then we could argue the "agreement" was merely an offer which All Girls may accept or reject.)

If we need to get out of these agreements, we could try to argue impracticability based on the fact that we don't have access to campus space as a result of Persnickety and Big Brothers' failures to perform as we expected. General impracticability, caused by acts of God, change of laws, etc. is a valid defense, but specific impracticability (sudden change in circumstances
making performance difficult for one party) is not. The latter is the case here. It would not be impracticable for anyone to honor those agreements (there has been no law making the agreements illegal or anything like that), but rather it would merely be difficult for us because we would need to (presumably) spend a lot of money to obtain additional campus space for the extra students. Consequently, this would not be a valid defense.

If we breach the enrollment agreements, the students' families may claim damages in the form of expectation interest (e.g., the cost of obtaining similar schooling elsewhere).

I recommend we begin examining the practicability of finding temporary alternate campus arrangements as soon as possible.

Sincerely,
In House Counsel

QUESTION 6 – CIVIL PROCEDURE
Plaintiff, a Maryland (“MD”) domiciliary, files an action in the federal district court of New Jersey (“NJ”) against defendant, a Delaware corporation with its principal place of business in NJ. The parties stipulate MD law will apply to plaintiff’s compensatory damages claim, but disagree on plaintiff’s punitive damages claim. NJ law does not allow punitive damages in lawsuits involving Food and Drug Administration (“FDA”) approved drugs, except if the company knowingly misled the FDA during the drug approval process. MD law has no restriction or cap on punitive damages.

Defendant applied for and obtained FDA approval for Kaspen through its NJ headquarters. Kaspen was exclusively manufactured by defendant in NJ. All marketing, distribution, and sales of Kaspen to physicians and hospitals throughout the United States, including MD and NJ, originated at defendant’s NJ headquarters.

Plaintiff was prescribed Kaspen to treat hypertension by his physician in MD. A year later, plaintiff experienced severe pain in his jaw and underwent extensive jaw surgery. Subsequently, plaintiff’s doctors learned of an association between Kaspen and jaw disorders and discontinued the use of Kaspen. All of plaintiff’s treatment for hypertension and his jaw disorder occurred in MD, where plaintiff resided for 20 years.

Prior to trial, defendant files a motion to apply NJ law to plaintiff’s punitive damages claim. Plaintiff, in opposition, contends MD law should apply to the claim. The court makes a ruling for NJ law to govern the punitive damages claim. Thereafter, defendant files a motion for summary judgment for the dismissal of plaintiff’s punitive damages claim, which plaintiff opposes. On September 1, 2012, the court enters an order granting defendant summary judgment on the punitive damages claim. On September 28, 2012, plaintiff files a motion for reconsideration of the court’s summary judgment order. In support, plaintiff submits an FDA ruling entered on September 15, 2012, concluding, “The defendant knowingly misled the FDA during clinical trials by withholding information regarding the detrimental side effects caused by Kaspen.”
You are the law clerk to the district court judge who has asked you to prepare a memorandum addressing the following issues.

1. Was the court’s ruling that NJ law will govern plaintiff’s punitive damages claim correct? Explain.

2. How should the court rule on plaintiff’s motion for reconsideration? Explain.

PREPARE THE MEMORANDUM

SAMPLE ANSWER 6A:

1. Governing law for Plaintiff's (P) punitive damages claim.

This claim has been brought before the federal district court of NJ based on a tort claim involving P's use of the drug Kasten. The federal district court has original subject matter jurisdiction over this claim based on diversity of citizenship between the parties and the amount in controversy. First, it appears assumed that the amount in controversy exceeds $75,000 (no one has disputed this and based on the damages, this seems likely, esp given the punitive damages claim and the possible pain and suffering for the jaw surgery and related problems). Second, the parties are diverse, as P is a resident of MD and Defendant (D) is a resident of both its state of incorporation, Delaware and its principal place of business, which is NJ. Therefore there is diversity of citizenship.

