QUESTION 1 - TORTS

Tony, an artist, owns a small home in a local development. He hires Peter, a contractor, to repave the driveway, the concrete surface of which has decayed over time, causing it to become lumpy and uneven. Peter promises to have the driveway repaved in time for Tony’s annual art show, at which he displays for sale the paintings he has created in his basement.

Kim, a native of Portugal visiting a friend in the neighborhood, attends the yard sale, hoping to purchase a painting to bring home as a souvenir. While browsing among the displayed paintings, Kim stumbles and falls over a loose brick in the driveway, fracturing her ankle. Just that morning, Tony had noticed that the brick was loose, and he had already called to leave a complaint on Peter’s voicemail. Tony also put up a hand-written sign to warn of the loose brick, but Kim, who speaks only Portuguese, was unable to understand the sign.

Kim’s husband, Barry, drives her to a nearby hospital, where her ankle is put in a cast. Barry then returns to the yard sale, where he angrily confronts Tony. The two men argue, whereupon Barry throws a punch at Tony, but misses and instead strikes Vera, another prospective art purchaser, in the head. Vera sustains a laceration, requiring medical attention. Worried about possible litigation, Tony consults you, his best friend and a noted law school professor. He asks you to prepare a memorandum, listing each party’s potential claims and defenses.

PREPARE THE MEMORANDUM

SAMPLE ANSWER 1A:
To: Tony
Introduction

Hello, Tony. This memorandum is in response to your request earlier that I write to you listing the potential claims and defenses of the people who were involved in the events that transpired during your yard sale recently. For a reminder, these parties are Kim, a visitor from Portugal; Barry, her husband; Vera, a prospective art purchaser; Peter, the contractor you hired to repair the driveway; and you. Below, I shall briefly discuss each party's prospective rights and liabilities stemming from those incidents. I will organize these issues into groupings based on parties who suffered injuries: first, Kim; second, Vera; and third, you. Barry and Peter are mentioned within the analysis where appropriate.

Possible Claims by Kim

Kim will claim that you were negligent in running your art show and failing to make safe the property for prospective visitors and purchasers. The issue is whether you were negligent.

Negligence is a tort that creates liability when a tortfeasor owes a duty to a plaintiff and breaches the duty, and that breach both actually and legally causes harm to the plaintiff. Duties are owed to foreseeable plaintiffs. In situations where a tortfeasor is a possessor of land, there are special duties owed to persons who enter the land, depending upon how the person made his or her entry. An invitee is a person who was impliedly invited onto the land by the possessor in a capacity that may generate money or commerce for the possessor. When the possessor is operating a business or a sale, entrants are considered invitees. Invitees are owed the highest duties of any land entrants. Possessors of land must make safe or adequately warn against any dangerous conditions, manmade or natural, that are either known to them or reasonably could be known with reasonable inspection.

A breach of duty occurs in premises liability when the possessor fails to make safe or adequately warn the invitee about the condition, if the tortfeasor knows about the condition or has failed to adequately inspect in order to find it. This is breach because such conduct by a possessor of premises has a slight burden of correction compared to the increased harm likely to the prospective plaintiff.

The plaintiff in a negligence suit must also show damages; a court will not presume damages. However, once any damages are shown, the defendant will be liable for all damages to the plaintiff, as long as the defendant caused those damages. Causation is measured in two ways, and both must be satisfied for the defendant to be liable. Causation must be both actual and legal ("proximate"). Actual cause exists where, but for the defendant's breach, the plaintiff would not have been injured. Proximate cause exists when the damages to this particular plaintiff were a foreseeable result of the defendant's breach; i.e., they were "within the zone of harm."
Here, Kim came onto your property because you had an art show at which you displayed for sale paintings that you had created. With respect to possibly dangerous conditions on the area of your property where the art show would be held, Kim was a foreseeable plaintiff, and you thus owed her a duty of care. Furthermore, because you were running a sale for profit and Kim came to look at your wares, she was an invitee, and you owed her the heightened duty of care that is associated with this kind of premises entrant. Your driveway was in a condition in which it made a slip and fall likely, but you did inspect for this condition, warn about it by using a sign, and attempt to have it repaired by notifying Peter, your contractor, about the condition. It is questionable whether your efforts were adequate; perhaps you could have used a multilingual sign, postponed the sale, or installed a wood plank over the faulty spot in the driveway, yourself. Assuming that you breached your duty, Kim's injury would not have occurred but for the problem with your driveway, and the falling and breaking of an ankle by an invitee is within the zone of harms expected by a dangerous driveway at the spot of your art sale. Because she actually suffered a broken ankle and will have, at the very least, medical bills stemming from it, she will have made out a case of negligence.

Kim will also claim negligence against Peter, your contractor. In so doing, she will assert that you were vicariously liable for his torts. The issue is whether he was negligent, and if so, whether you may be held vicariously liable (meaning that you will have to pay for damages caused by Peter).

Kim's claim for negligence against Peter will require the same elements as above to be proved: Peter will have to owe her a duty and breach it, and such breach must be the proximate and actual cause of Kim's injuries. Vicarious liability arises when there is an employer-employee relationship, and the employee commits negligent torts during the relationship and while performing work associated with the relationship. However, there is an exception to vicarious liability in this situation where the "employee" is not susceptible to complete control by his boss, but rather is an independent contractor who was hired to complete a task, with most of the discretion as to how the task will be completed left to himself. Unfortunately, there is a legal exception within this issue, as well: a premises owner who brings an independent contractor onto the premises may be liable for the contractor's negligent torts if an invitee is injured as a result of them.

Here, Peter was not an employee of yours. You are not in the business of driveway repair, and you merely hired Peter to fix your driveway one time. You asked him to complete the task, and left the choice of what materials to use and the process of going about making repairs to his discretion. Peter is your independent contractor. However, Peter came onto your property, and your invitee, Kim, was personally injured as a result of Peter's driveway repairs. It seems apparent that Peter made these repairs negligently and has thus committed a tort. Peter owed a duty to foreseeable plaintiffs. Persons who would be standing on the spot of the driveway where he was making repairs might foreseeably be injured by his negligent repairs. By failing to make the repairs so that they were safe for those foreseeable plaintiffs, Peter breached his duty. Kim was harmed when she fell and broke her ankle, and the fall and broken ankle were foreseeable results of Peter's failure to fix the driveway better. Finally, but for Peter's failure to repair correctly, Kim would not have been hurt.
Kim will be able to claim that you are vicariously liable for Peter's negligent repairs.

Your Defenses to Kim's Claims

You have two possible defenses to Kim's claims. In the first, you may claim comparative negligence against Kim. Comparative negligence exists when the plaintiff, herself, was negligent in her behavior. One form of comparative negligence exists when a plaintiff perceives a dangerous activity or condition, recognizes its danger, and decides anyway to engage in the activity despite her knowledge. This was once known as "secondary assumption of risk."

Here, you attempted to warn invitees about the loose brick in your driveway. Your warning was reasonable, and could have been expected to prevent the bulk of harms to most persons who encountered it. However, Kim does not speak English, and she did not subjectively understand the warning. Unfortunately, an actual, subjective understanding of the risk is necessary for a defense of comparative negligence based on assumption of the risk. Kim thus could not have assumed the risk, and will not likely be found comparatively negligent.

Your defense of comparative negligence will not succeed.

Your second defense to Kim's claim is to implead Peter as a co-defendant and claim against him for indemnity and contribution. These claims are available to tortfeasors when other defendants might share in the fault that caused the plaintiff to suffer her injuries. The operative legal theory is that no individual defendant should be required to pay more than his share when multiple defendants have combined to cause an injury. Indemnification exists when a contract provides for it, but it will also be implied by a court for the benefit of a tortfeasor who has been held vicariously liable for another tortfeasor's negligent actions. Contribution, meanwhile, is a way for jointly liable defendants to avoid paying more than their fair share of the judgment awarded a plaintiff. Generally, each defendant is liable to the plaintiff for 100% of the plaintiff's damages, and the plaintiff may collect it all against any or multiple defendants. The plaintiff may not collect more than 100% of the amount of the judgment. Contribution exists when a defendant has been found less than 100% at fault, and it allows that defendant to seek reimbursement from co-defendants for the portions of payments made to a plaintiff for which he is not liable.

Here, Peter committed a negligent tort, and you will likely be found vicariously liable. This will give you the right to claim indemnification against Peter for the entirety of damages that you pay to the plaintiff. In addition, if for some reason you are not granted an indemnity claim, the jury will likely assign percentages to you and to Peter (and possibly even to Kim) as to who bore each portion of the fault. You will be liable to Kim for 100% of her damages, as will Peter, but if you end up paying for 100% of them, you will be able to claim contribution from Peter in the amount of his share of the fault.

You will be reimbursed by Peter, most likely based on a theory of indemnification, but possibly based on contribution.

Vera's Claims
Vera will claim battery against Barry. The issue is whether Barry battered Vera.

Battery happens when a defendant intentionally makes contact with a plaintiff's person, causing harm or offense to the plaintiff. The only defenses available to it are consent and self-defense. For a defendant to intentionally make contact with a person, the doctrine of transferred intent may apply when the same defendant intended to commit any intentional tort to any person, but in actuality committed a different tort unto a different person. It is not necessary to prove damages in battery.

Here, Barry threw a punch, intending to strike you. Instead, he struck Vera. Thus, he will be found to have intended the contact he made with Vera by virtue of transferred intent. Vera was harmed; she required medical attention and had a laceration. Thus, Barry will be liable to Vera for the battery. There is no arguable case to be made that Vera manifested any consent to being punched by Barry, and Barry was not defending himself from any conduct by anybody.

Barry is liable to Vera for battery.

Your Claims

You may claim assault against Barry. The issue is whether Barry assaulted you.

Assault is an intentional tort, like battery, requiring that the tortfeasor intend his conduct that produced the forbidden result. Assault requires that the tortfeasor cause in the plaintiff a reasonable apprehension of imminent physical contact, harmful or offensive in nature, and that the tortfeasor do so other than by words alone. A reasonable apprehension means an awareness. The doctrine of transferred intent applies. It is not necessary to prove harm in assault.

Here, Barry threw a punch intending to strike you. He failed to strike you, so you may not claim battery against him. However, he intended to cause the conduct, and so the doctrine of transferred intent will apply to generate liability for this different tort of assault against the same person (you). In so doing, he caused you to at least be aware that you might be struck in the imminent future, and that the strike would harm you because it was a punch. Although you were not harmed, you may still claim nominal damages for assault.

You will succeed in your claim versus Barry for assault.

SAMPLE ANSWER 1B:

Memorandum

To: Tony
From: Professor
Re: Potential claims and defenses

Dear Tony:
Kim v. Tony for negligence

It is likely that Kim has a negligence claim against you, Tony. The issue is whether a landowner is negligent for injuries that occur on the property to a business invitee. Negligence is shown through duty, breach, causation, and damages. The default duty owed by a defendant to a plaintiff is that of ordinary care, meaning that which a reasonably prudent person would have in the same or similar circumstances. The duty is owed to all foreseeable plaintiffs. However, the duty may be modified based on who the defendant is. Here, as you Tony are a landowner, have a duty under premises liability to people who enter the property. An invitee is someone who enters the land for the benefit of the landowner, such as a customer to a business. A landowner owes a duty to an invitee to make safe all known artificial dangerous conditions, or those that the landowner should have known about.

Here, Kim is an invitee because she entered the yard sale as a customer in order to possibly to business to purchase the painting. She was not a friend or social guest. Thus as a landowner, you owed her this modified duty.

A breach is shown when the defendant does not satisfy the duty. Had the defendant acted in accord with the duty there would have been no breach. Here Kim was injured and thus she will argue there was a breach. You Tony could argue that by putting up a hand written sign you warned others of the loose brick, but not everyone would be able to read that sign because it was only in English and did not contain something like a picture of a hand showing watch out, so arguably this sign did not uphold the duty. Thus there was arguably a breach.

Causation is shown in two ways. Cause in fact is with a but for test - but for the defendant's breach the plaintiff would not have been injured. Here Tony was the but for cause because but for his breach in not having the brick repaired, Kim would not have been injured. Causation is also shown through proximate cause. This cuts off liability for the defendant if the plaintiff was not a foreseeable person because it is too attenuated in time, location, or scope. Here Tony was the proximate cause because it is reasonable to foresee someone who comes onto his property may be injured by his loose brick. Thus Tony is the cause of Kim's injury.

Finally, damages are shown when the plaintiff has suffered some injury. The defendant takes the plaintiff as she is, meaning that any injury as long as foreseeable is a liability for the defendant. Here Kim can show damages because she was injured when she tripped and she had to go to the hospital and get a cast. Thus Kim can show damages in this suit.

Thus it is likely that Kim can make a negligence claim against you, Tony.

However, you may be able to defend and reduce or eliminate your liability. First you could argue that Kim's contributory negligence should be considered to reduce your overall burden under the judgment. Contributory negligence is permissible in New Jersey, and in federal court, whereby the acts of negligence on the party of the plaintiff that contributed to her injury are counted against her when the damage award is computed. For example, if the jury found that the plaintiff were 30% at fault, then it would reduce an award of $100,000 to $70,000 in accord with this.

Here you, Tony should argue that Kim's inattention to her surroundings contributed to her injury because she was looking at the displayed paintings instead of where she was walking. If the jury agrees with you, it will reduce any award by a percentage that it attributes to Kim's inattention.
You should also argue that you had acted in accord with your duty as a landowner to have the bricks fixed in a timely fashion. First, you can argue that Peter's negligent construction is to blame and not you, and that because you called Peter to fix the bricks, it was his duty to so fix. However, the negligence of another is not commonly a way to eliminate a party's blame, especially if they are under a heightened duty such as under premises liability, so this may not prevail at trial. Also, it was a condition that you knew about before the injury occurred as stated in the facts, so you had a duty to fix it before someone was injured. However you may be able to implead Peter for contribution should you be found liable to Kim.