These facts are important because, in cases rests on diversity for subject matter jurisdiction, the federal court under the Erie doctrine should apply federal rules in terms of procedure and state rules in terms of substantive law (e.g., the elements of claims and defenses). Here, in considering whether the punitive damages claims will be governed under NJ state law (as the Court earlier held) or MD law, the court must look to the underlying law of its forum state, here NJ.

The question is therefore, under the governing analysis regarding the conflict of laws, should the court apply NJ or MD law to the punitive damages claim. There have been several different approaches to analyzing conflict of laws. First, under the First Restatements approach, called the vested interests approach, the forum state should apply the law where the rights of the parties have vested (or the last element in the cause of action attaches). Here, it appears that P was prescribed the drug in MD, took the drug in MD, and then experienced pain and underwent surgery in MD. Although the drug was made, sold and distributed out of NJ, these events preceded P’s use. So under the vest rights approach, the law of MD would be applied regarding punitive damages.

A second approach is the governmental interests aproach, which tries to determine which policies underlying the various state laws at issue are the most significant and deserve to be applied. The default is that the law of the forum state (here, NJ) would apply unless a party explicitly asks for another law to apply (which the parties have in fact done). Next, the court has
to determine the government policy interests behind the various laws at issue. Here, the specific law concerns whether punitive damages. The NJ law is that there are no punitive damages permitted in lawsuits involving FDA approved drugs except if the company misled the FDA during the approval process. By contrast, MD has no restriction or cap on punitive damages. So this court must weigh the two policy interests underneath these laws. The NJ law appears to be motivated by a desire to relieve drug makers of liability for punitive damages if they have gone through the FDA approval process in good faith; it is likely that NJ believes that punitive damages, which are reserved for intentional and wanton acts of wrongdoing, are inappropriate when a company has undergone the rigorous approval process of the FDA. It likely also believes that shielding drug companies from such punitive damages will encourage drug makers to make and license drugs with less fair of potential lawsuits, benefiting the public overall. By contrast, the MD law is silent on these issues. That silence could show that MD has not strongly evaluated these issues and does not have a compelling policy interest. Or the silence could indicate that MD believes that, even when a drug receives FDA approval, drug users must have the ability to claim punitive damages against the makers because drug safety is an imperative public good, with huge potential risks when drug dangers go unreported (for instance, as with Vioxx). Further, MD might believe that in such situation where punitive damages are explicitly found based on intentional or wanton conduct, that conduct is so extreme that shielding companies from liability is not necessary -- ie, it is precisely those companies that require punitive damages in order to keep them in order. If the court finds a genuine conflict, it should consider if there is more moderate and restrained approach; if there is not, it will have to decided which interest is greater. In the present case, the NJ law seems on balance to have more likelihood of representing a considered and deliberate policy and should be applied.

Finally, courts sometimes also use a third approach, found in the Second Restatement to the Conflict of Laws, which looks at the most significant relationship between the states and the events in controversy. Specifically, they would look at the following factors:

- the interests of judicial efficiency
- the policies of the forum state for the law
- the policies of the other state for its laws
- the policies of the field of law itself
- the expectations of the parties
- certainty, predictability and the uniformity of results
- the ease of applying this approach to future cases.

While many of these factors do not necessarily weigh heavily here -- for instance, P likely expects to use MD law, whereas D expects to use NJ law -- the policies of the two states which has already been discussed above argues for using NJ law. Further, under this approach, the court should look at the connecting factors between the parties and the event in question. Here, the connecting factors seem evenly split -- the P lives in MD, took the drug in MD, experienced problems in MD and would like to use MD law in the lawsuit; by contrast, D has its principal place of business in NJ, makes, sells and distributes the drug out of NJ. However, D always knows that its drugs are sold all over the US and will likely expect that it might have to defend
itself in another state. So the connecting factors does not on balance strong push this court towards either MD and NJ.