You could also argue that you fulfilled your duty to warn of dangers by putting up the warning sign. However, again, a landowner has a heightened duty to protect any invitees from artificial, meaning man-made, from such dangerous conditions, as previously discussed, and thus you had a duty to fix this and not just put up a warning sign because it would be foreseeable that someone would get injured walking around and not looking down. Also the sign did not work for Kim because she did not speak English.

Thus it is likely that you may raise some defenses, Kim will still prevail at trial.

Kim v. Peter for negligence

Kim may also raise a negligence claim against Peter the contractor. The issue is whether a contractor owes a duty to someone injured due to their negligence. Negligence is shown by duty, breach, causation, and damages. As stated before, the default duty is that of an reasonably prudent person under the same or similar circumstances. It is owed to all foreseeable plaintiffs. 

Here Kim is a foreseeable plaintiff because she could be injured by Peter's lack of proper paving of the driveway. A reasonably prudent person would have originally paved the driveway so that it did not become cracked. Peter may argue that his duty was complete once he finished the job, but Kim would argue that even if that were so, Peter did subsequently promise to Tony that he would repair the driveway in time for the art show, so Peter owed her a duty regardless. Breach is shown by circumstance that show a breach of the duty or a lack of upholding that duty, as stated before. Here, Peter breached his duty to Kim because Peter's initial and/or subsequent work on the driveway was insufficient because Kim was then injured. Causation is shown through cause in fact through a but for test, as previously stated. Peter was the but for cause of Kim's injuries because but for Peter's lack of proper fixing, Kim would not have slipped on the brick and been injured. Peter is also the proximate cause. Proximate cause cuts off liability to plaintiffs that are not foreseeable. Here it would be reasonably foreseeable that someone may be injured by Peter's lack of proper repair of the bricks. Thus Peter is the cause of Kim's injuries.

Finally Kim can show damages. Damages are shown through injuries caused by the negligence. Here Kim can show that she was injured when she tripped on the brick and that she had to go to the hospital to get a case. Thus Kim can show damages.

Thus it is likely that Kim can show a claim for negligence against Peter.

Kim v. Tony under vicarious liability doctrine
Kim may argue but not prevail to hold you, Tony liable for Peter's negligence under the vicarious liability doctrine. The issue is whether Peter was an independent contractor or not. Vicarious liability imputes, or puts, liability on an employer for their employee's negligence that occur during the course of their employment. An employee is defined through agency law, through factors such as someone who is under the authority or control of another, is paid by another, and is not an independent contractor. An independent contractor is someone who is not an employee and who is solely responsible for their negligence instead of the person who hired them.

Here, Kim would argue that Tony is liable for Peter's negligence under vicarious liability because Peter was Tony's employee. She would argue that because Tony had the authority and control over Peter to pave and then fix the driveway, and that he paid him, Peter was an employee. Tony, you should argue that Peter was your independent contractor, as most home repair or such services are, because you are not in the business of paving driveways, that you only have limited control and authority over Peter, and that your payment was a one time thing. Thus you should argue that Peter was an independent contractor solely liable for his negligence and it cannot be imputed to you.

Thus, Kim likely will not prevail on her vicarious liability argument to hold you Tony liable for Peter's negligence.

Vera v. Barry for battery

Vera will have a claim for battery against Barry. The issue is whether a battery intended against one person but completed on another is a battery against the other person. Battery is an intentional tort shown through the intent to commit serious bodily injury or offensive touching on the person of another, and such contact occurs. Intent is where someone acts with reasonably certain purpose to accomplish an act. The doctrine of transferred intent states that if a person intends to commit tort A against person A but accomplishes it against person B, the intent transfers to person B and the original person (tortfeasor) will be liable to person B.

Here, Barry's punch committed commit serious bodily injury, or at least an offensive touch, when he tried to punch Tony because a punch will cause injury or at least some offensive touch to the person punched. This punch did in fact cause such contact with Vera because she was in fact punched in the head and hurt. The issue of transferred intent applies because Barry had intended to punch Tony but instead hit Vera. Barry's intent transferred to Vera because he had intended to strike Tony and so acted, but accomplish his intended battery against Vera. Thus Barry will be liable to Vera.

Tony v. Barry for assault

Tony, you may have a claim for assault against Barry. The issue is whether Tony was put into reasonable apprehension of being struck. Assault is another intentional tort whereby a person intends to cause a battery or the reasonable apprehension of imminent bodily injury in another. Reasonable apprehension means that the victim thinks he is about to be acted upon by another person. Imminent bodily injury means that
the victim thinks he is about to be struck or attacked in a serious way, not just a casual touch. The victim must be aware of the action, and must actually be worried that it will occur. Finally, actual touching need not be shown. Here, it is clear that Barry intended to act against Tony because he threw a punch. It is also clear that he intended to cause reasonable apprehension that he would commit a battery because the punch was right away, it was not a threat to be used minutes later. There was also imminent bodily injury because a punch can cause serious injury. However the issue remains whether Tony was aware that Barry intended to attack him. Tony can argue that you saw Barry wind up and realized that he was about to hurt you and so you were in reasonable apprehension for several seconds that he would injure you. Barry will argue that he never intended to frighten you but instead wanted to actually injure you. However, this will not prevail because he never did strike you and only caused such reasonable apprehension. Thus you Tony can show a claim for assault against Barry.

Signed, professor

QUESTION 2 - CONSTITUTIONAL LAW
As the chief legal counsel to President Yokaira, you have been asked to prepare a memorandum of law on the constitutionality of various bills recently proposed in the U.S. Congress.
1. Bill 2013-1: U.S. citizens, at home or abroad, who pose an “imminent threat” as potential terrorist operatives will be placed on a “Kill List” and subject to attack via drone strikes if there is no reasonable opportunity for their capture.
2. Bill 2013-2: Offshore, wind mill farms will be constructed along the Eastern U.S. seaboard to promote Yokaira’s “Green Energy” initiatives. The Congressional Budget Office estimates that the real estate values of beach front residences and businesses will significantly diminish because the wind mill farms will obstruct the ocean views.
3. Bill 2013-3: The production, sale, or distribution of yuca, a plant used to make various food products like casaba, will be permanently prohibited in the United States. Yuca also has an alternative use as a primary source for addictive, mind-altering narcotics. Yuca rarely, if ever, enters into interstate commerce because it becomes inedible shortly after harvesting, and thus cannot be readily transported across state lines.
4. Bill 2013-4: Federal funding of state Medicaid programs will cease to any state that does not ban the sale of non-diet sodas and soft drinks in containers that are larger than two liters. The proposed legislation is modeled after a municipal ordinance designed to mitigate the epidemic of obesity and diabetes attributed to the consumption of sugary, high-caloric soft drinks. There are numerous exceptions to the bill, including fruit juices, alcoholic beverages, and other drinks that contain more calories than equivalent sizes of the soft drinks targeted for prohibition.
5. Bill 2013-5: Requiring photo identification for anyone seeking to vote in a presidential or congressional election. According to the legislative history, Senator Dolores indicated the bill’s purpose is to combat voter fraud, particularly in states with sizeable ex-convict and illegal immigrant populations. The potential impact, however, is that certain groups like elderly registered voters will have difficulty obtaining photo identification cards.

PREPARE THE MEMORANDUM
To: President Yokaira  
From: Chief Legal Counsel  
Re: Constitutionality of Recent Bills  

This memorandum will discuss the various issues of law that are implicated by the bills recently proposed by Congress.

1. Bill 2013-1  
This bill implicates procedural due process. Under the 5th Amendment, the federal government cannot deprive persons, especially U.S. citizens, of life, liberty, or property without due process of law. U.S. citizens retain these rights even when abroad. Procedural due process requires that certain procedures, such as notice or hearings, take place before the deprivation. Which procedures are required depends on the seriousness of the interest at stake for the person, the government's interest, and the effectiveness that additional procedures could have. Deprivations of life in particular are always serious, and will usually require a notice and hearing before the deprivation takes place, so that the person may be able to challenge the alleged need of the government to deprive them of life.  
Here, there does not appear to be a sufficient process in determining who will qualify to be put on the kill list. The criteria for imminent threat as potential terrorists is too vague and leaves too much discretion. There appears to be no opportunity to review a person's placement on the list or to challenge it. Since the kill list would result in deprivation of life of U.S. citizens, at home or abroad, the inadequacy of these procedures violate procedural due process rights of these citizens.

2. Bill 2013-2  
This bill might be challenged in several ways, although these challenges are not likely to be successful. First, the bill might be challenged as violating substantive due process. Under the 5th Amendment (and the 14th for the states), the government cannot deprive people of life, liberty, or property without due process of law. The discussion of procedural due process above would also be applicable here if proper procedures are not in place for the relevant residents and business to challenge placement of wind mills nearby, but I will assume that such procedures are in place and will be followed.  
However, substantive due process requires the government to provide adequate justification for deprivations, even when proper procedures are followed. If the deprivation involves a fundamental liberty, the government has the burden to show that the law is narrowly-tailored to serve a compelling government interest (strict scrutiny). If it is not a fundamental liberty, the plaintiff has the burden to show that the law is not rationally related to any legitimate government purpose (rational basis scrutiny). The court can, on its own, look to any conceivably legitimate purpose, even if it was not the government's actual purpose.  
If the challengers of the law challenge it as a deprivation of their "liberty" to have an unobstructed view of the ocean, they will likely lose. Such a liberty is not fundamental, so the plaintiffs would have to show that the law is not rationally related to a legitimate purpose. However, promoting green energy is a legitimate purpose, as it helps to provide energy,
dependence on foreign oil, and reduces greenhouse gas emissions. Actually constructing these windmills is rationally related to serving that purpose, and placing them offshore is likely intended to capture more wind, making them more efficient. Thus the challengers will lose this argument.

The challengers might challenge it as a deprivation of property. In addition to due process rights for property deprivations, if the governmental action is a "taking", then the 5th Amendment (applicable to the states through the 14th) requires the government to provide just compensation. However, in order for there to be a taking, there must be an actual property interest. An interest to be "property", there must be an legitimate, non-unilateral expectation in it. Even if it is considered property, government action is not a "taking" requiring just compensation if the action is regulatory and the property owner still has a viable economic use to the property. That is, substantial loss in value is not relevant -- there must be little value at all left.

If the challengers argue that they have a property interest in the ocean view, they will likely lose. There is no legitimate expectation that adjacent areas to a person's property will not block views. If the adjacent area is land, an owner could buy the adjacent land himself if he wanted to protect his view. While there are restrictions on blocking air flow and sunlight, there is no property right to a "scenic" view. Although the adjacent areas in question for this bill will be the ocean and the property owners will not be able to buy the land themselves, they will still receive adequate air and light, and thus have no property deprivation.

Regardless, the loss of value to their property would not constitute a taking anyway. Residences can still be used as residences and businesses will still operate as normal. Though there is significant loss in real estate values, this is not enough unless there was little value left. But these properties will probably still be more valuable than properties further inland. Thus, there is no taking here. Finally, if the challengers attack the bill as outside of federal power, they will fail. The federal government has authority over off shore areas, as well as authority to regulate interstate commerce, spend for the general welfare, and exercise eminent domain. The federal government can enact laws necessary and propert to carry out those powers. Where they conflict with state law, the Supremacy Clause holds that the federal law prevails.

Though the details of who will construct the windmills and whether the states will cooperate are not clear, there is sufficient constitutional authority regardless.

3. Bill 2013-3
This bill will be upheld under the Commerce Clause based on the precedent set in Gonzales v. Reich. The federal government has broad authority to regulate interstate commerce. The federal government can regulate anything that passes in interstate commerce, the instrumentalities of interstate commerce, or even non-economic intrastate activity if its effect, in the aggregate, would have a substantial effect on interstate commerce. In Reich, the Supreme Court upheld the federal government's ban on marijuana, even when California had legalized medicinal marijuana and had procedures in place to ensure that it never left the state. The reasoning was that the federal government's power to regulate included the power to prohibit, and a state allowing even fully intrastate use of marijuana would substantially undermine the federal governments interstate regulatory system of prohibiting marijuana.

Thus, this bill, which prohibits yuca, can be prohibited by the federal government. There is no fundamental right to it, and the government's prohibition in rationally-related to the purpose of protecting people from addictive, mind-altering narcotics. The federal government can prohibit
its transportation and sale in interstate commerce, and thus, can also regulate its intrastate use, because use of it within any single state could substantially undermine the interstate regulatory scheme.

4. Bill 2013-4
This apparent source of federal power for this bill is the Tax and Spend Clause (also known as the General Welfare clause). The federal government can tax and spend for the general welfare. In the past, the federal government had broad authority to make state grants conditioned on the state passing laws that the federal government could not otherwise enact itself. The threat of withholding these funds was considered a legitimate exercise of federal power. Recently, however, the Supreme Court has limited substantial withholding of previously granted funding is the state has grown dependent on it and the reason for the new conditions for the funding were not reasonably expected at the time the initial funding was accepted.

Here, Medicaid makes up a substantial portion of state budgets. At the time states agreed to accept the funding, it was likely not foreseeable that the funding would later become conditioned on the state banning non-diet soft drinks or limiting container size. Total ceasing of Medicaid funding based on failure to comply will likely be found to be an unconstitutional coercion of state power.

Furthermore, the law might be attacked for not being rationally-related to a legitimate purpose. Though there is a legitimate purpose in protecting health, the law still allows fruit juices and other drinks that have more calories than sodas. However, a "rationally-related" is valid even if attacks one harm while not attacking another, so this argument is not as strong as the previous.

5. Bill 2013-5

The federal government has the power to regulate the time, place, and manner of Congressional elections (and time and manner for Senatorial elections). Elections for presidential electors is under more state control. Regardless, the right to vote is a fundamental liberty, subject to strict scrutiny. However, the Supreme Court has held that ex-convicts and non-citizens can be restricted from voting. The government may have a compelling interest in ensuring that these groups do not vote, in order to protect the integrity of elections. However, this law might not be narrowly-tailored to that interest. It might have to be shown that voter-fraud is a serious and recurrent enough issue to warrant requiring everyone to vote, especially given the unintended consequences of many potentially legal voters being unable to get an ID in time.

If the bill provides for free and efficient ID obtainment, and ensures that practically everyone valid voter can get an ID in time before the first election where this bill's requirements will have an effect, then it should be upheld.

SAMPLE ANSWER 2B:

Memo

To: President Yokaira
From: Chief Legal Counsel
Date: August 1, 2013  
Re: Proposed Congressional Bills

(1) Bill 2013-1 (authorizing the placement of citizens on a "Kill List")

The US Constitution guarantees every citizen life, liberty, and property. Per substantive due process, the US government must have a valid reason in order to take any of these rights away from a citizen. Under procedural due process, the US government must follow certain procedures of notification and a hearing before taking any of these rights away from a citizen. While the denial of certain rights requires a subsequent hearing, some rights require both notice and a hearing before the right is affected. Two types of laws have been deemed unconstitutional as per se violative of the due process clause: ex post facto laws and bills of attainder. Ex post facto laws deem acts already performed in the past as criminal, and imposes a retroactive punishment. Bills of attainder are laws which name a certain citizen or group of citizens as criminals, without notice or trial. Both have been prohibited and Congress is not allowed to pass any such laws.

This bill, which authorizes the placement of potential terrorist operatives on a "Kill List" and also authorizes drone strikes on them constitutes a Bill of Attainder. The Bill only requires that the people on the "Kill List" be "potential" terrorist operatives- it does not require a citizen to be an actual terrorist in order to be placed on the Kill List. Thus, the law names a whole number of citizens as criminals without providing them their due process rights of a fair trial and hearing. It illegally authorizes the killing of such citizens without affording them a right to be tried and heard.

This Bill will not pass, as it is unconstitutional.

(2) Bill 2013-2 (authorizing the construction of wind mill farms along the east coast)

Eminent Domain is the taking of private property by the government. A taking can be an express physical taking, or it can be an implied taking wherein an action by the government diminishes one's property value to such an extent that it constitutes a taking. Eminent domain allows the government to take private property for a public purpose. However, in order to be constitutional, the government must provide "just compensation" based on the fair market value of the land that it is taking.

This bill authorizes the construction of windmill farms along the US east coast in order to promote "Green Energy" Initiatives. Though this is a viable public purpose, this construction will severely diminish real estate values in the area by obstructing views of the ocean. Therefore, this is a clear taking. Before the government can take private property by eminent domain for a public purpose, it must provide just compensation to the landowner, based on the fair market value of the property. Thus, this initiative is going to cost much more than expected, once the government reimburses property owners along the shore.

This Bill is constitutional as written, but the simple addition of one provision will render it constitutional.
(3) Bill 2013-3 (prohibiting the production or sale of Yuca)

Congress has three big powers: commerce, spending, and taxation. The Commerce Clause gives Congress the power to regulate interstate commerce, including the channels and instrumentalities of interstate commerce. In certain instances, the Commerce Clause also grants Congress the power to regulate intrastate commerce, where the activity, in the aggregate, has a substantial effect on interstate commerce.

Because yuca is rarely, if ever, transported across state lines, its production is unlikely to have a substantial effect on interstate commerce in the aggregate. However, if Congress can prove that the product does indeed cross state lines, then it will be deemed to be an instrumentality of interstate commerce, and will be subject to regulation by Congress.

This Bill may pass as constitutional, depending on if Congress can prove that yuca is indeed transported in interstate commerce.

(4) Bill 2013-4 (prohibition of funding to state Medicaid programs where state fails to ban sale of non-diet soft drinks larger than 2 liters)

As mentioned above, Spending is one of Congress's main powers. In exercising this power, Congress may spend for the general welfare. Though Congress is not allowed to compel state enforcement of federal programs, it may encourage compliance with federal programs and initiatives through its spending power, by conditioning federal funding upon such compliance. Any such initiative, so long as it does not affect a fundamental right or discriminate based on race, religion, legitimacy, alienage, or gender will be judged by the rational basis test. Rational basis requires that a law be rationally related to a legitimate government interest. The burden of proof is on the challenger of any such initiative, and is very easy for the government to satisfy.

Here, the prohibition of federal funding to state Medicaid programs is indeed for the general welfare. It is an initiative by Congress designed to mitigate the levels of obesity and diabetes among the American population by curbing the sale of beverages that are high in sugar and calories. This is clearly a legitimate governmental interest, as it rests on the health and welfare of the general population. Moreover, the Bill is rationally related to the interest, because it cuts back on the sale of drinks that are high in calories and in sugar, which contribute to the high levels of obesity and diabetes in this country. The fact that there are numerous exeptions to the bill is irrelevant. The bill does not have to be the best means of attaining the goal, narrowly tailored to attain the goal, substantially related to the goal, or necessary to attain the goal. Any challenger will have a difficult time opposing this Bill.

This Bill is constitutional.

(5) Bill 2013-5 (requiring photo identification for voters in presidential or congressional elections)
Voting is a fundamental right and an individual liberty in the US. The infringement of any fundamental right is subject to strict scrutiny. Strict scrutiny requires that a law be necessary to achieve a compelling government interest. Thus, the means of serving the interest must be "narrowly tailored" to achieve that purpose. Strict scrutiny is a difficult test to pass, and places the burden of proof on the government. While states have the right to control and oversee state elections, Congress has that right with respect to national elections in presidential and congressional races.

This Bill affects the fundamental right to vote, and is thus subject to a strict scrutiny analysis. It targets presidential and congressional elections, and thus is within the purview of congressional oversight and regulation. However, in order to pass this Bill, Congress will have to show that it is necessary and narrowly tailored to serve a compelling interest. Though voter fraud is a compelling interest, the government will have a difficult time asserting that it is necessary, as it is not narrowly tailored enough to serve that interest. Any potential impact beyond the purpose of the Bill will prevent the government from meeting its burden of proof on necessity. Because this bill may have an adverse impact on the exclusion of certain groups like elderly voters, who are not meant to be affected by the law, it is not narrowly tailored and will thus not pass constitutional muster.

This bill is unconstitutional, as it does not meet strict scrutiny.

QUESTION 3 - EVIDENCE
Oscar was leaving a therapy session with his psychiatrist, Dr. Drew, when he tripped over exposed computer wiring that ran across the floor of the office and injured his ankle. Oscar delayed seeking medical treatment and continued to walk around on his injured leg. When the pain became severe, Oscar went to the hospital and the surgeon implanted surgical hardware to help repair an ankle fracture. Thereafter, the hardware in his ankle became severely infected and Oscar underwent a below the knee amputation of his leg.

Oscar filed a civil suit against Dr. Drew in New Jersey Superior Court. At a pre-trial conference with the judge, the parties outlined the evidence they will seek to introduce at trial.

Oscar seeks to introduce the following evidence:
1. Testimony of Oscar that Dr. Drew visited him in the hospital after his surgery and stated that he was sorry about the accident and would pay all of Oscar’s medical bills.
2. Testimony of Oscar that after the accident, Dr. Drew told him that two of Dr. Drew’s employees also tripped over computer wires that ran across the office floor.
3. Testimony of Oscar that shortly after he tripped and injured himself, Dr. Drew re-routed the computer wiring through the ceiling rather than over the floor.

Dr. Drew seeks to introduce the following evidence:
4. Testimony of Dr. Drew that he was treating Oscar for substance abuse issues and that Oscar had relapsed shortly before the accident. In fact, on the date of the accident, Dr. Drew’s therapy notes include his observations and conclusions that Oscar was intoxicated on opiate drugs on the date of the accident. Dr. Drew seeks to testify and introduce his therapy notes from the date of the accident.
5. Testimony of Dr. Drew that he thinks Oscar aggravated his injury by not seeking medical treatment promptly after the accident.
6. Court records documenting that eight years ago, Oscar was convicted of a felony, insurance fraud.

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

PREPARE THE MEMORANDUM

SAMPLE ANSWER 3A
To: Judge
From: Law Clerk
Re: Oscar v. Dr. Drew, evidentiary issues

For each issue involving the admissibility of evidence in the case of Oscar v. Dr. Drew, we must take into account the issue of relevance. In order for evidence to be admissible, it must be relevant. Evidence is relevant if it has a tendency to prove or disprove a material fact. All relevant evidence is admissible unless an exception applies. Additionally the trial court judge has broad discretion to disallow relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, misleading the jury, it is unnecessarily cumulative or a waste of time.

1. Oscar should be allowed to testify that Dr. Drew stated that "he was sorry about the accident;" however, Oscar should not be allowed to testify that Dr. Drew offered to pay his medical bills. The issue is whether an admission by a party opponent is admissible against the party opponent. Hearsay is an out of court statement offered for the truth of the matter asserted. Hearsay is inadmissible unless it falls under an exception or exclusion to the rule. One such exclusion involves party admissions, otherwise known as, statement of party opponent. Statements of party opponents are non-hearsay and are admissible. They involve a statement of fault or admission of a material fact in the case. In the case at hand, Oscar wishes to testify that Dr. Drew said he "was sorry about the accident." Apologizing for the accident can reasonably be taken as an admission of fault and therefore it should be admissible.

However, the Dr. Drew's statement offering to pay Oscar's medical bills is inadmissible. The issue is whether an offer to pay medical bills is admissible. As a matter of public policy offers to pay medical bills, liability insurance and subsequent remedial measures are generally inadmissible. The rationale is to encourage rather than punish such behavior. Therefore, the offer to pay medical bills is inadmissible against Dr. Drew.

2. Oscar should be allowed to testify that after the accident Dr. Drew told him that two of his employees also tripped over exposed computer wiring that ran across Dr. Drew's floor. The issue is whether the statement the statement is hearsay. Again, hearsay is an out-of-court statement offered for the truth of the matter asserted. A statement that may look like hearsay may otherwise be admissible non-hearsay to prove something other than the truth of the matter asserted in the statement. For example, a statement may be admissible to show that the defendant had notice of a condition. Here, Dr. Drew's statement is offered to show that Dr. Drew had notice of the dangerous condition, rather then to show that Dr. Drew's employees did in fact trip over the wires. Therefore this is admissible non-hearsay. Oscar should be allowed to testify.
3. Oscar should not be able to testify that shortly after he tripped and injured himself that Dr. Drew rerouted the wiring through the ceiling rather than over the floor. The issue is whether subsequent remedial measures are admissible against a party. As previously mentioned, subsequent remedial measures are generally inadmissible as a matter of public policy to show fault. Subsequent remedial measures may be admissible for a different purpose, however, such as to show ownership or control of the item or property or to show the feasibility of safer alternatives. In the case at hand, the fact that the wires were under Dr. Drew's control is not under dispute. Additionally, it does not seem that Dr. Drew is arguing that there was no safer alternative way to run the wiring. Therefore, since neither one of the exceptions apply, Oscar should not be able to testify as to Dr. Drew's subsequent remedial measures.

4. Dr. Drew should be able to testify as to Oscar's substance abuse and introduce his therapy session notes unless the court finds its probative value is substantially outweighed by the risk of unfair prejudice. The issue is whether the psychiatrist/patient privilege prohibits a psychiatrist from testifying about his client's confidential communications in a case between the parties and whether any exclusionary rule would apply to bar introduction of notes taken in the course of therapy sessions. The psychiatrist/patient privilege prevents a psychiatrist from testifying as to confidential communications between the psychiatrist and his patient. This is the only doctor/patient privilege that is recognized on a federal level. However, an exception applies when there is litigation between the patient and his psychiatrist or if the patient puts his medical condition at issue. Here, the case clearly falls into the first exception. Oscar is suing Dr. Drew for injuries sustained at Dr. Drew's office. The issue as to Oscar's substance abuse history and a relapse is relevant because it tends to show that Oscar fell because he was intoxicated, rather than because of any fault of Dr. Drew. However, the court may decide that any probative value of such testimony is substantially outweighed by the risk of unfair prejudice or perhaps even misleading the jury and therefore not allow the evidence.

As to the therapy notes they are admissible under the business records exception to the hearsay rule. The issue is whether Dr. Drew's therapy notes are admissible under the business records exception to the hearsay rule. A writing can be hearsay if offered for the truth of the matter asserted in the writing. The business records exception to the hearsay rule allows the admission of business records created within the regular course of business. If Dr. Drew establishes that the therapy notes were created within his regular course of business, and this not created in anticipation of trial, then they should be admitted as evidence to show that Oscar was intoxicated on the date he was injured. Again, the court would still have to decide whether the probative value of such evidence outweighs any risk of unfair prejudice.

5. Dr. Drew should not be allowed to testify that in his opinion Oscar aggravated his injury by not seeking medical treatment promptly after the accident. The issue is whether this is appropriate opinion evidence. A witness must be competent to testify. Competency requires that the witness testify based on his or her own personal knowledge and testify under oath. A lay person is generally competent to testify as to her personal opinion on facts that she personally knows; for example whether or not someone seemed sober, how fast a car was going, etc if such testimony would be helpful to the trier of fact. On the other hand, an expert witness must have proper qualification to testify, in other words proper education or expertise that would qualify the person to testify on a particular issue, and a proper basis for his or her testimony based on
scientific or technical methods. Here, it is unclear whether Dr. Drew would seek to testify as a lay person or an expert. Although Dr. Drew is a psychiatrist, it is unclear that this qualifies him as an expert or at least someone knowledgeable on ankle fractures. Moreover, his testimony if offered as a lay witness would is unlikely to be helpful to the jury in deciding any fact. In fact, it is probable that the testimony would be misleading to the jury. Therefore the court is within its discretion to disallow such testimony.

6. Dr. Drew should be allowed to introduce evidence of Oscar's conviction for insurance fraud. The issue is whether a party's prior conviction for a felony involving dishonesty is admissible. Any witness can be impeached. A witness may be impeached through a prior conviction for a felony involving dishonesty that occurred in the last ten years. The judge has no discretion to keep such evidence out. Since Oscar seeks to testify, his testimony is subject to impeachment. Therefore, Dr. Drew can impeach Oscar through his prior conviction for felony insurance fraud. Oscar can then seek to rehabilitate himself after the impeachment through showing good character for honesty or prior consistent statements to rebut any inference that Oscar's testimony is fabricated.