Based on these analyses or some hybrid approach combining them, this court should on balance use the law of NJ regarding punitive damages, as it did.

2. The P has filed a motion for reconsideration based on the court's prior summary judgment order, granting D summary judgment on the punitive damages claim. That ruling was based on the finding by the court that, analyzing all of the evidence in the light most favorable to the nonmoving party (here the P), there is no genuine issue of material fact and D was entitled to receive judgment as a matter of law. This ruling is likely to have been based on the finding that, since the drug was approved by the FDA and NJ law applies, under NJ law there can be no punitive damages under the company knowingly misled the FDA on the approval process. There must have been no material disputes in evidence to show that there was any such conduct occurred.

Attached in support of the motion is a FDA ruling stating that the FDA has concluded that the D knowingly misled the DRA during clinical trials. Normally, a court would not reconsider a prior ruling if a party had failed to previously submit such information into the record. However, the FDA ruling occurred on September 15, 2012, and the court's order is dated September 1, 2012, 15 days earlier. Therefore, it appears that P was not able to submit the ruling to the court before to its ruling. The next question is whether the FDA ruling is sufficient to raise an issue of material fact to denied the grant of summary judgment. The court is not required to find that the FDA conclusion is absolutely true, but the court can take judicial notice of a government ruling such as this. Based on such judicial notice, the court would be reasonable to conclude that this new evidence does create a genuine issue of material fact and that the prior grant of summary judgment on punitive damages was improper and should be vacated.

SAMPLE 6B:

To: District Court Judge
From: Law Clerk
Re: Lawsuit

The Court's ruling that NJ law will govern plaintiff's punitive damages claim was correct.

The question of whether NJ or MD law should apply to plaintiff's punitive damages claim is governed by the Erie Doctrine. When a diversity case is brought in federal court, the court is to apply federal procedural law and state substantive law. In this case there is a strong argument to be made that the punitive damages provision is substantive in nature insofar as it is outcome determinative. Accordingly, state substantive law should apply to this claim. When, as in case like this, there is a conflict as to which state law to apply, Klaxon v. Setnor holds that the forum state's choice of law methodology should apply to the determination of which state's law to apply. In this case, the lawsuit was filed in federal district court in NJ, therefore NJ's choice of law rules
will apply. There are three main choice of law methodologies. The First Restatement calls for a territorial approach whereby the claim is classified and then the facts are analyzed to determine the appropriate state's law. In this case, it is a tort claim and the plaintiff was injured in MD. This would seem to suggest an application of MD is appropriate; however, the First Restatement's approach has been disapproved and is not used in NJ. The second approach is the governmental interest approach where the court asks whether each forum state truly has interest in the applicability of it's law relative to the instant case. Here both states appear to have an interest. The plaintiff was actually injured and received treatment as well as the medication in MD but the defendant corporation is domiciled in NJ and conducts all of its marketing and business in NJ. MD punitive damages provision is established to protect its citizens and give them wide latitude to seek compensation for injuries. The limitation on punitive damages in NJ in cases involving FDA approved drugs, evinces NJ's intent to protect the drug manufacturers operating in its state for excessive damages in cases where no deliberate misleading conduct is alleged. Under this analysis, there is a true conflict between the states and therefore the default is simply to apply the law of the forum state to give force and effect to the plaintiff's choice of forum - in this case NJ. The final approach, is the most significant relationship approach that uses the same policy-oriented factors to evaluate the interests of the forum state and the connections of the respective parties to their forums. In the case of a true conflict, as here, there is no default to the forum state; rather, the law of the state with the most significant relationship to the suit will apply. Under that analysis, NJ law is the proper choice of law as well. As stated, the issue in the case focuses primarily on the conduct of the NJ domiciled corporation and only incidentally affects MD. This is because the plaintiff only happens to be a Maryland resident. He was the end user of a drug that was developed, marketed and sold in NJ. Accordingly, under either analysis, NJ law should apply. The court was correct in applying NJ law to govern the punitive damages claim.