SAMPLE ANSWER 3B
To: Trial Judge

From: Clerk

Date: 8/1/3

Re: Evidentiary issues in Oscar v. Dr. Drew

1. The Court should admit Oscar's testimony that Drew apologized but exclude the evidence about the offer to pay medical bills.

First, the both statements are relevant because they tend to prove material facts at issue. The statement is probative and not substantially outweighed by the danger of any unfair prejudice.

Nevertheless, relevant, probative evidence may be excluded on other grounds. Here, Drew could raise a hearsay claim to prevent his out of court statement from being introduced. At issue is whether a party's own statements, when offered in evidence by the party opponent, are hearsay. Hearsay is defined as an out of court statement offered in evidence to prove the truth of the matter asserted. While this statement would on its face appear to be hearsay, evidentiary rules provide that a party's own statement is NOT hearsay, when offered into evidence by the opposing party (note: in some jurisdictions such statements would be an exception, not an exclusion to the hearsay rule). Thus, because the statement was made by Drew and is offered by Oscar, the opposing party, it is not hearsay.

However, the Court should exclude Drew's offer to pay medical expenses. At issue is whether this probative evidence should be excluded for special policy reasons. For policy reasons, ie to
encourage generous offers to pay medical expenses, such offers cannot be used as evidence at trial. Thus, Drew's offer to pay Oscar's medical expenses should be excluded. However, the earlier apology can be admitted because statements of fact or otherwise unrelated to the offer to pay medical expenses are admissible. Accordingly, the Court should allow Oscar to testify that Drew said he was sorry but not allow him to testify that Drew offered to pay his hospital bills.

2. The Court should admit Oscar's testimony that Drew told him about two employees tripping over the computer wires.

This testimony is relevant because it would tend to show that the condition was dangerous, as well as tend to prove that Drew was on notice of the dangerous condition, two material issues at this trial. The testimony is quite probative and is not outweighed by any unfair prejudice such as undue delay or inflaming the jury's passions.

Drew could not successfully raise a hearsay objection to this evidence because, as set forth above, the statements of a party are not hearsay when offered by the opposing party.

Drew may also object on the grounds that this testimony is really a back door into inappropriate character evidence by showing other acts of misconduct. At issue is whether previous injuries arising from a dangerous condition can be admitted at trial. Generally, prior incidents involving the same condition can be offered in evidence to show that the condition was in fact dangerous and whether the condition was known or knowable to the defendant. Here, Oscar can successfully argue that the fact that the employees tripped over the very same wires show both that the condition in the office was dangerous and that Drew was on notice of the condition. Thus, the testimony should be admitted.

3. The Court should exclude the testimony that Drew re-routed the computer wiring.

The testimony is relevant because it would tend to show that the previous layout of the wiring was dangerous since Drew fixed it. There is no unfair prejudice.

The Court should exclude this evidence because subsequent remedial measures are not admissible to prove fault in a negligence claim. At issue is whether Drew's remedial measures should be admitted. Though apparently relevant and probative, for policy reasons, namely to encourage defendants to fix dangerous conditions to avoid further harm, subsequent remedial measures are not admissible in order to prove fault. Thus, the Court should not allow the evidence.

Oscar may argue that the remedial measures are nonetheless admissible to show the feasibility of a different layout of the office that would not be so dangerous. While subsequent remedial measures can be admitted to show feasibility, this would not be proper unless and until Drew raises any feasibility or practicality defense. Unless Drew raises this defense, Oscar should not be permitted to introduce this evidence.

4. Drew should be permitted to introduce his observations and conclusions and the therapy notes containing his thoughts and conclusions on the date of the accident. He should not be permitted
to testify about any statements Oscar made about substance abuse issue because of the psychiatrist-patient privilege.

Drew's testimony is relevant because it would tend to show that Oscar's substance abuse was the cause or at least partial cause of the accident. It is highly probative. While there is a danger of unfair prejudice because a jury could be inflamed by knowing Oscar is a drug user, this prejudice does not substantially outweigh the probative value, and the Court could cure any prejudice with appropriate limiting instructions.

Any statements by Oscar about substance abuse would be non-hearsay statements of a party, but nonetheless inadmissible due to the psychiatrist-patient privilege. At issue is whether Drew may testify about the substance abuse issues where the testimony involves Oscar's statements. Under the psychiatrist-patient privilege, statements of the patient made under confidence and for the purpose of psychiatric treatment, are inadmissible. Drew may argue that there is a waiver where the patient has brought suit against the psychiatrist, but this argument would lack merit. Oscar would only waive the privilege by suing Drew for professional malpractice where the psychiatric care is at issue. Here, Oscar and Drew's status as patient/psychiatrist are not relevant to the dispute. Thus, testimony about Oscar's statements or based upon these statements would be privileged and not admissible.

Drew's testimony about his observations and conclusions would not be privileged because they are not statements. What Drew observed and concluded about Oscar's intoxication would be admissible. The observations of intoxication would be direct evidence and even a layperson can give opinion testimony about whether a person is intoxicated because (1) such observations would likely be based on the witnesses' perception and (2) helpful to the jury. Thus, Drew should be permitted to testify about what he saw and concluded about Oscar's intoxication.

Finally, Drew should be permitted to admit his therapy notes (provided they are redacted to keep out any privileged statements). Oscar could raise a hearsay objection to these notes, but the objections should be overruled. At issue is whether Drew's treatment notes satisfy a hearsay exception for business records. While the statements of Drew in the notes are hearsay, they can be admitted under the business records exception to the hearsay rule. To establish a writing as a business record, the proponent of the evidence must show (1) the records are kept and maintained in the ordinary course of business, (2) they were made by a person with knowledge (or are supported by a hearsay exception), (3) the records reflect observations made by a person with a duty to accurately report to the business. Here, Drew will likely satisfy each of these elements. A psychiatrist would keep and maintain notes in the ordinary course of business, they were made by Drew, who had firsthand knowledge of what he wrote, and Drew needs to accurately keep notes and records as part of his practice. Thus Drew can likely establish that his notes are admissible as business records.

5. Drew's testimony that he thinks Oscar aggravated his injury by failing to seek prompt medical attention should not be admitted. At issue is whether this opinion testimony should be admitted. As set forth above, a layperson can give opinion testimony but in this case, lay opinion would not be appropriate, because specialized medical knowledge is required to give this opinion. Thus a lay opinion such as this would not be based on Drew's perception or helpful to the jury. Drew
may attempt to admit his opinion as expert testimony. Expert testimony can be admitted where (1) the witness has relevant, specialized scientific, medical, technical or other superior knowledge, (2) the opinion is based on reliable methods, (3) the opinion is based on admissible evidence, trial testimony or other evidence that an expert in the field would rely on and (4) the testimony would be helpful to the jury. Here, Drew has failed to show what his methods were or what the basis of his testimony would be so elements 2 and 3 must fail. Further, while Drew may be a doctor, he has not, and likely cannot, establish that he has specialized training or experience that could qualify him as an expert on ankle injuries. Thus, the first element fails as well. Finally, this testimony would simply not be helpful to a jury. Thus, Drew's opinion or testimony about what he thinks should not be permitted either as lay or expert testimony.

6. Absent further evidence the Court should not admit Oscar's insurance fraud conviction. The conviction is relevant to show Oscar's bad character but character evidence is generally admissible in a civil case. Further, the conviction is highly prejudicial, such that any minimal probative value is outweighed by unfair prejudice.

Drew will likely argue that prior bad acts may be admissible for nonpropensity purposes such as proving motive, intent or a scheme. Here, Drew will argue that this prior conviction is admissible to show that Oscar had a scheme to defraud through false claims. At issue is whether Drew can admit this evidence where the facts do not show its relevance. Drew has not submitted any facts which show the similarity between the claim in the old case and his claim in this case such that a reasonable factfinder could determine whether there was a common scheme of false claims. Further, the fact that there is only one conviction makes it less likely that there even was a scheme. Thus, Drew cannot introduce this evidence as tending to show Oscar's intent or scheme to make fake claims.

It should be noted that if and when Oscar testifies, the conviction must be admitted because it is less than ten years old and inherently involves dishonesty. Thus, Drew may introduce this evidence for impeachment purposes only should Oscar testify.

QUESTION 4 - CIVIL PROCEDURE
On October 1, 2011 plaintiffs, John, Suzette, and Elizabeth, filed a complaint against Foley Cruises, Inc. (“Foley”) in the Superior Court of New Jersey on behalf of all paying passengers who consumed water and/or food unfit for human consumption (“Class Members”) on Foley’s cruise ship, FunTime, during three consecutive voyages, which departed from the Port of Elizabeth, New Jersey on June 1, 2011 (“Voyage 1”), June 15, 2011 (“Voyage 2”), and July 1, 2011 (“Voyage 3”). The complaint alleged Foley and its agents acted negligently in serving adulterated water and/or food to Class Members on FunTime causing them to become ill, and further breached the implied warranty of fitness that FunTime’s food and/or water was fit for human consumption.
Foley, incorporated in California, has its principal place of business in New Jersey. John and Suzette are residents of New Jersey and were paying passengers on Voyages 1 and 2, respectively. Both suffered from vomiting after eating food and drinking tap water on FunTime. Elizabeth, a Florida resident, was a non-paying passenger on Voyage 3 as she won her cruise as part of a contest. Plaintiffs sought an aggregate of $5,500,000.00 in damages against Foley,
exclusive of interest and costs, on behalf of 750 Class Members. The three named plaintiffs each sought $7,350.00 in damages. Fewer than one third of the Class Members are New Jersey residents. On October 15, 2012, Foley filed a notice of removal of the action to the federal district court of New Jersey based on diversity of citizenship. Thereafter, plaintiffs filed a motion to remand the action to state court.

While their motion is pending, and in support of their complaint and request for class certification, plaintiffs introduce the results of a Center for Disease Control (“CDC”) investigation of Voyages 1, 2, and 3. According to the CDC, passengers’ symptoms, which on all three Voyages included vomiting, diarrhea, and headaches, were probably caused by a single continuous outbreak of the small round structured virus (“SRSV”) rather than three separate outbreaks because: (1) the CDC’s testing of ill passengers on Voyages 1 and 2 confirmed at least 50% suffered from the identical strain of SRSV; (2) the SRSV was most likely caused by FunTime’s drinking water due to a breach of the integrity of the potable water system; (3) no changes to the potable water system were made by Foley until after the completion of Voyage 3; and (4) although the CDC did not test the ill passengers on Voyage 3, the most likely cause of their illness was the drinking water on FunTime and SRSV.

In opposition to plaintiffs’ request for class certification, Foley submitted evidence that FunTime made several stops at various Caribbean islands where the majority of Class Members disembarked, ate, and drank tap water while on the islands. Foley also submitted the certification of an expert, Dr. Smith, stating, “Though diarrhea, nausea, and vomiting can be caused by the SRSV, the exact same symptoms can be brought on by common seasickness as well as Salmonella and parasites, which can be found on the Caribbean islands where the passengers from all three Voyages disembarked.”

You are the law clerk to the federal district court judge who has asked you to prepare a memorandum addressing the following issues.
1. a. Should plaintiffs’ motion for remand be granted? Explain.
   b. If the amount of damages plaintiffs sought in aggregate was reduced to $4,500,000.00, exclusive of costs and interest, how would you answer 1.a.? Explain.
2. Should plaintiffs’ class be certified pursuant to F.R.C.P. 23? Explain.

PREPARE THE MEMORANDUM

SAMPLE ANSWER 4A:
MEMORANDUM

To: Federal District Court Judge
From: Law Clerk
Re: Foley Cruises, Inc. Class Action

1a

The plaintiff's motion for remand should not be granted because the Class Action Fairness Act does not require complete diversity amongst named parties for the case to be brought in federal court.
Under general subject matter principals, unless a case involves a federal question, a lawsuit may only be brought in federal court if there is complete diversity amongst all of the defendants and all of the plaintiffs and the matter in controversy exceeds $75,000. Complete diversity means that all of the plaintiffs and all of the defendants reside in different states. An individual is deemed to reside in the state that it domiciled, which is the state in which it lives and intends to stay in. A corporation resides where it is incorporated and where it maintains its principal place of business. For class actions, for there to be complete diversity amongst the parties, the named plaintiffs and named defendants must have complete diversity.

However, under the Class Action Fairness Act (CAFA), Congress has carved out an exception to the complete diversity requirement for class actions for damages that total at least $5,000,000. Under CAFA, for there to be complete diversity amongst the parties, only one of the plaintiffs must be diverse from one of the defendants, if the sum total of all of the class participants damages is at least $5,000,000.

When plaintiffs originally file a case in state court, the defendant may exercise his right to remove to federal court if the federal court would have subject matter jurisdiction. As stated above, federal courts may only hear cases that involve a federal question or meet the requisite diversity requirements. If the case meets those requirements, then it should remain in federal court. However, if the plaintiff attempts to remand the case to start court, the plaintiff's request shall be granted if the federal court has no basis for subject matter jurisdiction, otherwise the case should remain in federal court.

Here, the plaintiffs are seeking an aggregate of $5,500,000 in their class action suit, which means the case falls under CAFA. Two of the named plaintiffs are from New Jersey, but one of them, Elizabeth, is a Florida resident. Foley is incorporated in California and has its principal place of business in New Jersey. Therefore, there is minimal diversity amongst the parties which should allow the case to be heard in federal court under CAFA. Therefore, the plaintiff's motion to remand to state court should be denied as the federal court has proper subject matter jurisdiction over the case.

1b.

If the plaintiffs only sought an aggregate of $4,500,000.00 exclusive of costs and interest, then CAFA will not apply to the case and the motion to remand should be granted.

When a case does not fall under CAFA, it must abide by the general principles of subject matter jurisdiction which requires complete diversity amongst the parties. To determine diversity in class actions, the court must look only to the named plaintiffs in the action. Here, there are two from New Jersey and one from Florida. Because Foley's principal place of business is in New Jersey and two of the named plaintiffs reside in New Jersey, there is not complete diversity.

Additionally, the amount in controversy requirement for diversity jurisdiction would not be met. In a class action case, for the amount in controversy requirement to be met, there must be at
least one named plaintiff whose claims total $75,000. Here, each named plaintiff is only seeking
$7,350.00 in damages.