The court should grant plaintiff's motion for reconsideration

Even the NJ punitive damages provision allows for punitive damages in cases involving FDA approved drugs where the company knowingly misled the FDA during the drug approval process. At the time Defendant moved for summary judgment, there was no genuine issue of material fact in dispute with respect to the punitive damages claim. Plaintiff had merely established that he was injured by defendant's drugs but had not established that the defendant had misled the FDA during the approval process. Pursuant to the court's earlier determination that NJ's punitive damages provision applied to this case, there was no outstanding issue of material fact in dispute and defendant was entitled to a judgment as a matter of law. During the appropriate 30-day window, plaintiff filed his motion for reconsideration. A motion for reconsideration is proper only when at the time of ruling on the original motion, the court did not have the opportunity to take into account additional issues of fact or law that were not available at the time. The court granted the motion for summary judgment on September 1, 2012 and the FDA ruling holding that Defendant knowingly misled the FDA during clinical trials was not published until September 15, 2012. Accordingly, the court did not have the opportunity to consider that fact at the time it ruled on the motion for summary judgment. This is highly significant insofar as knowingly misleading the FDA makes Defendant liable for punitive damages under the NJ punitive damages provision. Accordingly, there is now a disputed issue of material fact relevant to the outcome of the case - namely, whether the Defendant knowingly
misled the FDA entitling plaintiff to recover punitive damages. As such, the court should grant plaintiff's motion for reconsideration.

QUESTION 7 – REAL PROPERTY

A State of New Berry statute provides:

Every instrument concerning an interest in land shall, until duly recorded in the County Clerk’s office, be void and of no effect against all subsequent bona fide purchasers, not having notice thereof, whose deed shall have been first duly recorded. A recorded instrument shall be notice to all subsequent purchasers of the instrument and its contents.

On October 1, 2012, Elizabeth closes on her sale of Lot 1 located in the State of New Berry to John. Immediately thereafter Elizabeth and John argue over a matter unrelated to the sale of Lot 1. Elizabeth is so enraged that she sends John back his check and demands a return of the deed. John sends his check back to Elizabeth and notifies her that he will not return the deed. Elizabeth does not negotiate John’s check but instead approaches Steve and asks if Steve would like to purchase Lot 1. Although Steve hears a rumor that Elizabeth previously sold Lot 1 to John, he decides to proceed with the purchase of Lot 1. On October 15, 2012, Steve pays Elizabeth in exchange for a deed for Lot 1. Steve records his deed on October 17, 2012, and John records his deed on October 18, 2012.

Lou leases Residential Property and lives there. John purchases Residential Property and notifies Lou that he must move out. Lou shows John a writing signed by a prior owner of Residential Property that states Lou can lease and live at Residential Property for as long as Lou wants. John discovers that occasionally people bring their cars to Residential Property and pay Lou to detail them. Residential Property is zoned for residential use only.

Several years ago, Anne, John’s mother, conveys Lot 2 by deed to Carolyn and her heirs. The deed states that no commercial establishment shall be operated on Lot 2. Carolyn decides to sell coffee and pastries and applies for a variance to install a commercial kitchen on Lot 2. Anne receives notice of the variance application but does nothing about it. The variance is granted. Carolyn installs an expensive commercial kitchen and starts selling coffee and pastries from Lot 2. Anne passes away, leaving a Last Will and Testament that bequeaths any interest she has in real estate to John.

John comes to your law firm. John wants: (1) Steve to have no rights in Lot 1; (2) to have Lou move out of Residential Property; and (3) to take possession of Lot 2 from Carolyn.

You are asked to prepare a memorandum setting forth all of John’s rights, obligations, and liabilities with respect to these issues.