Thus, because neither the diversity nor the amount in controversy requirements are met if the
sum of the claims is less than $5,000,000, the motion to remand should be granted because the
cause would not have proper subject matter jurisdiction to be heard in federal court.

2.

The plaintiff’s request for class certification should be granted because it meets the requirements
under F.R.C.P. 23.

To certify a class action under F.R.C.P. 23, a plaintiff class must meet four general requirements
- (1) Numerosity; (2) Commonality; (3) Typicality and (4) Adequate Representation by the
named class members. Additionally, when the class action involves damages, the class must be
able to show that common issues of law or fact predominate and that a class action is the most
efficient way to decide the case. Each element will be discussed in turn below.

There is no set number of class members that must be met to meet the numerosity requirement,
but courts have held that 30 or less may be enough. Here, the numerosity requirement is clearly
met because the proposed class contains 750 members.

The commonality requirement is met if all of the class members claims are common to one
another. Here, all of the class members suffered from vomiting, diarrhea and headaches which
they claim were symptoms of the same SRSV virus. All of the class members used Foley Cruise
ships, and thus the commonality requirement is met.

Typicality requires that the class representatives claims be typical to those in the class. That is
certainly true here for John and Suzette because they were paying passengers on the voyages and
both suffered from vomiting after eating food. Although Elizabeth was a non-paying customer
because she won her cruise as part of a contest, if her symptoms are similar to those of the other
class members, this should not defeat class certification.

The adequacy of representation element also looks to the class representatives. This is satisfied if
the named class members can adequately represent all of the other class member’s interests.
Again, although Elizabeth won the cruise as a prize, there is no indication that she or her attorney
would be compelled to represent herself individually any different for the injuries sustained.

Because the four basic prongs have been met, the most difficult requirement for the class to meet
will be that common questions of law or fact predominate the case. There are some factors that
weigh against certifying the class in this respect. One is that there were three different voyages
and that all of the class members were not on the same cruise. Another is that it is possible that
some of the passengers suffered from seasickness or Salmonella rather than SRSV, which the
class has asserted caused their symptoms.
However, the questions of law or fact that are common predominate those separate issues. The fact that the class has been able to assert and prove that the most likely cause of the illness was the drinking water should be determinative in this case. The water was the same for all three of the voyages and the defect in the water system was not corrected for all three voyages.

A class action is the most effective way to settle this litigation because the case will turn on whether or not the drinking water caused the similar injuries. If Foley is able to prove that their drinking water was not contaminated, then they will win the case, and all of the class members that took part in the case will not be able to sue them separately, and will instead have to attempt to sue the other potential restaurants at which they ate while on the cruise. If the class were not certified, then 750 members would have to individually bring suit against Foley which would be inefficient. Use of the class action will allow for combined discovery and pleading and is the most effective way to settle this case.

SAMPLE ANSWER 4B:
To: Federal District Judge
From: Law Clerk
Re: Plaintiff's Motion and Class Certification

1a. The plaintiff's motion for remand should not be granted because of the Class Action Certification Act under federal law that allows for more permissive use of class actions. For a federal court to have subject matter jurisdiction over an action, there must either be diversity of citizenship or federal question jurisdiction. Federal question jurisdiction involves a claim that arises under the Federal Constitution or federal law. Diversity of citizenship has two requirements. First, all plaintiffs must be diverse from all defendants. This is true in class actions as well. The named plaintiffs must be diverse from the defendants. For the purposes of citizenship in determining diversity, the court will look to that person's domicile. An individual is domiciled in the place where he lives and where he intends to remain. For example, a party living in New Jersey who intends to remain in New Jersey is considered a citizen of New Jersey for diversity purposes. For corporations, citizenship is determined by looking at where the company is incorporated and where its principal place of business, or nerve center, is located. This means that corporations can be citizens of multiple states. The second half of diversity jurisdiction requires that the amount in controversy exceed 75,000. Even where the parties are completely diverse, if the amount in controversy requirement is no met, the action cannot be brought in federal court.

This calculus has changed in some regards with the liberalization in federal law of the ability of parties to bring class actions. Under an act that reforms to an extent the rules for when a party can bring a class action in federal court, the court allows parties to bring class actions where at least one plaintiff is diverse from one defendant, there are over 100 class members, and the amount in controversy in the aggregate exceeds five millions dollars. This liberalization allows otherwise non-fully diverse parties to bring class actions in federal court.
Typically a defendant can remove to a federal court in the district where the state court sits if that action could have originally been brought in federal court. Removal is at the defendant's discretion.

In this case, the plaintiff's motion for remand should be denied because the action could have been brought in federal court and the defendant opted to remove to the federal court. Under traditional rules of diversity of citizenship jurisdiction, this case would not have met the requirements for removal from federal court. The named plaintiffs are two citizens of New Jersey and one Florida resident. The corporation in this case, because of the nerve center test is considered a New Jersey resident because that is where it has its principal place of business. Therefore, there is no complete diversity because the named plaintiffs are not completely diverse from the defendant. Moreover, the amount in controversy of each of these plaintiffs does not meet the $75,000 minimum. In this case, each plaintiff is claiming only $7350 in damages, well below the 75,000 minimum. However, as mentioned above, federal law has liberalized the ability to bring class actions by permitted class actions to be brought where any plaintiff is diverse from any defendant, there are at least 100 class members, and the amount in controversy in the aggregate exceeds five million dollars. The plaintiffs' class in this case meets all of these prerequisites. Elizabeth is a citizen of Florida and is thus diverse from Foley which is a citizen of both California and New Jersey. Moreover, fewer than 1/3 of the class members are from New Jersey, and assuming they are also not from California, their diversity could be the basis for satisfying this requirement. Secondly, there are more than 100 class members. The facts indicate that there are 750 class members, well in excess of the number needed. Lastly, the amount in controversy in the aggregate in 5,500,000-- 500,000 over what is required by the statute. Since the class meets all of these requirements, the action could have properly been brought in federal court and thus the plaintiffs' motion for remand to state court should be denied.

b. If the claim in the aggregate was only for 4,500,000, the plaintiffs' for remand to state court should be granted. As already stated, the case above was able to be brought in federal court because of the liberalization of federal law in bringing class actions. The expanded rule allows for classes to be brought where all three requirements are met: one plaintiff is diverse from one defendant, the class has over 100 members, and the amount in controversy in the aggregate exceeds five million dollars. If the amount in controversy were less than five million, the class wouldn't be entitled to this more permissive way into federal court. Since this avenue would not be open to them, the diversity of citizenship jurisdiction would need to be analyzed under the traditional rules. Therefore, there would be no diversity because two of the named plaintiffs are not diverse from the defendant. Since the action could not have been brought in federal court under these circumstances, the plaintiffs' motion for remand to state court should be granted.

2. The class should be certified under FRCP 23 because it meets all the prerequisites of the rule. Under FRCP 23, to be certified as a class, the plaintiffs must show four requirements: numerosity, commonality, typicality, and that the class representative will adequately represent the interests of the class. Numerosity requires a showing that the plaintiff class is so numerous that joinder would be impracticible. There is no set number for how many plaintiffs would meet this requirement, but surprisingly small numbers have satisfied the numerosity requirement. The second requirement is commonality. The plaintiffs must show that there are common questions of law or fact the resolution of which will provide answers or relief for the entire class. The third
requirement is typicality. The plaintiffs must show that the class representative's and the other plaintiffs' claims are typical of the entire class. Lastly, the class representative must be able to adequately represent the interests of the class. Also, to certify a class, the class must fit in one of three categories. To fit into the third category, the class would need to show that class certification is the superior method of adjudication of the claim.

The class here seems to meet the requirements under FRCP 23. The class here meets the numerosity requirement. In this instance there are 750 class members. This is far in excess of smaller class certifications that have been approved. There is also a common question of all the parties the resolution of which would provide answers to all. Based on evidence from the CDC, all of the plaintiffs suffered from an identical strain of SRSV that was most likely caused by a breach of the integrity of the water system on Funtime. Moreover, Foley didn't make any changes between the voyages to the drinking system. Therefore, despite that the passengers were on separate journeys and the fact that the Voyage 3 passengers were not tested by the CDC shouldn't bar class certification. Additionally, Foley's allegation through its expert that SSRV could be brought on by other causes through like seasickness or salmonella, or even could have come from a source other than Foley, does not seem really to affect the argument that the class has common issues. Without actual proof of the assertion, the class should be certified. They all have the common questions of the cause of the illness and the breach of the implied warranty of fitness for the food and the water. The named plaintiffs also have typical complaints to that of the rest of the class members. They all suffered vomiting and nausea. Though the court would need to make a determination about adequacy of representation by the class representative, this could likely be found. Lastly, the class certification seems to be the superior method of adjudication to avoid multiplicity of suits and inconsistent results in suits against Foley.

QUESTION 5 - CRIMINAL LAW

Dan, a resident in a rooming house owned and operated by Lucy, suffered from post-traumatic stress disorder and anxiety as a result of his war experiences. One evening Lucy knocked on Dan’s door demanding that he pay his overdue rent. When Lucy threatened to call the police, Dan threw open the door and shoved her against the wall in the hallway, where she hit her head. Tom, another rooming house resident who had been drinking most of the day, was in the hallway and saw what happened. Tom immediately dialed 911 on his cell phone and ran back to his room to get his large hunting knife. Tom retrieved his knife and ran down the hallway towards Dan shouting: “I will kill you if you harm Lucy.” Tom’s shouting was recorded by the 911 operator. As Tom neared, Dan pushed Lucy who fell into the knife held by Tom. Lucy died instantly. Dan took the knife and then ran to Lucy’s room. He entered her unlocked room, took cash and jewelry from her nightstand, and then fled from the house.

Once outside, Dan ran into the street in front of a car driven by Paul. Paul stopped his car to avoid hitting Dan. When Paul got out of his car, Dan pointed the knife at Paul and ordered him to hand over his keys and wallet. Paul yelled: “Please don’t take my car. My two-year-old son is in the backseat.” Dan pushed Paul aside and drove off in the car. The car was later recovered, and the toddler was unharmed. However, the police found a bag of marijuana hidden inside the car. Later that day, the police found Dan wandering in a park. When they approached Dan, he stated: “The voices told me to do it.” Dan was arrested by the police.

You are the assistant prosecutor assigned to review this matter. You have been directed by the
The county prosecutor is tasked with preparing a memorandum outlining all potential crimes that may be charged against Dan, Tom, and Paul, along with all possible defenses and motions that may be asserted, and the likelihood of success at trial.

**PREPARE THE MEMORANDUM**

**SAMPLE ANSWER 5A:**

To: County Prosecutor  
From: Assistant Prosecutor  
Re: Charges against Dan, Tom and Paul

First is to address the potential crimes that Dan may be charged with:

1. Dan can be charged with second degree murder. Second degree murder is all intentional murders that do not fall within first degree murder. Here, Dan's acts of pushing Lucy into the knife illustrate the intent to murder. As seen from common law, one can intend to murder a person if they intend to seriously injure the person to the point that should cause death. Here, the act of pushing a victim into a knife held by a third party evidences that intent.

2. Dan in the alternative can be charged with involuntary manslaughter which is reckless murder. Reckless as defined under common law is when a person should have been aware of certain substantial and unjustifiable risks and did not act accordingly and therefore caused the death of a person. Here, the act of pushing a person into a knife creates a grave risk of death. Dan should have been aware of such a risk because it was substantial and therefore his act of pushing Lucy into Tom's knife was reckless.

3. Dan also can be charged with criminal negligence homicide. Under criminal negligence homicide the act of the person is so morally blameworthy and morally culpable as well as causing the death of the victim. Once again Dan's act of pushing Lucy into the knife illustrates that. He did not care what happened to her and a reasonable person would not push another into a knife causing that person's death.

4. Dan can also be charged with two counts of Larceny. Larceny is the taking and carrying away of property of another person with the intent to deprive that person of that property. Here Dan entered Lucy's room after she died and took her jewelry and cash from the night stand and fled. The taking and leaving with Lucy's property evidences that he intended to keep the property. Furthermore, depending on how much cash Dan took as well as the value of the property Dan may be charged with a higher degree of Larceny, such as grand larceny. Besides the act of stealing Lucy's cash and jewelry, he may also be charged with larceny of the Paul's car. There Dan intended to deprive paul of the car because he forced paul out of the car and then drove off with the car. Typically theft of a car is given a higher degree because of the value of the car and therefore once again Dan may be charged with grand larceny.

5. Dan can also be charged with Burglary. Burglary is defined as the breaking and entering of the dwelling of another with the intent to commit a crime therein. Here, Dan entered Lucy's room without permission. Although the door was unlocked, the mere opening of a closed door is sufficient to meet the breaking and entering standard. The fact that Dan committed a larceny while inside is enough to show that he intended to commit a crime therein. It should not matter that at the time of the entry, the owner of the dwelling was dead because Dan still entered into the dwelling without permission with the intent to steal cash and jewelry once inside.
6. Dan can also be charged with Robbery as to Paul's car. Robbery is the forcible stealing of property of another with the intent to commit a crime therein. Here Dan used a sufficient amount of force by pointing a knife at Paul and ordering him to hand over his keys and wallet. Then Dan stole Paul's car and drove it away with the intent to deprive Paul of the property. Since Dan used a weapon to exact force upon Paul, he can be charged with a higher degree of Robbery for possession of a dangerous weapon.

7. Dan can also be charged with Kidnapping. Kidnapping is the abduction or false imprisonment of a person and moving them to a different location or concealing them. Here Dan arguably kidnapped Paul's two year old son by leaving him in the back seat of the car that he stole. He forcibly took the child to a different location without the consent of his parent. Dan concealed where the child was by leaving the car. It does not matter that the child was unharmed in order to bring about the kidnapping charge.

8. Dan can also be charged with possession of a weapon. Under most penal codes today, a weapon is considered anything that could cause imminent death or serious physical harm to another. The knife that Dan took from Tom and then used to threaten Paul would be enough to satisfy that definition because it was readily capable of causing death to a person.