PREPARE THE MEMORANDUM
SAMPLE ANSWER 7A:

To: John  
From: Attorney  
Re: Property Rights, Obligations and Liabilities  

Lot 1  

John likely owns Lot 1, whereas Steve has no interest in the lot because he purchased the lot only after receiving notice of the prior sale from Elizabeth to John. As a general rule, when a grantor makes multiple conveyances of an interest in real property, the first person to which the right was conveyed will prevail. However, states' recording statutes often alter this common law rule in favor of purchasers for value. Under a race statute, whichever purchaser for value records first owns the land. Under a notice statute, the subsequent purchaser for value will prevail over a prior purchaser so long as the subsequent purchaser had no notice of the prior conveyance. Finally, under a race-notice statute, a subsequent purchaser will prevail over a prior one so long as the subsequent purchaser had no notice of the prior conveyance AND the subsequent purchaser records first. The subsequent purchaser may also have notice in any one of three ways: actual, inquiry, or record notice. Actual notice exists when the subsequent purchaser had actual knowledge of the prior conveyance. Inquiry notice exists when the subsequent purchaser acquires such information that would compel a reasonable person to inquire into whether there had been a prior conveyance. Record notice exists when a deed has been validly recorded, and there are are no gaps in that deed's chain of title.

Here, John will prevail against Steve because Steve had notice of the conveyance to John prior to Steve's purchase. The New Berry statute is a race notice statute because it protects a subsequent purchaser only if he or she does not have notice and records first. Here, it is clear that Steve recorded first because he recorded on October 17 and John only recorded on October 18. However, Steve cannot claim the protection of the recording statute because he had notice of the Elizabeth-John conveyance. Although there is some dispute as to whether Steve had actual notice of the prior conveyance because Steve had only heard "rumors" of the sale, the rumors would suffice to constitute inquiry notice. Rumors of a prior sale would ordinarily compel a reasonable buyer to look into whether such sale actually occurred. Consequently, Steve had notice prior to his conveyance and is not protected by the recording statute. John will prevail.

Steve's only argument remaining is that Elizabeth somehow validly rescinded the sale after closing by returning the check and demanding a return of the deed. This argument will fail. Conveyance of an interest in real property is completed upon lawful execution of a deed and valid delivery. A deed is lawfully executed when it contains an adequate description of the parcel and is signed by grantor. Delivery may be accomplished either by physical transfer of the deed or by words of present intent to convey by the grantor. Here, there is no indication of any defect in the deed given by Elizabeth to John. Furthermore, once the deed actually was given to John, the conveyance completed and title could not be transferred back to Elizabeth simply by John handing the deed back to her. Consequently, this argument too will fail.
Residential Property

John has several options for having Lou removed from the Residential Property. First, he may argue that Lou has a tenancy at will that John may terminate at any time. A leasehold is a non-freehold interest to possess the land of another. Under a term of years, the lease allows the tenant to possess the land for a period of a known, fixed duration. Under a periodic tenancy, the lease consists of defined periods (such as a month or a year) that repeat until either party to the lease gives notice of termination. The notice of termination goes into effect the next full lease period after notice is given. Under a tenancy at will, the lease may be terminated by either party at any time, provided that reasonable notice is given. Courts generally interpret such leases such that the other party enjoys the same right to terminate the lease at any time. Finally, in a tenancy at sufferance, a tenant has wrongfully held over after the termination of a lease. The tenant remains in possession under such a tenancy only until the landlord brings an action to evict or the tenant is held over to a new lease.

Here, John can show that the writing Lou presented creates only a tenancy at will that John may terminate by reasonable notice. The document contains no fixed term, nor does it provide for a repeating periodic term. Rather, the document only provides that Lou may reside at Residential property "as long as Lou wants." This language leaving termination to Lou's discretion indicates a tenancy at will was created, and as was explained above, a court will imply that John also has discretion to terminate the lease even though the document itself only gives Lou this right. Accordingly, John has the right to terminate Lou's tenancy at will.