9. Dan finally can be charged with the assault against Lucy. Assault is the intentional conduct of causing physical injury to another person. Here Dan's shoving of Lucy against the wall so that she were to hit her head was an intentional act. Furthermore, Lucy suffered physical injury because she hit her head against the wall.

Dan may raise the affirmative defense of insanity. If following the M'Naghten test, Dan must show that due to an illness or mental defect he was unable to understand the nature of his conduct or know that his conduct was wrong. Here Dan suffers from post-traumatic stress disorder and anxiety due to his time in the military. Many experts have noted that post-traumatic stress disorder is a mental illness and does effect how people act. Therefore, Dan will have to show that because of such illness he was unable to either understand the nature of his conduct or to know that what he was doing under each crime was wrong. He statement to the police "the voices told me to do it" may help because it illustrates that he was hearing things and potentially he was unaware of his actions. Dan will be successful most likely on this affirmative defense if the jury believes that he did not understand his conduct was wrong or the nature of his actions.

Dan may also bring a motion to suppress his statement to the police. Under the 5th amendment, a person has right not to be forced into making incriminating statements due to undue coercion or pressure from the police. However, the 5th amendment will only be triggered when the situation illustrates control by the police in sucha manner that would make a reasonable person feel they were in custody and were subject to a police interrogation. Dan's statement "the voices told me to do it" however will not be suppressed. At the time the statement was made Dan was not in custody nor subject to an interrogation that would bring him into Miranda terrority because he was freely walking in the park when approached by the police. Here, the police approached Dan while he was in a public park, and upon seeing the police he spontaneously stated the above statement. Such, spontaneous statements are not covered within Miranda and therefore will not be suppressed at trial because they are not a product of police coercion.

The following are the potential crimes that Tom may be charged with
1. Menacing: Menacing is the intent to place a person in reasonable apprehension but with no intent to cause actual physical injury. Here, Tom threatened Paul with a knife stating "I will kill you if you harm Lucy." Although it is unclear if he intended to actually cause harm to Dan, it is clear that he did intend to make Dan believe he would cause him physical injury which is all that is necessary for a charge of menacing.

2. Tom also may be charged with the involuntary manslaughter of Lucy. As stated above this is a type of reckless murder. Reckless as defined under common law is when a person should have been aware of certain substantial and unjustifiable risks and did not act accordingly and therefore caused the death of a person. Here, the act of holding a knife in a public area could be viewed as a reckless act because a person should know that someone may get harmed from the knife. However, the issue here is that Tom was not the proximate cause of Lucy’s death, rather Dan was. Tom will argue that since he was not the proximate cause of Lucy's death and that Dan was an intervening force he cannot be guilty of Lucy's death.

3. Tom also can be charged with unlawful possession of a dangerous instrument. There are certain instruments that are deemed unlawful within the penal code. Furthermore, if the weapon is used in such a manner that threatens to cause or actually causes physical injury a person may be charged with possession of an unlawful instrument. Here, Tom's large hunting knife is a dangerous instrument. Although if used in a hunting scenario can be viewed as lawful, when used to threaten the life of another the instrument then becomes unlawful and possession of such instrument can be a crime.

Tom may try to raise voluntary intoxication defense as to the menacing charge. Voluntary intoxication can only be asserted against specific intent crimes which menacing is. However, from the facts it does not appear that Tom was inhebriated to the point that such a defense can be raised. Typically under this defense one must be so drunk as to not be able to function and make rational decisions. Furthermore, defendant must be at a level of inebriation where they are unable to form the specific intent required for the underlying offense. Here, Tom knew to call 9-1-1 and had enough ability to run to his room to get a hunting knife in order to threaten Dan. Such acts demonstrate that Tom had the ability to comprehend what he was doing and therefore this defense will not be available to him.

Tom will also raise the defense of self-defense. One may assert self-defense in the defense of others if that other person may be able to assert the defense as well. Here, Tom would argue that he was just defending Lucy from Dan's assault. However, although a person may use nondeadly force against a person and to protect another, they may not assert self-defense using deadly force when there is no hint that there is imminent deadly harm or serious physical injury. Here, Dan used only non-deadly force when he shoved Lucy. However, Tom by obtaining a hunter's knife and threatening to kill Dan escalated the conflict to a deadly one and therefore, may not be able to assert this justification successfully.

Tom may move to suppress his statement during the 9-1-1. A statement may be suppressed when it was obtained through police coercion and through police interrogation. When the statement was made during the 911 call Tom was not being interrogate or even within police
custody. Therefore his spontaneous statement during the 911 call that is obviously incriminating will be admissible and will help prove his menacing charge.

The Crimes against Paul:

Paul can only be charged with possession of marijuana that was found in his car. Since the marijuana was found hidden inside the car it can be inferred that since Paul owned the car he therefore possessed the marijuana which is illegal.

Paul may first argue that since for sometime Dan was in possession, the marijuana was not his. However, although Dan was in possession of the car for some time, the police found the marijuana when it was hidden and therefore it is unlikely that it belonged to Dan. Paul also may try to get the marijuana suppressed as a violation of his 4th amendment right. Under the 4th amendment a person is free from unreasonable searches and seizures that are unsupported by probable cause and are not obtained through a search warrant. Police Officers may under a few circumstances conduct a search and seizure without a warrant if it falls within an exception. It should be argued that the search was not illegal because the car was abandoned. The Supreme Court has held that people do not have 4th amendment privacy rights in abandoned property. Therefore, since Dan after stealing the car from Paul abandoned the car, the police reasonably searched the car. Furthermore, the Police search can be argued the fall within the automobile exception. The police knew that the car was part of a crime because it had been subject ot a robbery and kidnapping earlier that day. Therefore, upon finding the car they had probable cause to search it because it was reasonable for them to believe that evidence of Dan's crimes would be found in the car that he was last seen using. Therefore, the police may search all compartments and containers found in the car that could reasonably have evidence of the crimes committed by Dan that day. Upon conducting the search the police found the bag of marijuana. Since the marijuana was a product of a lawful search under the automobile exception, Paul's motion for suppression will be denied.

The trials against each defendant will most likely be successful.

SAMPLE ANSWER 5B:
To: County Prosecutor
From: Applicant
RE: Crimes
Date: Aug 1, 2013

MEMORANDUM

Crimes to be charged against Dan

• Battery
In order to have a battery, the actor must have the intent to cause harmful or offensive contact to the body of another. Here, Dan intentionally shoved Lucy into the wall in the hallway of his rooming house after she asked him to pay his rent money. As a result of this shove, Lucy suffered a head injury.

• Assault

In order to commit the crime of assault, one must have the intent to cause the apprehension of harmful or offensive contact to the body of another. Here, after throwing open the door, Dan shoved Lucy against the wall. Lucy was facing Dan, so she would have seen this attack coming prior to it occurring. Therefore, she had the apprehension of harmful contact.

• Involuntary Manslaughter

For the crime of involuntary manslaughter, an individual must recklessly or negligently cause the death of another. Here, after Tom had pulled out a knife and was holding it in front of both Lucy and Dan, Dan shoved Lucy into the knife, instantly killing her. Dan did not have the specific intent to kill Lucy, as she merely pushed her out of the way. Therefore, Dan exhibited a gross indifference to human life, and also negligently causing Lucy's death.

• Larceny

For the crime of larceny, an individual must take the property of another without his permission with the intent to permanently deprive. Here, after he pushed Lucy into Tom's knife, Dan took the knife away from Tom and ran into Lucy's room. Although he did not say anything to show that he was intending to permanently deprive Tom of his knife, it can be assumed that he took the knife which such intent, as he later kept the knife with him as he ran from the house.

• Burglary

Burglary is the wrongful entry into the dwelling of another with the intent to commit a felony therein. Here, Dan, after taking Tom's knife, ran into Lucy's room, and took cash and jewelry from her nightstand before fleeing from the house. Although the door was unlocked, Dan gained entry to the room by causing harm to Lucy, thereby allowing for a fraudulent entry into the room. Dan also had to open the door to the room, which is a movement sufficient enough to constitute a wrongful entry. Dan ran into the room for the purpose of stealing Lucy's cash and jewelry, which constitutes a felony. Additionally, the burglary occurred in the evening, which could be considered nighttime if the act occurred after a certain hour of the day. Therefore, Dan has met the elements required for burglary.

• Unlawful possession of a deadly weapon
Unlawful possession of a deadly weapon requires the actor to knowingly have on his possession any object known to be, or an object that could easily become, a threat to human life and safety. Here, Dan was carrying with him a large hunting knife, which had already killed one individual that day. Dan therefore fulfills the requirements for this crime.

• Carjacking

Carjacking is the taking and control of another's car, without his or her permission, when the individual is within 10 feet of the car, with the intent to deprive. Here, Dan ordered Paul to hand over the keys to his car, along with his wallet. Prior to doing so, Paul got out of his car, which means that he was within 10 feet of the car when Dan pushed him aside and drove off. Paul also yelled to Dan not to take the car, thereby fulfilling the requirement of the taking without permission. Therefore, Dan fulfilled the necessary elements for carjacking as well. Because Dan utilized a knife during the commission of this crime, it is likely that the degree will be elevated to take into account the use of a deadly weapon.

• Robbery

Robbery is the taking of another's property by force or threat with the intent to permanently deprive. Here, Dan pointed the knife at Paul and ordered him to hand over his keys and wallet. The threat from the knife was the threat required to fulfill that element, and Dan had the intent to deprive because even after Paul asked him not to take the car because his two year old son was in the backseat, Dan refused to listen and drove off with the car anyway. Therefore, Dan fulfilled the requirements for robbery.

• Assault

In order to commit the crime of assault, one must have the intent to cause the apprehension of harmful or offensive contact to the body of another. Here, in order to gain access to Paul's car, Dan pushed Paul aside. This contact was offensive in that it was used to deprive Paul of his car, and possibly harmful if Paul had gotten hurt as a result of the pushing. Therefore, Dan is liable for assault.

• Kidnapping/reckless endangering

Kidnapping is the removal of an individual from his or her parents for a wrongful purpose. The crime will be elevated if the individual taken is harmed during the kidnapping. Here, Dan knew that Paul's young son was in the back seat of his car, yet Dan still chose to drive off with the child. The child was later returned to his father unharmed, but the child was nonetheless taken from his father, and therefore a kidnapping occurred. With regards to reckless endangering, an individual must recklessly disregard the safety of human life, and must act in a manner that is likely to result in bodily harm. Here, Dan knew that the
child was in the car, and yet he drove away from the scene with the child. It can be assumed that, because this was during the commission of a carjacking, that Dan drove away quickly, thereby putting the child, pedestrians, and other motorists in danger of being hit by the car, and therefore suffering injury. Dan has fulfilled the elements for reckless endangering.

Defenses for Dan

In order to defend himself from the crimes presented above, Dan may present the defense of insanity. In order to receive a jury instruction from a judge for "guilty but insane," an individual must demonstrate that he did not have the volition to understand that his actions were a crime or were not accepted in a reasonable society. A person may also claim that he or she was so separated from reasonableness due to a sickness of the mind, that he or she could not formulate the intent required to commit the specific crimes. Here, Dan, after being approached by police, stated that the voices in his head told him to do it. This sentence goes to show that Dan lacked some form of self-control to prevent a mental disease from taking over his thoughts. This overtaking thus caused him to lack the necessary intent to commit the crimes. Dan will need to have psychiatric evaluations in order for this defense to be successful.

Dan may also request a motion to suppress the statement that he made to police when he said that the voices told him to do it. This is a confession, and Dan confessed prior to receiving any Miranda warnings. However, this argument will not stand because Dan was not in custody when he told the police about the crime, which means that the police were not required to give the Miranda warnings at that time, and he voluntarily and without provocation or questioning on the part of the police said the statement, thereby eliminating any use of the defense.

Crimes to be charged against Tom

• Terroristic threatening

Terroristic threatening is the use of words to threaten to commit a crime, or to put people in fear of a crime. Here, Tom shouted at Dan that he would kill him [Dan] if he hurt Lucy. Tom was therefore threatening to commit a crime against Dan if Lucy was hurt at the hands of Dan. This statement was heard by the 911 dispatcher.

• Involuntary manslaughter

For the crime of involuntary manslaughter, an individual must recklessly or negligently cause the death of another. Here Tom was holding out a hunting knife while standing in a hallway in front of two individuals. He was holding the knife when Lucy fell on top of it, and therefore will be found liable for the involuntary manslaughter because he had no intent to harm or kill Lucy. However, the court may find that Tom's statement that he will kill Dan could show an intent to cause harm to Dan, which would thus raise the issue of transferred intent onto the death of Lucy. This argument is likely to lose, however, because Tom did not engage in any actions that would cause a reasonable person to believe that Tom actually wanted to kill Dan.
Defenses for Tom

To defend himself against the above crimes, Tom can state that he was acting in defense of another. Here, the other person was Lucy. Tom chased Dan down the hall after he had seen Dan injure Lucy, and was seeking to protect her from future harm. This defense will not be sufficient because Tom was not defending Lucy with the same amount of force. Here, Tom was wielding a deadly weapon against Dan's hands. This is an unbalanced fight, and therefore Tom had no right to use deadly force in this situation.

Tom may also raise the defense of voluntary intoxication to the manslaughter charge. However, voluntary intoxication will only apply to specific intent crimes, and therefore will be inapplicable here.

With regards to motions to raise at trial, Tom should seek a motion to suppress the statement recorded on 911. This motion is likely to fail, however, because it can be considered an exited utterance, or a statement made to a police officer in non-testimonial form. Therefore, the statement will likely come in at trial.

Crimes to be charged against Paul

• Possession of marijuana

In order to show the crime of possession, one must be in or near a car or other vehicle in which there is drugs. The drugs may also be found on an individual after a search. Here, the marijuana was found in Paul's car after the police recovered it from the carjacking. Because the drugs were found hidden in the car, the police may believe that the drugs are Paul's.

Defense/motion to make at trial

In order to combat the possession charge, Paul should file a motion to suppress the marijuana because the police conducted an unlawful search not incident to arrest. The police did not have Paul's permission, nor had they just arrested Dan in the car, and therefore had no probable cause to search an unattended vehicle without the owner's consent. Paul may also seek to have the marijuana suppressed because it was not his, which would require certain statements and admissions from parties. Paul is likely to be successful with this claim, especially because he can show that the police lacked probable cause for the search of the vehicle, which is a necessary requirement unless the police were searching incident to arrest or had the owner's consent.

QUESTION 6 - REAL PROPERTY
Thirty-five years ago, Abby subdivides a lot into Lots 1 and 2, retaining Lot 1 for herself and selling Lot 2 to Meg. Meg builds a cabin on Lot 2, which she uses during the summer months only. Abby allows Meg to drive her car on a dirt path (the “Path”) over Lot 1 to access Lot 2. During the non-summer months the Path becomes covered with vegetation. In June 2011 Meg subdivides Lot 2 into Lots 2A, 2B, 2C, and 2D. Meg retains Lot 2A on which
her cabin is located and sells Lots 2B, 2C, and 2D (the “Other Lots”) to buyers each of whom constructs a cabin on his/her lot during the summer of 2011. Meg and the owners of the Other Lots use the Path to access their lots.

In January 2012 Abby sells Lot 1 to Eric on which he erects a building. When Meg and the owners of the Other Lots return to use their cabins in the summer of 2012, they discover that part of the building Eric constructed on Lot 1 is located on the Path preventing use of the Path to access their lots. Meg and the owners of the Other Lots want the building relocated as the only other access to their lots is a road located one mile away.

Meg and Francis own a commercial property (the “Commercial Property”) as joint tenants. Francis signs a contract to sell his interest in the Commercial Property to Trish. Before the closing on the sale can occur, Francis passes away. Trish wants to close on her purchase, but Meg does not want that to happen.

Meg purchases a residential property (the “Residential Property”) from David. Immediately after the closing Meg finds a massive infestation of termites when she removes paneling in the basement. Additionally, after the closing, Meg makes two discoveries that distress her: (1) a shed on a neighboring property encroaches on the Residential Property by approximately one-half foot; and (2) the property description in the deed she received from David varies from the property description in the deed David received when he purchased the Residential Property. Meg no longer wants the Residential Property.

Meg comes to your law firm. Meg wants to: (1) have Eric relocate the building so that she and the owners of the Other Lots can use the Path to access their lots; (2) prevent the sale to Trish; and (3) return the Residential Property to David and receive her money back from him.

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

PREPARE THE MEMORANDUM

SAMPLE ANSWER 6A:
To: Partner
From: Associate
Date: 8/1/13
Re: Meg’s causes of action

1. Meg will not succeed in her claim against Eric because she held a revocable license in the property. Additionally, any easement would not have run with the land in this case, and Meg exceeded the scope of any easement were it to have been granted.

The issue is whether the agreement between Abby and Meg created a revocable license or an easement over Lot 1, whether that easement/license ran with the land, and if it did, whether the use of the easement by 3 new people exceeded the scope of the original grant. An easement can be created in a number of ways including an express easement, implied easement by prior use, easement by necessity, or an easement by prescription. An express easement must be in writing to satisfy the statute of frauds to be valid. Generally, an oral agreement between two landowners which convey an effective express easement if made in writing, will create a license instead. An easement can be implied from prior use which is continuous and obvious from the previous owner of the land. An easement by necessity is created by law where one parcel of land cannot be
accessed without the easement. An easement by prescription is created if the elements of adverse possession are satisfied. For an easement by prescription, the easement use must be continuous, open and obvious, it must be actually used and there must be hostility. A license, on the other hand is when an owner allows another permission to use their land for some purpose without any benefit being conferred on the land. This is revocable by the grantor of the license.

Here an express easement was not created because there is no evidence that the easement was contained in the deed that Abby conveyed to Meg. Additionally, there is no easement from prior use because the easement had not been created prior to Meg being granted the land. Prescription is not satisfied here because Meg used the easement with Abby's permission. Additionally, the use was not continuous because Meg only used the home in the summer months and during the winter months the easement became covered with vegetation. Necessity is also not satisfied because another road only one mile away grants access to their lots. Therefore, it is likely that this was revocable license.

A license will not run with the land. Therefore, if this was a license that was created then once Abby conveyed the land to Eric, the license was revoked as it did not run with the land and Meg would not have claim against Eric to relocate the building.

If this was an easement that was created, then in order to run with the burdened land from Abby to Eric, the easement must be intended to run with the land, it must touch and concern the land, there must be horizontal and vertical privity. Here, the burden will not run with the land to Eric because horizontal privity is unlikely to be established. Horizontal privity occurs in cases of grantor/grantee relationships, devises and bequests.

Additionally, it should be noted that even if this was an easement and even if it did run with the burdened land so that Eric was subject to it, the use of this easement likely exceeds the scope of the grant. An easement will not be enforced if the dominant holder of the easement substantially exceeds the original scope of the easement.

Here Abby sold the land to Meg and gave her permission to cross the land. Meg was one person and one car. However, Meg subdivided the lot and the other owners of the Lots 2B,C,D then began using the easement to access their own lots. This was only a dirt path and now four properties were using the easement instead of 1. This is likely a substantial increase in the scope of the easement and would not be enforceable.

In conclusion, the oral permission Abby granted Meg likely created a license. However, even if was an easement, the easement did not run with the burdened land because horizontal privity cannot be established. Additionally, the substantial increase in the scope of the easement from one dominant land holding to four dominant land holders, is likely unenforceable. For all the foregoing reasons, Meg will not have a cause of action against Eric.

2. Meg will be unable to prevent the sale to Trish because the interest in a joint tenancy is alienable and equitable conversion will mandate that the sale to Trish go through
When two or more people own land together with the same title, taking at the same time, with
the same interest, and possession of the whole, a joint tenancy is created. The four unities must
be established for a joint tenancy to survive. One's interest in a joint tenancy is completely
alienable without consent or knowledge of any of the other joint tenants. If a joint tenants
transfers their undivided interest in the land, the joint tenancy is severed and a tenancy in
common is created. The tenancy in common does not contain a right of survivorship. If the joint
tenancy is still in full effect at the time of death of one of the tenants, the remaining interest will
go to the other tenant. This is called the right of survivorship. However, if the joint tenancy is not
in effect, then death will not automatically transfer the interest to the remaining tenants.

Here, Meg and Francis initially owned the commercial property as joint tenants. This would
mean that they had a right of survivorship and that Francis' interest in the property would transfer
automatically to Meg at Francis' death.

However, under the doctrine of equitable conversion, when a contract for the sale of land is
executed and signed, that contract effectively transfers the land. Equity does that which out to be
done. When the contract for the sale of land was signed between Francis and Trish, the joint
tenancy of Meg and Francis was effectively destroyed and became a tenancy in common
between Trish and Meg. The four unities were no longer in effect. Once the interests become that
of a tenancy in common, Meg has no recourse to stop the sale to Francis.

3. Meg will not be able to return the home David because closing has already occured on the
house. However, depending on the type of deed that was executed for the sale, Meg will likely be
able to sue David for damages for the shed encroachment. Additionally, Meg may be able to sue
for a reduction in the purchase price of the house if the land actually conveyed is smaller in
acerc from the land David actually owned. Meg is unlikely to be able to obtain damages for
the termites unless she can prove that David knew and affirmatively misrepresented the
condition of the house or that he made a material ommission or intended to cover up the termite
infestation.

A seller has an obligation to convey marketable title at the time of closing. A marketable title is
one that will not open the buyer up to litigation. Encumbrances on the property make a title
unmarketable. However, even if title is unmarketable at the time of closing, if the buyer closed
on the property, their only recourse then is ground in the deed that was conveyed. If the deed
conveyed is a quit-claim deed then the seller warrants nothing and only sells their own interest in
the land, whatever that may. If the deed conveyed is a special warranty deed then the seller
warrants agasint defects in the title created by him and encumbrances on the land created by him,
but not be anything created by his predecessors. A general warranty deed is the most protective
and it protects against six covenants, including the covenant against encumbrances.

Here, Meg closed on the house so although David had the duty to provide marketable title free
and clear from defects at the time of closing, this right was extinguised at the time for closing.
Therefore, Meg will have to sue under the deed. If the deed conveyed was a quit claim or special
warranty deed, then Meg will have no recourse for the neighbors shed on the land. If the deed
conveyed was a general warranty deed, Meg will be able to obtain damamges for the shed on the
neighbors land.
Additionally, Meg may have a claim against David because the property description in the deed she received from David, varies from the description in the deed David received when he purchased the Residential Property. Generally, a deed must merely contain an adequate description of the property, not a perfect description or even a particularly detailed description. Without additional facts here on what the variance was between the two deeds, we cannot say that the deed was facially invalid. However, when the property actually conveyed is less in acreage then the property contracted for, the buyer is entitled to a reduction in purchase price for that diminished acreage. Therefore, if the property description is smaller in acreage than the property contracted for, Meg could receive a reduction in the purchase price from Dave.

SAMPLE ANSWER 6B:

(1) Eric does not have to relocate the building so the other owners can have access to the Path. The issue is whether there was an easement acquired and whether it was terminated.

An easement can be acquired by grant, necessity, implication, or prescription. A granted easement must be contained in a signed writing to satisfy the statute of frauds. If an easement is not granted or acquired but a servient tenant tries to give a dominant tenant a right of way, that right is probably a license and is freely revocable. An easement is acquired by prescription when the elements for adverse possession are met. These elements are the use must be continuous for the statutory period, actual and exclusive, open and notorious, and hostile.

Once there is an easement, it is terminated by estoppel, necessity, destruction, condemnation, release, abandonment, merger, or prescription. An easement can be terminated by prescription in the same way it can be acquired, only the use must be interrupted under such requirements.

Here, there was originally a license because there was no grant, necessity, or implication. There is no writing so there is no satisfaction of the statute of frauds. There is no necessity because even though the other access road is a mile away, that is not extremely difficult or expensive to use. There is no implication because there is no evidence that the path was used by Abby prior to the split of the property, nor intended by the parties to run with the land.

However, there is an easement by prescription. The use was continuous for 35 years. Even though the use was only during the summer months, it was used every summer and satisfies the continuity requirement. It was open and notorious because it was used by Meg and the other owners and not in secret and in a way an owner would use it. It was actual and exclusive because the parties used actually used it. The use was not hostile because it was a permissive use by Abby. It may have become hostile when the other owners began using it, but they do not meet the statutory period requirement, so there is no easement by prescription.

If there was an easement, Eric would have to show that it was terminated in one of the ways enumerated above. However, there was no easement so it does not need to be terminated. Meg and the owners merely have a license which is freely revocable and thus Abby and any subsequent owners are free to revoke it.
(2) Meg cannot prevent the sale of the Commercial Property to Trish. The issue is whether a joint tenancy with a right to survivorship is severed by the sale of one party's interest.

Joint tenants are established when the parties take the same title, at the same time, the same interest, and the right to possess the whole. Joint tenants also enjoy a right to survivorship of the other party's interest in the property at his or her death. Joint tenancies can be unilaterally severed by one tenant's sale of his interest in the property. This sale results in the remaining original tenants still being joint tenants, and the new owner being a tenant in common.

Here, Meg and Francis were joint tenants with a right of survivorship. At the death of the other, the surviving tenant would inherit the whole. However, when Francis signed a contract to sell his interest to Trish, he effectively severed the joint tenancy. The joint tenancy is severed upon the signing of the contract because of the doctrine of equitable conversion which regards the sale to be complete if the contract is signed even if the deed has not been transferred and/or closing has not occurred. When Francis signed the contract, equitable conversion regarded Trish to be the owner of the property. The joint tenancy was severed and there was no longer a right of survivorship. Therefore, Meg no longer has an interest in Francis's portion of the property and cannot interfere with the sale to Trish. Meg and Trish will be tenants in common, which does not have a right of survivorship.

(3) Meg cannot return the Residential Property to David. The issue is whether there was a breach of any warranties in the sale of the property.

First, there is no implied warranty of habitability in a sale of a property. This warranty only applies to leases. In the sale of property, the burden is on the buyer to inspect the property and the buyer takes the property as is. Therefore, Meg cannot return the property because of the termite infestation. Meg may be able to recover damages from David if she can show that he knew of the infestation and affirmatively misrepresented that there was no such infestation.

Second, assuming this is a general warranty deed, it comes with certain warranties including seisin - warrants that seller has title to the property; right to convey - warrants that seller has right to convey the property; warranty - that the property is not subject to any encumbrances or other litigious issues; further assurances - warranty that seller will defend buyer against any after arising claims.

Regarding (1) the encroaching neighboring property, Meg may have a claim against David for breach of warranty because there is an encumbrance on the property. However, if the one half-foot is found to be insignificant, Meg will likely only be entitled to a reduction in price of the value of the half-foot of property she is not receiving.

Regarding (2) the varying description of the deed, Meg has a right to question the variance and determine which is the proper description. If it is a significant variation of metes and bounds, Meg may be entitled to rescind the contract, return the property and get her money. However, if the description variation is merely due to a physical change in the property or an insignificant difference, Meg will again be entitled to a reduction in price in relation to the differing value of the property.
If she is receiving land in the deed that she did not intend to take under the contract, she should not have accepted the deed. A land contract is the controlling document until the deed is lawfully executed and delivered and once that is true, the deed controls and terms of the contract do not matter. She will not have a valid claim to return the property and get her money back if she knowingly accepted the varying deed.

**QUESTION 7 - CONTRACTS**

Darryl is a tech wiz-kid. For three years, he has operated a business of taking open-source components and turning them into home automation systems. The components allow the user to control security, lighting, and HVAC with voice commands. Darryl’s business is finally picking up after being profiled in Tech Home Today magazine, and he anticipates purchasing his first car for his 18th birthday in August. After reading about Darryl, John sought a quote for a system for his lovely new mansion in New Jersey. On June 16, Darryl quotes John $5,000.00 for a system installed by July 16. John says, “Ok, we have a deal if you’ll do it for $4,500.00.” Darryl accepts. Unfortunately Higgy-Tek, Darryl’s overseas manufacturer, suffered a building collapse and cannot supply any equipment. On June 24, Darryl e-mails John that equipment costs have gone up as he had to find a new manufacturer and that the cost of the system will actually be $5,500.00. John did not reply to the e-mail.