John could also sue Lou for eviction based on Lou's breach of a covenant of the lease by virtue of Lou's operating a car detailing business on Residential Property. A substantial breach of a covenant in a lease by a tenant permits a landlord to bring an action to evict the tenant. The lease at issue here appears to contain an explicit covenant for Lou to use Residential Property only for residential purposes, as the document at issue only states that Lou can "live at Residential Property," not open a business there. Furthermore, leases may contain an implied covenant requiring the tenant to use the leased property in accordance with any applicable laws. John could base an action to evict Lou on a breach of either of these covenants. By detailing cars, Lou would be breaching any explicit covenant to limit the use of Residential Property to using the property only as a place for Lou to live. Furthermore, as the property is zoned only for residential use, John could assert that Lou is using the property inconsistent with the residential use zoning restriction, thereby constituting a breach of an implied covenant in the lease. Thus, there would be two bases for evicting Lou.

Lot 2

John likely has no ownership interest in Lot 2 because Anne conveyed to Carolyn a fee simple absolute. A fee simple is an estate constituting absolute ownership, created by a grant simply to grantee and grantee's heirs without any durational or conditional language. A fee simple determinable is created by a grant of ownership to grantee and grantee's heirs, but limited by clear durational language. The grantor retains a possibility of reverter; the right to the land
automatically reverts to grantor upon grantee's violation of the condition. A fee simple subject to condition subsequent is created by a grant of ownership to grantee and grantee's heirs, but limited by a clear condition or clear durational language. The difference from a fee simple determinable is that the grantor reserves a right of re-entry. Possession does not automatically revert to grantor upon violation of the condition; grantor must bring suit to reclaim title to the property.

Here, Anne's grant to Carolyn and her heirs likely created a fee simple. Creation of a fee simple determinable or fee simple subject to condition subsequent requires the use of clear durational language, not language specifying an intent or purpose for which the land shall be used. Here, the grant from Anne to Carolyn and Carolyn's heirs does not state its restriction in durational terms as part of the conveyance. Instead, the restriction of no commercial use is stated separate from the language of conveyance. As this language is not durational in nature and part of the language of conveyance, Carolyn likely holds Lot 2 in fee simple, free of any restriction that would terminate her interest.

John, of course, will argue that he inherited Anne's possibility of reverter or right of reentry that may have been created in the event that Anne granted a fee simple determinable or fee simple subject to condition subsequent. Future interests in land held by a grantor, including a right of re-entry or a possibility of reverter, are freely devisable by will. Thus, Anne would have successfully transferred such future interests by her Will to John. Thus, assuming that Anne had created a fee simple determinable or fee simple subject to condition subsequent, Anne would have retained a possibility of reverter or right of reentry over Lot 2. These future interests would have passed by will to John because Anne's will bequeathed to him any interest Ann had in real estate. Thus, if these future interests existed, John would have asserted he had a right to re-take Lot 2 based on Carolyn's violation of a no commercial use restriction in the grant.

Carolyn would also probably argue that, to the extent John may have a right of re-entry, Anne waived this right when she obtained notice of the variance to install the commercial kitchen and took no action. When a future interest is a right of re-entry, the grantor does not automatically re-take the land upon violation of the condition contained in the grant of a fee simple subject to condition subsequent. Rather, this right must be exercised by the holder of the future interest, and can potentially be waived. Carolyn would assert that this waiver was effectively accomplished when Anne failed to exercise the right of reentry when Anne applied for the zoning variance.