On July 10, after receiving the needed equipment, Darryl arrived at John’s mansion to install the system. John, after answering the door with a puzzled look, stated he had hired Liz of Liz-Tech Systems to do the work. John explained that when he saw Darryl’s e-mail indicating more money was needed, he simply decided to go with a different company. John advised Darryl that Liz-Tech Systems agreed, after a bit of haggling, to install the system for $4,500.00, the same price as Darryl’s original contract. John continued, saying, “And they threw in surveillance cameras and electronic locks.” Upset by this, Darryl yelled at John, “I may be young, but I am going to sue you and win!” Darryl was especially annoyed as he knew the cost of the cameras and locks was $500.00, and his company could not give a similar discount.

Liz called John on July 14 to advise him that her crew was ready, but that there was a small problem. Liz explained that the manufacturer of the cameras and locks, Higgy-Tek, just advised her that those items were “backordered” because of damage to their manufacturing plant. John was livid. He told Liz, “You tech people are all the same; unreliable and always changing prices. You had me sign your invoice for the system and you even wrote in that I would have cameras and locks for free!” After a long pause, John said, “Forget it. Do not come to my house. I am done.” John then hung up the phone.

Darryl has filed suit against John. Liz also filed suit against John. The cases have been consolidated. You are the attorney assisting the court-appointed mediator, who has requested a memorandum discussing all of the contractual legal issues among the parties.

**PREPARE THE MEMORANDUM**

**SAMPLE ANSWER 7A**

Memorandum
To: Darryl, John, and Liz  
From: Attorney mediator  
Re: All contractual issues among Darryl, John, and Liz

Dear Darryl, John, and Liz:

This memorandum will summarize all legal issues with respect to your contract disputes.

Darryl v. John

John breached an enforceable contract with Darryl by refusing to pay and hiring another company. The first issue is whether there was an enforceable contract between John and Darryl. A contract is formed by offer, acceptance, and consideration. A contract is governed by the common law if it is for services, and under the UCC if it is for the sale of goods. Here the contract was for Darryl's services to install the equipment, so the common law governs. An offer is an objective manifestator by the offeror that they intend to enter into a contract. An acceptance is an objective act by the person to whom the offer was made that they accept. There must be a meeting of the minds for the contract to be formed. Consideration must support the contract as well. Consideration can be a bargained for exchange, where both parties to the contract exchange promises to do something. The promises can be in the form of a benefit and a detriment.

Here there was an offer when Darryl quoted John $5,000 to do the work. However, John rejected this offer because he said "if youll do it for $4,500". Any change to the offer violates the Mirror Image rule, which states that the acceptance must be a mirror image of the offer. Here as John's response did not mirror image, or exactly reproduce every part of John's offer, there was no acceptance.

However, a rejection can be a counter offer if there are additional terms in the statement. Here there were additional terms in the new price and as such John's statement was a counter offer because of these additional terms. Thus there was valid acceptance when Darryl agreed to it because the facts state he "accepts" and this would be sufficient objective manifestation to accept.

Consideration was present here because there was a promise by Darryl to do the work and a promise by John to pay $4,500. Because there was this exchange of promises, there was a valid consideration.

As there was a valid offer, acceptance, and consideration, there was a valid contract to do the work by July 16.

John will argue that the contract was not in writing. The issue is whether the statute of frauds requires a writing for this contract to be enforceable. The statute of frauds requires a writing signed by the party to be charged (or sued) if the contract is for the sale of goods over $500. However, the primary purpose of this contract was for a service. Such contracts are required to be in writing only if they cannot be executed within one year. However as the contract is to be accomplished by July 16, it will be done within 1 year, and thus there is no writing requirement.
Thus John will lose this argument because the statute of frauds is not a defense to the contract's enforcement.

John may also argue that there is no contract because Darryl was a minor at the contract's execution. The issue is whether a contract executed by a minor can be voided by the adult party to the contract. Parties to a contract need to have capacity to contract. Incapacity is a defense available to minors and intoxicated persons. In most jurisdictions, including New Jersey, the age of majority is 18. Thus the incapacity defense is available only to minors. A minor may void the contract at his choice, but the adult party to the contract may not void the contract. Here John is an adult but Darryl is a minor because the facts state he is not yet 18. Thus only Darryl can void the contract and stop any performance obligations. Thus John cannot void the contract because Darryl is a minor.

John breached the contract when he hired Liz before July 16 and did not pay John. The next issue is whether a contract is materially breached by a party when they do not provide any performance required under the contract. A material breach is a breach of a contract to a material term. A breach is the nonaction, or action that negates an action, by one party to the contract. Here, John committed a material breach when he did not pay Darryl for his services because this was a nonaction where John was required to pay Darryl for his services. Darryl did not breach because Darryl showed up at John's house before July 16 to install the components. John went even further in his breach because not only did he not provide Darryl his money due under the contract, he hired Liz to do the job instead and before the agreed completion date of July 16 under the contract. Thus John committed a material breach by not performing under the contract to Darryl.

John will defend that Darryl committed an anticipatory repudiation when he said that equipment costs had gone up and that he had lost his overseas manufacturer. The issue is whether an ambiguous statement may be an anticipatory repudiation. A party may prevent its performance and immediately breach if the other party provides a statement that is an unambiguous denial of going through under the contract. The statement must be clear that the party will not perform at all. Here, Darryl made two statements to John but neither were an anticipatory breach. Darryl's statement that his manufacturer had collapsed was not an anticipatory repudiation because it was not clear that Darryl could not otherwise acquire his needed inventory. In fact Darryl showed up before July 16 ready to install his system. Next, Darryl's statement that his prices were going up was not an anticipatory breach because it was not a threat not to work if John did not agree to the new price. Neither of Darryl's statement was an objective unambiguous statement that said Darryl would not perform. Thus Darryl did not commit an anticipatory repudiation that would allow John not to perform and hire someone else, like Liz.

As shown, John breached the contract with Darryl so Darryl is entitled to damages. The issue is how much in damages is Darryl owed.
Expectation damages are those that would put the damaged party back into the position they would have been in had the contract been followed. Contract damages do not seek to punish but only to make the party whole. In a material breach, the damaged party is also entitled to incidental damages. Such damages include the costs and fees associated with fixing the problem.

Here, Darryl expected to make $4,500 under the contract as described above because that was the accepted offer price. Darryl may argue that the contract price had changed to $5,500 due to his June 24 email. However, in contract law, the pre-existing duty rule states that a subsequent modification or change to a contract under the common law is not effective unless it is supported by new consideration. Here John neither accepted Darryl's new price, nor did either side provide any sort of consideration for this new price because there was no exchange of promises or money. Thus the original contract price of $4,500 prevails.

Thus as Darryl expected to get $4,500 under the contract, he is entitled to $4,500 as expectation damages. Darryl may also collect whatever incidental damages he incurred.

Liz v. John

Liz had a valid contract with John. The issue is whether their oral contract was enforceable. A contract is formed through offer, acceptance, and consideration. Please see above for specifics on these elements.

There was a valid contract because the facts state that John had "hired" Liz. Thus there was an enforceable contract between John and Liz.

John will argue that he does not have to perform under the contract because his performance was excused due to impossibility. The issue is whether it would have been impossible for Liz to perform.

Impossibility occurs when the subject matter of the contract or the tools to complete the service are destroyed and make performance impossible.

Here there was no impossibility because, while Liz advised John that the items from Higgy Tek were unavailable because they were backordered due to the damage, there is no indication that she would not otherwise be able to get the required items. Thus she would still be able to perform and it would not be impossible for her to install the required items.

Thus John is not excused due impossibility.

Liz may immediately sue John due to his anticipatory repudiation. The issue is whether John committed such an act.

An anticipatory repudiation is an unambiguous statement that one party will refuse to perform. See above for further info on the elements.

Here John committed an anticipatory repudiation because he shouted at Liz and said "do not come to my house! I am done!" and hung up on her. This was an anticipatory repudiation because it was very clear that he was refusing to pay her and would not accept her service under the contract.

Thus Liz may immediately sue John for anticipatory repudiation.
The final issue is the amount of damages Liz may collect from John for his breach. Expectation damages are those that the nonbreaching party was expecting to get had the contract been fulfilled. Please see above for further info on damages. Here Liz expected to make $4,500 under the contract. The fact that she offered a discount is only a factor in that it was built into the price. Thus Liz may collect $4,500 in damages from John. She may also collect whatever incidental damages because she was the nonbreaching party.

signed, lawyer

SAMPLE ANSWER 7B
I. Darryl and John

As an initial matter, Darryl is 17 years old during the relevant periods in question and his 18th birthday is in August. Therefore Darryl is a minor and is not competent to enter into binding contracts as a matter of law. Contracts entered into by minors are voidable at the option of the minor. The minor may not, however, void contracts that deal with necessities such as food, shelter and clothing. The minor is also able to void contracts entered into while he was a minor for a reasonable time after his 18th birthday. Unless the minor reaffirms the contract or receives the benefits of the contract for an unreasonable time after reaching the age of majority, the contract can be voided by the minor. All of the relevant contracts being discussed below are not contracts for necessities were all entered into while Darryl was a minor. Therefore these are all voidable with respect to Darryl. The minor is not required to disaffirm the contract however and can demand performance by the other party. Thus Darryl's suit against John is not barred due to his infancy.

For a contract to be valid there must be an offer, acceptance, consideration and a bargained for exchange. Consideration must be a benefit conferred or a legal detriment for both parties.

On June 16, Darryl gave John an offer to install a new system by July 16 in return Darryl's promise to pay him $5,000 for the work. John returned that offer with a counter-offer to pay Darryl $4,500 to install the system. Because John materially changed the terms of the offer, this statement is viewed as a rejection of Darryl's previous offer and a new counter-offer. Darryl then accept the counter-offer. At this point there is a valid contractual agreement supported by valid consideration on both sides.

After the formation of the contract, Darryl learns that his overseas manufacturer could not supply any of his equipment. On June 24, Darryl emails Jonh to tell him of this equipment cost increase and that the overall price of the system will actually be $5,500. John does not reply to this e-mail. Darryl will argue that his performance has been excused by the doctrine of impracticability. Under this doctrine, a contract party's performance is excused if there is an unforeseen change of circumstances that makes performance of the previous contract substantially more costly and impracticible under the circumstances. In this case, the circumstances are fairly unforeseeable because the manufacturer's shortage was caused by a building collapse. This occurance is not similar to the increase in the price of a fungible good that regularly fluctuates over time such as
oil or wheat. It was unforeseeable to Darryl that his manufacturer's building would collapse causing him to find a new supplier. If you do decide to find that there was impracticability, then Darryl's performance under the contract is excused.

If Darryl does not have a valid defense of impracticability then his e-mail will likely be seen as an anticipatory repudiation. A contracting party is allowed to take the words or actions of another party to constitute a breach when the occurrence of the breach is substantially certain. In this case, Darryl is expressing that his performance under the existing contract will not continue unless he is paid a thousand dollars more.

The next significant event occurred on July 10. Darryl bought and received the necessary equipment and arrived at John's mansion. John then informed Darryl that he hired another company to do the work. As a result of Darryl's last e-mail, John found another company to perform the work for less money.

Even if no binding contract is found to exist between Darryl and John on July 10, a court could impose a quasi contract to remedy any unjust enrichment. In the case of quasi contract, a party is entitled to the reasonable value of the services rendered to that point. In this case, the only reliance that has occurred is the purchasing of the needed equipment. Darryl might be entitled to the reasonable value of those services. However, Darryl's reliance on the non-binding contract must have been reasonable and justifiable. In this circumstances, Darryl knew John had not agreed to the new price term and continued to rely on the previous contract. This is most likely not reasonable reliance.

If a valid contract did exist as of July 10, then Darryl would be entitled to expectations damages for the contract. This would mean the amount of money Darryl expected to make in profit from the original contract. Darryl could also receive reliance damages for any services rendered up until that point.

Court will not impose specific performance in the context of personal services contract.

This contract could be subject to the statute of frauds because it involves the purchase of goods over $500. The UCC sets the requirements for the statute of frauds that a contract to be valid must be in writing and signed by the party to be charged. Here, although the contract involves the installation of the system, the personal service component is not the primary factor in the contract. The contract primarily deals with the creation of a home automation systems. Therefore this contract is not valid because it is not in writing.

II. Liz and John

Liz and John entered into a valid contract whereby Liz would install the system in exchange for John's promise to pay her $4,500. This deal also included Liz giving John surveillance cameras and electronic locks. One issue is whether the promise to give John surveillance cameras and electronic locks was a gratuitous promise not backed by any mutual consideration or part of the original bargained for exchange. There is not enough information to know in what order these terms were agreed to.
This agreement does satisfy the statute of frauds because John signed an invoice for the system. This agreement falls under the statute because the cost of the cameras and locks is $500. Additionally, the home automation system itself is above that value.

Liz called John on July 14 to tell him of the fact that her manufacturer had the items she required backordered because of damage to their plant. Liz will likely claim that her performance was excused by impracticability as discussed above. Additionally, since this only relates to the free cameras and locks that were being given to John, if this promise was merely gratuitous, then there is no anticipatory repudiation. Liz never stated that she would not install the system for the original price or that the original price of the contract would increase. Additionally, the original contract was silent as to when the delivery of the surveillance cameras and locks would take place. There is insufficient information to know how long the backorder will take. If this will only result in a reasonable delay then such a breach could be viewed as immaterial and Liz's performance of the rest of the contract.

John's statement saying forget it, don't come to my house, I am done will likely be viewed as anticipatory repudiation. He is in the position of unjustifiably refusing to perform by not paying Liz the previously agreed on payment for her system and services to install it. In this case Liz would be entitled to specific performance of the contract because John's performance is only the payment of money and not a personal service. John's refusal to pay the money is a material breach of the contract. In the absence of specific performance, Liz is entitled to expectation, consequential and reliance damages.