**SAMPLE ANSWER 7B:**

To: John  
From: Applicant  
Re: John's Property Rights  

Ownership of Lot 1:

The State of New Berry is a race-notice jurisdiction. Therefore, a bona fide purchaser ("BFP") of real estate, without notice of a prior transfer of that same real estate, who properly records his
deed will take that property over any prior transferees who failed to properly record their deeds before him. Elizabeth sold you Lot 1 and that sale was not undone by her return of the check and demand for the deed; it is additionally irrelevant that she has not negotiated your check. However, before you recorded the deed, Elizabeth then sold Lot 1 to Steve for value, and Steve recorded. Therefore, if Steve is a BFP without notice of your prior purchase of Lot 1, he will be considered its owner. Because Steve paid consideration, he will be considered a BFP as long as he did not have notice of your purchase, which would disqualify him under the statute and make you the proper owner. Because you have since recorded, you would then win against any claimants from future purchases. Notice comes in three forms: actual, inquiry or record. Because you did not record, there is no record notice. Inquiry notice is constructive and imputes notice to anyone who for what they should have discovered after a reasonably inquiry. For example, the buyer should visit the home. Whether or not Steve did this, if you were in possession of the time at the time Steve purchased, he will be constructively considered to have had notice of your ownership, and will not be a BFP. If you were not in possession of the home at the time, our strongest argument is that the fact that Steve heard a rumor that Elizabeth previously sold the home put him either on actual notice or on inquiry notice. Actual notice requires actual knowledge, and the rumor may not be found to amount to actual knowledge, depending on how believable it was. However, there is a strong argument that the rumor should have put Steve on inquiry notice, which would require him to make a reasonable investigation as to the ownership of the home. This could have included speaking to you about the rumored sale. Therefore, there is a reasonably good likelihood that Steve will not be considered a BFP without notice and you will be found to be the owner of Lot 1.

Residential Property:

Lou has a lease from a previous owner of Residential Property that he may lease and live there as long as he wants. Generally a lease that is neither a term of years or a periodic lease will be considered an at-will lease, which either party can terminate at any time. However, because there is no mutuality for termination, Lou may argue that his lease interest is akin to a life estate and cannot be terminated. However, because there is no clear grant of a life estate and because Lou must continue to pay rent to maintain possession, it is more likely that a court would interpret the ability to unilaterally extend the lease as an illusory contract and will imply an at-will tenancy, with termination allowed by either party, likely with an implied reasonable period of notice. It is therefore likely that with reasonable notice, you will be able to terminate Lou's lease. In the alternative, there is a chance that you could evict Lou for failing to comply with the zoning ordinance limiting the property to residential use because of his operation of a small scale mechanical shop. However, that may be difficult to argue is a true nonconformity depending on the frequency and relative disturbance and whether there was a prior nonconforming use. The best route would be to argue that Lou's ability to stay as long as he wants is ambiguous and should be interpreted as a tenancy at will, which would allow you to terminate.

Possession of Lot 2:

The deed conveying Lot 2 to Carolyn and her heirs states that no commercial establishment shall be operated on Lot 2 but does not specify what will happen if that condition is violated. The transfer to "Carolyn and her heirs" will be read by courts to be a transfer in fee simple absolute,
and the condition will be read as a condition subsequent. Because there is no later taker specified in the event of violation, what is effectively a nonautomatic reversion to the grantor will be implied in the form of a right of entry or termination. When your mother transferred the property to Carolyn, she gave Carolyn a fee simple subject to a condition subsequent, and your mother retained a right of reentry. That right is alienable, devisable and descendable, and your mother devised it to you in her Will. However, Carolyn will be able to assert a defense of laches and make a strong argument for promissory estoppel. When Carolyn applied for the variance and began the operation of her business, your mother had a right of reentry and could have asserted her right. Because the Rule Against Perpetuities does not apply to future interests in the grantor or her heirs, that right is still arguably open, even if there is a RAP in the State of Berry. However, she did not assert her right. It is not clear how long along the violation occurred, but a Court may find that too long has now passed between that violation and your current desire to enforce the right. In either event, Carolyn can argue that she detrimentally relied on your mother's failure to assert her rights, which may be construed as an implied promise never to exercise them, by obtaining the variance, installing an expensive commercial kitchen and starting her business. You can assert your right to reentry or termination, which has not expired, but it is unclear whether you will be successful in court.